FILE 2811 — February 21, 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. The Filer also has not waived his right to a trust accounting.

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 value[2] of that beneficial interest exceeds the applicable disclosure threshold. The trust has a spendthrift clause that operates to prevent him from alienating or

[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.

encumbering his beneficial interest. As we recently confirmed in CEO 23-8, Question 1, an asset 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

[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."

ownership), he could potentially have indirect interests. You state that the Filer has no 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 beneficiaries[4] 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 disclosure[5] 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 this context, that implied obligation to make a reasonable inquiry includes having a filer take reasonable steps to ensure that his or her access to the information necessary to make the required disclosures is preserved against foreseeable spoliation. In the case of the Filer, that means requesting the trust accounting from the trustee, not executing any new waivers of his right to a trust accounting, and revoking all existing waivers of his right to a trust accounting.

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.).

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[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).

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 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.

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November 29, 2023

The Honorable Ashley Lukis, Chair
Florida Commission on Ethics
P. O. Drawer 15709
Tallahassee, FL 32317-5709

RE: Request for advisory opinion concerning § 112.3145, Fla. Stat. (2023),

Dear Chair Lukis:

The undersigned represents Steven Kolbert, who serves as an Assistant State Attorney in the Eleventh Judicial Circuit. This is a request, pursuant to § 112.322(3)(a), Fla. Stat. (2023), for an advisory opinion from the Florida Commission on Ethics (the "Commission"). Specifically, he requests that the Commission advise about how his financial disclosure obligations apply to a trust of which he is a listed beneficiary but with which he otherwise has no connection.

I. Background

On November 6, 2023, he became a "specified state employee." *See* § 112.3145(1)(b), Fla. Stat. (2023). Accordingly, he must file a statement of financial interests on CE Form 1. *See id.* § 112.3145(2)(b); *see also* § 34-8.202(1), Fla. Admin. Code (last amended Jan. 1, 2023).

Earlier this year, he became aware that he is one of the beneficiaries of an irrevocable spendthrift trust (the "Trust") established by a relative (the "Settlor") as part of the Settlor's estate planning efforts. A second relative serves as the Trust's trustee (the "Trustee"). Neither the Trustee, the Settlor, nor the Trust have any reason for interacting with his employing agency.

Mr. Kolbert has no role in the Trust. He has no knowledge of the Trust's income or assets. He has no control over, information about, or input on, the Trust's investment decisions. The Trust has its own federal tax ID number, separate from the Social Security number of the Settlor, the Trustee, or any of the beneficiaries. He has not contributed any money or property to the Trust, and he has no plans to do so in the future. To date, he has not received any financial or other distributions from the Trust, and he does not expect to receive any before the Settlor's death.

II. Question Presented

Where a specified state employee is a listed beneficiary of a trust but lacks any knowledge about the trust's finances, receives no distributions from the trust, and possesses no control over the trust's decisions, what are the specified state employee's disclosure obligations regarding the trust's finances?

III. Legal Analysis

Given the weak connection between the Trust and Mr. Kolbert, the Commission should advise that his disclosure obligations are limited. Specifically, the Commission should provide the following advice about how to complete each part of CE Form 1, as detailed below.

- For *Part A (Primary Sources of Income)*, the Commission should advise that he need not report income the Trust itself received during the disclosure period because that income was not distributed to him during the disclosure period.

- For *Part B (Secondary Sources of Income)*, the Commission should advise that he need not report information about the Trust's sources of income because the Trust has made no distributions to him during the disclosure period.

- For *Part C (Real Property)*, the Commission should advise that he must disclose information about the Trust's ownership of real property in Florida—if any—only if he is actually aware that the Trust owns any such real property.

- For *Part D (Intangible Property)* the Commission should advise that he should disclose the Trust itself as intangible property, not the individual investments held by the Trust.

- For *Part E (Liabilities)*, the Commission should advise that he is not required to disclose the Trust's debts—if it has any—as his own.

- For *Part F (Interests in Specified Businesses)*, the Commission should advise that he must disclose the Trust's interest in the specified businesses only if he has actual knowledge of the Trust's interest in any of the specified businesses.

Florida's Code of Ethics for Public Officers and Employees, enacted by the Legislature, details the information required to be disclosed on the statement of financial interests. § 112.3145(3)(b), (7), Fla. Stat. (2023). Additionally, the Commission on Ethics has refined the statutory requirements by issuing advisory opinions, *see* § 112.322(3), Fla. Stat. (2023); § 34-6.00, Fla. Admin. Code (last amended July 28, 1998), and promulgating instructions[1] on the CE Form 1. These instructions carry the force of law because the Commission on Ethics is explicitly authorized to promulgate rules regarding the statutory provisions governing financial disclosure, and those rules explicitly

[1] *See* CE Form 1, at 3–6.

incorporate-by-reference CE Form 1, including its instructions. *See* § 112.322(3), Fla. Stat. (2023); § 34-8.202(1), Fla. Admin. Code (last amended Jan. 1, 2023).

CE Form 1 contains six sections, labeled parts A through F, corresponding to the six categories of information required to be disclosed.[2]

III. A. CE Form 1, Part A—Primary Sources of Income

First, the Commission should advise that the Trust's funds form part of Mr. Kolbert's "gross income," reportable under Part A of CE Form 1, only when the Trust makes a distribution directly to him or to a third party for his use or benefit. The Commission should further advise that the Trust's own income is not reportable because that income is attributable to the Trust as an independent entity, not to him as one of multiple listed beneficiaries.

Using the "dollar value thresholds," a specified state employee must disclose "[a]ll sources of gross income in excess of $2,500 received during the disclosure period by the person in his or her own name or by any other person for his or her use or benefit, excluding public salary." § 112.3145(3)(b)1., Fla. Stat. (2023); *see also* CE Form 1, at 4. Income to be reported could include "compensation for services, income from business, gains from property dealings, interest, rents, dividends, pensions, IRA distributions, social security, distributive share of partnership gross income, and alimony if considered gross income under federal law, but not child support." *Id.* at 4.

"'Gross income' means the same as it does for income tax purposes, even if the income is not actually taxable." *Id.* Federal[3] tax jurisprudence defines "gross income" as "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Comm'r v. Indianapolis Power & Light Co.*, 493 U.S. 203, 209 (1990) (quoting *Comm'r v. Glenshaw Glass Co.*, 348 U. S. 426, 431 (1955)). When there is a question of "attribution of income," that question "is resolved by asking whether a taxpayer exercises complete dominion over the income in question," or, if (as in Mr. Kolbert's case) income generated by an asset never reaches the taxpayer, "the question becomes whether the [taxpayer] retains dominion over the income-generating asset." *Comm'r v. Banks*, 543 U.S. 426, 434 (2005).

Because a trust beneficiary exercises dominion over neither the income generated by the trust nor the assets contained within the trust, the Internal Revenue Code recognizes that a trust's gross income is taxable to the trust, not to the trust's beneficiaries. I.R.C. § 641(a); Treas. Reg. § 1.641(a)-2. To that end, trusts file their own separate tax returns, and trustees—not beneficiaries—pay the trust's taxes. I.R.C. § 641(b), Treas. Reg. § 1.641(b)-2(a). Only when a

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[2] CE Form 1 contains a seventh section—part G—which does not apply to specified state employees. *See* § 112.3142, Fla. Stat. (2023); CE Form 1, at 2, 6.

[3] Presumably, CE Form 1's reference to "income tax purposes" means *federal* income tax purposes, not *state* income tax purposes. Florida's state income tax applies only to corporations. *See* art. VII, § 5(a), Fla. Const.; § 220.03(z), Fla. Stat. (2023). Corporations cannot have income from "social security" or "alimony," which the Commission has explicitly identified as types of "gross income." *See* CE Form 1, at 4. Additionally, the Commission explicitly references "federal law" when explaining when alimony constitutes "gross income" for purposes of Part A. CE Form 1, at 4.

trust makes a distribution to a beneficiary is the income attributable to the beneficiary. I.R.C. § 662(a)(2); Treas. Reg. § 1.662(a)-1(b).

The federal tax treatment of trusts as independent legal creations distinguishable from their beneficiaries finds support in the Commission's prior treatment of trusts under the Code of Ethics. When analyzing a conflict-of-interests question arising under § 112.313(7)(a), Fla. Stat. (1991), the Commission explained that "trusts should be viewed as entities, . . . separate and distinct from their trustees and beneficiaries." CEO 91-31 (July 19, 1991).

The absence of the word "trust" in this portion of the statute supports the conclusion that funds received by a trust are not "received . . . by any other person for [the reporting individual's] use or benefit," § 112.3145(3)(b)1., Fla. Stat. (2023). While similar language is often associated with trusts, the Legislature has explicitly referenced trusts multiple times elsewhere in the Code of Ethics. *See* §§ 112.312(5), (12)(a), 112.3148(1)(c), 112.3149(1)(b), Fla. Stat. (2023); *see also id.* § 112.311(13). "[L]egislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 127 (Fla. 2016). Had the Legislature intended this statutory language to apply to funds received by a trust, it would have used the word "trust," as that word appears elsewhere in the Code of Ethics.

In light of the foregoing, the Commission should advise that payments or contributions to the Trust do not form part of Mr. Kolbert's "gross income" merely because he is one of the Trust's listed beneficiaries. This would be the result under federal tax law, both because he does not exercise dominion over the Trust's income or assets, and because the Trust is treated an independent entity with its own federal tax ID number which is required to file its own tax returns. Because the Commission has adopted the federal tax jurisprudence's treatment of "gross income," because the Commission's prior rulings support the treatment of trusts as independent entities separate and distinct from their beneficiaries, and because of the Legislature's choice not to use the word "trust" in § 112.3145(3)(b)1., Fla. Stat. (2023), the Commission should advise that the payments or contributions to the Trust are not reportable.

Instead, the Commission should advise that Mr. Kolbert must report only those distributions he receives directly from the Trust or which the Trust makes to a third party for his use or benefit. Because he has yet to receive any such distributions, nor is he aware of any such distributions to any third parties for his use or benefit, the Commission should advise that he has nothing to report with regard to the Trust in Part A of CE Form 1.

III. B. CE Form 1, Part B—Secondary Sources of Income

Second, the Commission should advise that while the Trust is a qualifying business entity for purposes of Part B of CE Form 1, Mr. Kolbert nothing to report because he has not received any distributions from the Trust exceeding the disclosure threshold.

A reporting individual must disclose "[a]ll sources of income to a business entity in excess of 10 percent of the gross income of a business entity in which the reporting person held a material interest and from which he or she received gross income exceeding $5,000 during the disclosure

period." § 112.3145(3)(b)2., Fla. Stat. (2023). This provision "is intended to require the disclosure of major customers, clients, and other sources of income to businesses in which [the reporting individual] own[s] an interest." CE Form 1, at 4.

For purposes of the statute, a "material interest" is "more than 5% of the total assets or capital stock of a business entity," whether the reporting individual owns the business entity "either directly or indirectly in the form of an equitable or beneficial interest." CE Form 1, at 4. Additionally, a "business entity" itself includes a "trust" if the reporting individual is a beneficiary of that trust. § 112.312(5), Fla. Stat. (2023); CE Form 1, at 4; CEO 75-88 (Apr. 28, 1975); *see also* CEO 91-31 (July 19, 1991).

Because Mr. Kolbert's beneficial interest in the Trust exceeds the 5% "material interest" threshold, the Commission should advise that the Trust is a qualifying "business entity" for purposes of Part B of CE Form 1. However, because the Trust has not made any distributions to Mr. Kolbert, he has not received more than $5,000 in "gross income" from the Trust. Accordingly, the Commission should advise that he has nothing to report about the Trust in Part B of CE Form 1.

To the extent the Trust itself owns a material interest in any business entities, the Commission should advise that its ownership of those business entities could be imputed to Mr. Kolbert because he would own those business entities "indirectly in the form of an equitable or beneficial interest." CE Form 1, at 4. However, the Commission should further advise that, for purposes of the $5,000 "gross income" threshold, any income the Trust receives from those businesses is not imputed to Mr. Kolbert. Neither the statute nor CE Form 1's instructions suggest that a trust's gross income should be imputed to the reporting individual. § 112.3145(3)(b)2., Fla. Stat. (2023); CE Form 1, at 4. As explained in section III.A., *supra*, the Trust's gross income is not imputed to him unless the Trust distributes that income directly to him. Because that has not occurred, the Commission should advise that Mr. Kolbert has nothing to report in part B of CE Form 1 about any business entities the Trust may own.

III. C. CE Form 1, Part C—Real Property

Third, the Commission should advise that, while Mr. Kolbert must disclose real property in Florida both which he owns directly and which is owned by the Trust, that he is obligated to disclose only the Trust's Florida real property of which he is actually aware.

A reporting individual must disclose "[t]he location or description of real property in this state, except for residence and vacation homes, owned directly or indirectly by the person reporting, when such person owns in excess of 5 percent of the value of such real property." § 112.3145(3)(b)3., Fla. Stat. (2023). Owning real property "indirectly" includes being the beneficiary of a trust which contains real property. *See* § 112.312(13), Fla. Stat. (2023); CE Form 1, at 4; CEO 83-3 (Jan. 27, 1983). Put another way, "where equitable title to property vests in an individual, but the legal title does not, as is the case with the beneficiary of a trust, that property interest . . . must be disclosed." CEO 14-18 (July 30, 2014).

The Commission has never issued an advisory opinion concerning the disclosure of Florida real property contained in a trust benefiting a reporting individual. However, the Commission has

previously approved of the use of blind trusts when analyzing conflicts-of-interest questions. CEO 11-5 (May 18, 2011); CEO 88-11 (Jan. 19, 1988).[4] *But see* CEO 91-24 (Apr. 19, 1991). The salient facts for the Commission upholding the use of a blind trust were (1) that the requester's primary "relationship . . . [was] not his ownership of stock in the business entity, but rather [was] with the trust and trustee," and (2) that the requester lacked both knowledge of "what the trust's advisors have invested in," and "control over those individual investments." CEO 11-5 (May 18, 2011). The Commission has rejected the use of a blind trust only when the requester knowingly put conflict-creating assets into the trust as a means of avoiding the conflict. CEO 91-24 (Apr. 19, 1991). If the blind trust later came into possession of a conflict-generating asset, at the direction of the trustee and without the beneficiary's knowledge, the Commission found that this would not create a conflict. CEO 11-5 (May 18, 2011).

The Commission should extend its blind trust analysis from the conflicts-of-interest context to the disclosure context, treating reportable Florida real property for disclosure purposes the same as the Commission treats conflict-generating assets for conflicts-of-interest purposes. Specifically, the Commission should advise that, when a reporting individual is a beneficiary of a trust, the reporting individual need not disclose Florida real property contained within the trust if the reporting individual's relationship with the trust meets the criteria the Commission has set out in its earlier advisory opinions:

- The reporting individual's primary relationship is with the trust and trustee, rather than with any of the assets contained within the trust—and, specifically, with the Florida real property;

- The reporting individual lacked knowledge about the trust's assets—and, specifically, lacked knowledge of any Florida real property contained within the trust;

- The reporting individual lacked control over the trust's assets—and, specifically, lacked control over any Florida real property contained within the trust; and

- The reporting individual did not knowingly place any reportable asset—in this case, any Florida real property—into the trust at the trust's creation.

The Commission should therefore advise that Mr. Kolbert has nothing to report about the Trust in Part C of CE Form 1 because the Trust meets the requirements above. First, his primary relationship—to the extent that he has one—is with the Trust and Trustee, not with any assets within the Trust, including but not limited to any Florida real property that the trust may contain. Second, he lacks any knowledge of the trust's assets. Specifically, he does not know whether the Trust owns any Florida real property. Third, he lacks any control over the Trust's assets: if the

[4]The Legislature previously enacted, then repealed, a statute regulating blind trusts. *See* ch. 2013-36, § 5, at 8-11, Laws of Fla., *codified at* § 112.31425, Fla. Stat. (2013), *repealed*, ch. 2019-60, § 1, at 1, Laws of Fla. The Commission's action in these two advisory opinions predated the blind trust statute. Therefore, the statute's repeal does not affect the continued validity of the two opinions' analysis. Even if the statute were still in effect, it would not impact the Commission's analysis because the statute's disclosure provisions did not apply to specified state employees. *See* § 112.31425(5), Fla. Stat. (2013) (applying to "public officer[s]"). During the statute's life, the Commission issued a single opinion, affirming a requester's compliance with the statute. CEO 13-14 (Sept. 18, 2013).

Trust owns any Florida real property, He lacks any control over that property. Finally, he is unaware of any Florida real property having been placed inside the Trust at its inception. In fact, he only recently became aware of the Trust.

In sum, because the Trust meets all the elements of the Commission's blind trust analysis, the Commission should conclude that Mr. Kolbert must report Florida real property contained within the Trust (if any exists) only if he actually knows of that property's existence. Because he does not, and because he does not directly own any Florida real property, the Commission should advise that Mr. Kolbert has nothing to report in Part C of CE Form 1.

III. D. CE Form 1, Part D—Intangible Personal Property

Fourth, the Commission should advise that Mr. Kolbert must disclose the Trust itself as intangible personal property, rather than the assets within the Trust.

A reporting individual must disclose "a general description of any intangible personal property worth in excess of $10,000." § 112.3145(3)(b)3., Fla. Stat. (2023). Examples of intangible personal property "includes things such as cash on hand, stocks, bonds, certificates of deposit, vehicle leases, interests in businesses, . . . money owed [to the reporting individual], . . . and bank accounts in which [the reporting individual has] an ownership interest." CE Form 1, at 4.

Sometimes, assets must be separately itemized. For instance, when a reporting individual keeps cash in multiple bank accounts, each account should be separately itemized, although multiple accounts within the same bank may be aggregated and reported jointly. *Id.*, *see also* CEO 12-10 (Fla. Apr. 4, 2012). Likewise, when a reporting individual participates in an investment plan that itself holds investment products, then those investment products should be separately itemized. CE Form 1, at 4; CEO 12-10 (Apr. 4, 2012); CEO 11-11 (Sept. 14, 2011).

The requirements for itemization are not straightforward. For instance, if a reporting individual participates in an individual retirement account (IRA), a 401(k) plan, the Florida Retirement System's (FRS) defined-contribution "Investment Plan," the non-guaranteed 529 plan "Florida College Investment Plan" (FCIP) or the "Florida Deferred Compensation Program" (FDCP) 457 plan, then the reporting individual should report the specific assets associated with these plans: *e.g.*, the stocks or mutual fund shares contained within the plans. CE Form 1, at 4; CEO 12-10 (Apr. 4, 2012); CEO 11-11 (Sept. 14, 2011). The Commission reasoned that plans of this type allow for either fine-grained control over the assets contained within (as is the case with IRAs or 401(k) plans), or the less precise control of selecting from among several investment plan options, which are then managed by third parties (as is the case with the FRS's Investment Plan, the FCIP, or FDCP). CEO 12-10 (Apr. 4, 2012); CEO 11-11 (Sept. 14, 2011).

Not all investment, savings, or retirement programs require that the reporting individual itemize the investment products contained within the plan or program. For instance, where a reporting individual participates in a guaranteed, transferable, 529 qualified tuition program like the Florida Prepaid College Plan (FPCP)—in which the plan participant makes no investment choices—the FPCP itself is the intangible property and no further itemization is required. CE Form 1, at 4; CEO 11-11 (Sept. 14, 2011) Likewise, FRS's "Deferred Retirement Option Plan" (DROP)—which

operates like a savings account which a state employee cannot access until terminating employment—the plan or program itself is the asset, not the individual assets contained within the plan or program. CE Form 1, at 4; CEO 12-10 (Apr. 4, 2012); CEO 11-11 (Sept. 14, 2011). Participation in FRS's defined-benefit "Pension Plan" is not intangible property and need not be reported at all because the pension's value is difficult to value prior to retirement and because the pension participants play no role in pension investment decisions. CEO 11-11 (Fla. Sept. 14, 2011).

Notably, intangible personal property also includes "beneficial interests in trusts." CE Form 1, at 4; *see also* CEO 78-1 (Jan. 19, 1978) (advising that an interest in a trust is an "asset" for purposes of the state constitutional disclosure provision—presently numbered art. II, 8(j)(1), Fla. Const.—if the interest in the trust is alienable). However, assets held in trust for a third party should be reported as the settlor's intangible property where "the trust is tentative and revocable at will" and the reporting individual "is entitled to withdraw some or all of the" property held in trust. CEO 78-37 (June 13, 1978).

The Commission should advise that Mr. Kolbert's beneficial interest in the Trust is his reportable asset. The Commission's instructions on CE Form 1 explicitly describe "beneficial interests in trusts" as intangible property. The Trust is permanent and irrevocable, and the Settlor is not entitled to withdraw funds or use property within the Trust, suggesting that the Trust is intangible property attributable to me, rather than the Settlor.

The Commission should further advise that, under the circumstances presented here, Mr. Kolbert's is not required to further itemize the Trust's assets in Part D of CE Form 1. His beneficial interest in the Trust is more akin to the retirement, savings, or investment plans or programs not requiring further itemization than to those which the Commission has identified as requiring further itemization of the assets contained within those plans or programs. In particular, Mr. Kolbert has no control over the assets within the Trust: He has neither the fine-grained control one might have over the investment products within an IRA or 401(k), nor even the less precise control of selecting from among available investment plans controlled by others, as is required of participants in the FRS's Investment Plan, the FCIP, or the FDCP. Rather, he makes no investment choices, much like participants in the FPCP. In fact, he has no knowledge of the particular assets contained with the Trust, akin to participants in FRS's Pension Plan. Like participants in DROP, he has no authority to make withdrawals or order distributions from the Trust.

In sum, Mr. Kolbert's beneficial interest in the Trust is more akin to those financial products the Commission has found do not requiring further itemization. Additionally, a "beneficial interest in trusts" is explicitly mentioned as a type of "intangible property" requiring disclosure. Accordingly, the Commission should advise that the Trust itself, not any of the Trust's underlying assets, is the intangible property requiring disclosure in Part D of CE Form 1.

III. E. CE Form 1, Part E—Liabilities

Fifth, the Commission should advise that the Trust's liabilities, if any, are not imputed to Mr. Kolbert, and that he need not report any of the Trust's debts on Part E of CE Form 1.

A reporting individual must report "[e]very liability in excess of $10,000." § 112.3145(3)(b)4., Fla. Stat. (2023). However, a reporting individual may omit "credit card and retail installment accounts, taxes owed (unless reduced to a judgment), [or] indebtedness on a life insurance policy owed to the company of issuance." CE Form 1, at 5. The reporting individual may also omit "contingent liabilities. A 'contingent liability' is one that will become an actual liability only when one or more future events occur or fail to occur, such as where [the reporting individual is] liable only as a guarantor, surety, or endorser on a promissory note." *Id.*

The Commission should advise that the Trust's liabilities, if any, are not imputed to Mr. Kolbert. Neither the statutory language nor the CE Form 1's instructions mention trusts, nor do they use language like "indirect" to suggest the imputation of a trust's debts to the reporting individual. Accordingly, because the Trust's debts are not reportable, and because he has no other qualifying debts, the Commission should advise that Mr. Golbert has nothing to report in Part E of CE Form 1.

III. F. CE Form 1, Part F—Interests in Specified Businesses

Finally, the Commission should advise that, while Mr. Kolbert must disclose interests in specified businesses which are owned by the Trust, that he is obligated to disclose the Trust's interests only when he is actually aware of those interests.

A reporting individual must disclose certain relationships with "any business entity which is granted a privilege to operate in this state." § 112.3145(7), Fla. Stat. (2023). Those businesses include "state and federally chartered banks; state and federal savings and loan associations; cemetery companies; insurance companies; mortgage companies; credit unions; small loan companies; alcoholic beverage licensees; pari-mutuel wagering companies, utility companies, entities controlled by the Public Service Commission," as well as "entities granted a franchise to operate by either a city or a county government." CE Form 1, at 5.

Specifically, reporting individuals must disclose whether they served as "an officer, director, partner, proprietor, or agent, other than a resident agent solely for service of process" for such a business. § 112.3145(7), Fla. Stat. (2023); *see also* CE Form 1, at 5. Additionally, reporting individuals must disclose whether they "owned a material interest in" such a business. § 112.3145(7), Fla. Stat. (2023). The Commission defines "material interest" as holding "either directly or indirectly in the form of an equitable or beneficial interest . . . more than 5% of the total assets or capital stock." CE Form 1, at 5.

The Commission should advise that Mr. Kolbert has nothing to report with regard to interests in specified businesses. He has not served in any of the specified positions in any of the specified businesses. He has not directly owned a material interest in any of the specified businesses. With regard to the Trust, the Commission should, consistent with the analysis in part III.C, *supra*, extend its existing blind trust analysis from the conflicts-of-interest context to the disclosure context, treating reportable interests in specified businesses for disclosure purposes the same as the Commission treats conflict-generating assets for conflicts-of-interest purposes. Under the circumstances presented here and discussed in part III.C., *supra*—in particular, his lack of knowledge about the Trust's assets and lack of control over its decision-making—the Commission

should advise that the Trust's ownership of any specified businesses is not imputed to him, and that Mr. Kolbert therefore has nothing to report in Part F of CE Form 1.

IV. Conclusion

Mr. Kolbert requests the Commission to render an advisory opinion consistent with the preceding analysis. If the Commission or its staff has questions regarding this request, please do not hesitate to contact me.

Sincerely,

Mark Herron

cc: Stephen E. Kolbert

I wouldn't want the Commission to find that I am waiving application of CEO 23-8. For that reason, I'd like to adjust the language as follows--

- on p.1, pt. I, second paragraph in the section-- Add a footnote to the word "spendthrift," as follows: "The Trust instrument contains a spendthrift clause, which reads, '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 voluntary or involuntarily alienated or encumbered.'"
- on p.2, pt. III, fourth bullet point-- "For Part D (Intangible Property) the Commission should advise that my client need not disclose the Trust itself as intangible property, nor the individual investments held by the Trust."
- on p.6, pt. III.D, first sentence after the section heading-- "Fourth, the Commission should advise that my client need not disclose the Trust itself as intangible personal property, nor the assets within the Trust."
- On p.7, pt. III.D, last paragraph-- Delete the word "However." Add to the end (after citation to CEO 78-37): "However, a trust is not the intangible personal property of its beneficiary where the beneficiary 'not legally capable of marketing [the beneficiary's] interest' in that trust by 'sell[ing], borrow[ing] against, or otherwise alienat[ing]' that 'beneficial interest in the trust,' due to the operation of 'a spendthrift clause in the trust instrument.' CEO 23-8 (Dec. 6, 2023)."
- on p.8, pt.III.D, first paragraph-- Delete the entire paragraph. Replace as follows: "The Commission should advise that my client's interest in the Trust is not intangible personal property requiring disclosure. The Trust instrument contains a spendthrift cause which precludes my client from voluntarily or involuntarily alienating or encumbering my client's interest in either the Trust's principal or income. Because my client may not legally sell, borrow against, or otherwise alienate that interest, the Trust does not constitute intangible personal property subject to disclosure."
- on p.8, pt. III.D, third paragraph (just before new section heading)-- Delete the entire paragraph. Replace as follows: "In sum, the Trust itself is not my client's intangible personal property because my client lacks the ability to alienate any beneficial interest in the Trust. Further, the assets and investments within the Trust are not my client's intangible personal property because my client lacks any knowledge of, or control over, those assets and investments. Accordingly, the Commission should advise that neither the Trust itself nor any of the Trust's underlying assets require disclosure in Part D of CE Form 1."

Zuilkowski, Steven

From: Mark Herron <mherron@lawfla.com>
Sent: Saturday, February 3, 2024 12:34 PM
To: Zuilkowski, Steven
Subject: RE: Formal Opinion Request

You don't often get email from mherron@lawfla.com. Learn why this is important

Mr. Kolbert has not executed any waiver at this time, however, Mr. Kolbert believes that there's a strong chance he will be asked to execute a waiver when he makse the demand for a trust accounting contemplated by the Commission's draft opinion.

Mark Herron

Messer Caparello
Telephone: (850) 222-0720
Direct: (850) 425-5217
Cell: (850) 567-4878
Email: mherron@lawfla.com

From: Zuilkowski, Steven <ZUILKOWSKI.STEVEN@leg.state.fl.us>
Sent: Friday, February 2, 2024 4:42 PM
To: Mark Herron <mherron@lawfla.com>
Subject: RE: Formal Opinion Request

Thank you and have a great weekend.

From: Mark Herron <mherron@lawfla.com>
Sent: Friday, February 2, 2024 4:41 PM
To: Zuilkowski, Steven <ZUILKOWSKI.STEVEN@leg.state.fl.us>
Subject: RE: Formal Opinion Request

You don't often get email from mherron@lawfla.com. Learn why this is important

Will forward to client for response.

Mark Herron

Messer Caparello
Telephone: (850) 222-0720
Direct: (850) 425-5217
Cell: (850) 567-4878

Email: mherron@lawfla.com

From: Zuilkowski, Steven <ZUILKOWSKI.STEVEN@leg.state.fl.us>
Sent: Friday, February 2, 2024 4:35 PM
To: Mark Herron <mherron@lawfla.com>
Subject: Formal Opinion Request

Mr. Herron:

I'm writing about the formal opinion request for Mr. Kolbert. Can you confirm that your client did waive the trustee's duty of accounting, as described in s. 736.0813(2), F.S.? (Put another way, can you state whether he is considering waiving or if he has actually waived?) If he has waived, did he do so in writing? When did he do that? Is the waiver still in effect? If there are any additional facts you want me to have, please also send those. Although you showed me the email your client sent you with some additional facts, I don't believe you gave me a copy.

Thank you for your time.

Steve

Steven J. Zuilkowski
Deputy Executive Director & General Counsel
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