

CONFLICT OF INTEREST

MAYOR SEEKING INVESTMENT FOR VENTURE CAPITAL FIRM

To: Keith A. James (West Palm Beach)

SUMMARY:

Guidance is provided to a Mayor regarding the ethical boundaries of soliciting investors for a venture capital firm where the Mayor is a member of a partnership that is, in turn, a General Partner of the firm. Referenced are CEO 08-20, CEO 13-25, CEO 19-13, CEO 19-23, CEO 22-3, CEO 22-4, CEO 23-5, CEO 25-6, and CEO 26-1.

QUESTION:

Are there any ethical restrictions that would prohibit a Mayor from creating a venture capital firm, where the Mayor has formed a partnership that is, in turn, a General Partner of the firm and will be seeking investments in the firm from potential Limited Partners?

This question is answered as follows.

In your inquiry, you indicate that you serve as the Mayor of West Palm Beach, Florida. In your private capacity, you indicate that you have formed a partnership with two individuals, and that this three-person partnership will be the General Partner of a venture capital firm ("the Firm") that you have created. You explain that fundraising for the Firm is set to begin, and that investors will become Limited Partners in the Firm, receiving a defined percentage of equity. You note that you and the two individuals with whom you have formed a partnership ("your partners") must unanimously agree to accept a Limited Partner into the firm.

In terms of how you will solicit investments in the Firm, you indicate that you plan to publish a press release and solicitation materials. You state that neither the press release, nor the solicitation materials will refer to you as "Mayor," but that the documents will refer to your sixteen-year experience in public service. You note that, prior to your term as Mayor ending on April 1, 2027, all solicitations to prospective investors will be made by your partners. You indicate that you will provide your partners with the names of some prospective investors from your contacts, but will not give them the names of any prospects with business before the City of West Palm Beach ("the City").

In terms of your compensation, you state that you will only receive compensation if the Firm's initial fundraising goal of \$250 million is reached, which you have indicated is not likely to happen before the conclusion of your term as Mayor. You explain that once the fundraising goal is met, the General Partner will receive a 2% administrative fee, and a portion of that fee will be paid to you and your two partners as a salary. In subsequent email communications with Commission staff, you also indicated that you will not receive commissions or referral fees for money contributed to the Firm. Against this backdrop, you ask whether this arrangement implicates any ethical prohibitions.

Section 112.313(7)(a), Florida Statutes, sets the parameters by which public officers and employees may maintain outside employment or contractual relationships. Section 112.313(7)(a) states:

CONFLICTING EMPLOYMENT OR CONTRACTUAL
RELATIONSHIP.—No public officer or employee of an agency
shall have or hold any employment or contractual relationship
with any business entity or any agency which is subject to the

regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of the statute prohibits a public officer or employee from holding an employment or contractual relationship with a business entity that is doing business with, or is subject to the regulation of, his or her own agency. Here, as to the first part of the statute, you have stated that none of your partners (with whom you hold a contractual relationship) do business with or have pending regulatory matters with the City (your agency). You have also stated that the General Partner (with which you also hold a contractual relationship) is not a vendor to the City, nor does it have any pending regulatory matters with the City. As such, it does not appear the arrangement you have described will create a conflict of interest for you under the first part of Section 112.313(7)(a).¹

¹ This opinion does not address whether you will hold a contractual relationship with any of the Limited Partners who will invest in the Firm, or with the Firm as a whole. Where you have indicated that none of the Limited Partners will be doing business with and/or subject to the regulation of the City, and where you have indicated that Firm will not come before the City on

The second part of Section 112.313(7)(a) prohibits a public officer or employee from having an employment or contractual relationship that will create a continuing conflict between his or her private interests and his or her public duties, or would impede the full and faithful discharge of his or her public duties. Here, your contractual relationships with your partners and with the General Partner of the Firm will necessarily incentivize you to act in the best interests of the Firm. However, it does not appear that this dynamic will inherently create a conflict between your private interests in the Firm's success and the full and faithful discharge of your public duties as Mayor. First, it does not appear that you will have to take any official acts as Mayor in relation to the Firm itself, as you have stated that the Firm will not need to come before the City on any matters. It also does not appear that you will have to take any official acts in relation to your partners, as you have indicated that neither of them have any pending regulatory matters with the City, nor are they vendors, lobbyists, or principals of lobbyists of the City. In addition, it does not appear that you will have to take any official acts in relation to any Limited Partners of the Firm, as you have indicated that you and your partners will not admit any Limited Partners to the Firm who are vendors, lobbyists, or principals of lobbyists of the City, or who have any regulatory matters pending with the City. Given these facts, the second part of Section 112.313(7)(a) also will not prohibit the business arrangement you have described, as it does not appear that there will be any inherent temptation for you to dishonor your public duties in favor of the Firm's interests, or in favor of the interests of your partners and/or Limited Partners of the Firm.²

any matters, it does not appear that the analysis under first part of Section 112.313(7)(a) as to the Limited Partners and the Firm as a whole is necessary here.

² Section 112.313(3), Florida Statutes, also concerns financial transactions between public officers, their businesses, and their public agencies. The first part of the statute prohibits a public officer from acting in his or her public capacity to purchase, rent or lease any realty, goods, or services for his or her own agency from a business entity of which the public officer (or his or her spouse or child) is an officer, partner, director, or proprietor or in which he or she owns a material interest

The next statute relevant to your inquiry is Section 112.313(6), Florida Statutes. Section 112.313(6) states:

MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself or others.

For a violation of the statute to occur, three elements must be present. First, the public officer must have either taken or attempted to take some action in his or her public capacity or used a public resource within his or her trust. Second, the public officer's action must have resulted in, or would have resulted in, an actual, non-speculative benefit to the public officer or someone else. And, third, the public officer must have taken the action at issue with corrupt intent. Section 112.312(9), Florida Statutes, states the term "corruptly," as used in Section 112.313(6), means conduct:

. . . done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

(greater than 5%). The second part of Section 112.313(3) prohibits a public officer from acting in his or her private capacity to rent, lease, or sell any realty, goods, or services to his or own political subdivision or any agency thereof. Here, it does not appear that Section 112.313(3) is relevant to your inquiry, as you have provided no information to indicate that the Firm will be entering into any business transactions with the City.

In the context of an advisory opinion, the Commission generally does not opine on a requestor's intent, as it is difficult to ascertain without knowing all of the circumstances in a particular situation, as would be present in an investigation. See CEO 25-6 (citing CEO 23-5, note 6; CEO 22-4, Question 3; and CEO 22-3, Question 2). With that being said, we have some relevant observations that may assist you in proceeding.

There are a few areas in which the arrangement you have described may implicate Section 112.313(6). One concerns the Firm's solicitation materials and press releases. You note that none of your Firm's solicitation materials or press releases will refer to your title as Mayor, but you indicate that these materials will refer to the length of your tenure in public service. On this front, we have consistently opined that self-identification as a public officer for autobiographical purposes, without more, does not amount to a corrupt use of one's public position. See CEO 08-20, CEO 13-25, CEO 19-13, and CEO 26-1. As such, you will not be at risk of violating Section 112.313(6) by simply referring to your years in public service for autobiographical purposes in any of the Firm's written materials.³

Next, in addition to your partners, once Limited Partners start being admitted to the Firm, you should be aware that Section 112.313(6) will prohibit you from corruptly using your position as Mayor to provide them with a special benefit. While you have indicated that the Firm will not admit any Limited Partners who do business with or otherwise have pending matters before the City (and that this is also the case for your partners) you should nevertheless keep this prohibition in mind. Furthermore, although you have indicated that the Firm will not need to come before the

³ In terms of the solicitation of investors in general, you have indicated that you will not personally engage in any solicitations until your term as Mayor ends. However, if you do engage in any solicitations prior to your term ending, you should not invoke your public role for the purpose of obtaining investors.

City on any matters, you should take care not to corruptly use your public position to provide the Firm itself with any special benefit, as would constitute a violation of Section 112.313(6).⁴

The next two statutes that are relevant to your inquiry are Section 112.313(2), Florida Statutes, and Section 112.313(4), Florida Statutes. These statutes are similar, and both are concerned with things of value being given to public officers for the purpose of influencing their official actions. Section 112.313(2) will prohibit you from soliciting or accepting anything of value based upon any understanding⁵ that an official action of yours would be influenced thereby. Section 112.313(4) will prohibit you (and your spouse and/or minor children) from accepting anything of value when you know, or, with the exercise of reasonable care, should know, that it is being given to influence an official action of yours. Although you have made it clear that you will not admit any Limited Partners to the Firm who have any pending City business, you should take

⁴ Following this guidance also will keep you in compliance with Article II, Section 8(h)(2), Florida Constitution, which contains a prohibition that is highly similar to that contained in Section 112.313(6). It provides that a public officer or public employee shall not abuse his or her public position to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest. Rule 34-18.001(2)(a), Florida Administrative Code, defines the term "disproportionate benefit" as it is used in the provision to mean "a benefit, privilege, exemption or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of his or her public duties." It cannot be said the Constitutional provision and the statute are identical, as the Constitutional provision is violated only when a "disproportionate benefit" is provided to certain enumerated parties (while Section 112.313(6) is violated when a "special privilege, benefit, or exemption" of any degree is provided to any party). However, the requisite intent needed to violate the Constitutional provision is highly similar, if not identical, to that of the statute. See CEO 19-23.

⁵ A quid pro quo, criminal bribery-like understanding is required to constitute a violation of Section 112.313(2). See CEO 26-1.

care to not accept any funds for the Firm if it appears that they might be given to influence your actions as Mayor.⁶

Another statute that is relevant to your inquiry is Section 112.3143(3)(a), Florida Statutes, which concerns voting conflicts for local public officers. Section 112.3143(3)(a) prohibits local public officers, such as yourself, from voting on any matters that would inure to their own special private gain or loss, or would inure to the special private gain or loss of a relative, business associate, or any principal by whom they are retained, or to the parent organization or subsidiary of a corporate principal by whom they are retained.

The term "special private gain or loss" for purposes of Section 112.3143(3)(a) is defined in Section 112.3143(1)(d) as an economic benefit or harm. While you have indicated that the Firm will not need to come before the City on any matters, if you are presented with any votes on matters that could create an economic benefit or harm for the Firm—and, by extension, yourself and/or your business associates with whom you have a shared profit-making motivation—you must abstain from voting on those matters. You must also, prior to the vote occurring, publicly state the nature of your interest in the matter, and, within 15 days after the vote, disclose your interest on a CE Form 8B "Memorandum of Voting Conflict for County, Municipal, and Other Local Public Officers," which must be filed with the person responsible for recording the meeting minutes.⁷

⁶ Section 112.3148, Florida Statutes, governs the solicitation, acceptance, and reporting of gifts by certain public officers and employees. However, this statute is not implicated by your inquiry, as investments made in the Firm will not constitute a "gift" to you. The term "gift" is defined in Section 112.312(12), Florida Statutes. Essentially, this definition provides that a "gift" is a thing of value accepted by a public officer for which greater or equal consideration is not given within 90 days. Here, however, consideration in the form of equity in the Firm is being given to the Limited Partners who invest in the Firm.

⁷ The CE Form 8B is available for download on the Commission's website: www.ethics.state.fl.us

The final statute relevant to your inquiry is Section 112.313(8), Florida Statutes. Section 112.313(8) will prohibit you from disclosing or using non-public information (except for information related exclusively to governmental practices) that you have gained by reason of your position as Mayor for your personal gain or benefit, or for the personal gain or benefit of another, such as the Firm or any of your partners or Limited Partners. It is important to note that this statute will still be applicable to you after your term as Mayor ends, as it applies to both current and former public officers. While your inquiry does not contain any facts to indicate that you are at risk of violating this prohibition, we wanted to alert you to it nonetheless.

In sum, if you heed the cautions in this opinion, it does not appear that the business arrangement you have described will violate any ethical prohibitions over which the Florida Commission on Ethics has jurisdiction. We note, however, that pursuant to Section 112.326, Florida Statutes, the governing body of any political subdivision may impose upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those contained in the state statutes over which the Florida Commission on Ethics has jurisdiction. This opinion does not address local code provisions that may be administered by the Palm Beach County Commission on Ethics.

Your question is answered accordingly.