CEO 82-10 -- February 18, 1982

CONFLICT OF INTEREST

CITY COUNCIL MEMBER SERVING AS OFFICER, TRUSTEE, AND GENERAL COUNSEL OF NONPROFIT CORPORATIONS LEASING PROPERTY FROM CITY

To: James W. Martin, City Council Member, St. Petersburg

SUMMARY:

No prohibited conflict of interest exists where a city council member serves as an officer, trustee, and general counsel of two nonprofit corporations which have entered into an agreement with the city for the establishment of an art museum and into leases of property from the city prior to his appointment as a member of the council. Although the nonprofit corporations are doing business with the city, their relationship with the city has been fixed by contracts and through the leases prior to the individual's service on the city council. Therefore, as in CEO's 80-88, 77-37, 76-114, and 76-48, Section 112.316, Florida Statutes, provides the equivalent of "grandfather clause" exempting a situation which would have been prohibited if the relationship between the nonprofit corporation and the city had occurred while the council member was in office.

QUESTION:

Does a prohibited conflict of interest exist where you, a city council member, serve as an officer, trustee, and general counsel of two nonprofit corporations which have entered into an agreement with the city for the establishment of an art museum and into leases of property from the city prior to your appointment as a member of the council?

Your question is answered in the negative.

In your letter of inquiry you advise that approximately two years ago you were involved with a group of business people seeking to encourage an art museum to relocate to St. Petersburg. The project contemplated a State University System program under which the museum would be located in a building owned by the City of St. Petersburg, which the City would contribute to the project. In June, 1980, the Legislature appropriated two million dollars to the University System to be used as a grant to the City to fund the cost of renovating the building, relocating the museum, and setting up operations in St. Petersburg. Future fundings to support operating deficits of the museum in the first several years would come directly to the institute from the University System by State grants.

Further, you advise that the museum is operated by a nonprofit foundation of which you are the secretary, a trustee, and the general counsel. Although you are paid legal fees as counsel, you advise, you receive no compensation as trustee or secretary. You also advise that after the Legislature's appropriation for the museum project, a nonprofit institute was

incorporated to raise funds and to establish an educational program involving the museum. You advise that you are the secretary, a trustee, and the general counsel also of this nonprofit corporation. Similarly, although you receive no compensation as trustee or secretary of the institute, you receive legal fees for your services as counsel.

In September, 1980, you advise, the City received the $2 million grant from the State and entered into a written agreement with the institute, the foundation, and the donor of the art collection. You negotiated and prepared the agreement on behalf of the institute and the foundation, while the City Attorney represented the City. At that time you were not a member of the City Council or any other body of the City.

Under the agreement, the City was to use a portion of the State grant to renovate and improve the building for the museum. This work has been substantially performed and completed by the City at the present time, and the museum is now occupied by the museum staff.

Under the agreement, the City was to allocate the rest of the State grant to the institute to use for relocating the collection and for start-up expenses, with funds being paid to the institute on request. The City has placed the funds into its fiduciary funds account and not into its general revenue account, since the funds are held in trust by the City because of the Legislature's intent to benefit the institute, with the funds. At the present time, you advise, funds exist in this account, and it is expected that it may be one year before these funds are fully drawn by the institute. The City Council does not take action on the draws, you advise, since the draws are purely ministerial acts handled by the staff of the City and the staff of the institute.

Also under the agreement, the City was to sever the completed building and improvements from its underlying realty and to transfer title of the building to the institute when construction was complete; the City also was to lease for one dollar a year the underlying realty to the institute at the same time.

In a telephone conversation with our staff, you advised that additional land surrounding the building has been leased to the institute also. Although the City could not convey the land and building to the institute, as had been initially contemplated, the City did transfer ownership of the building improved with the State grant and did lease the land for a substantial period. The terms of the leases are thirty years and five years, but if the City decides not to renew the leases, it is required to construct identical facilities for the museum at the City's expense, to move the museum at this expense, and to fully indemnify the museum of loss during the move. Thus, you advise, the leases have such harsh consequences for failure to renew that the leases are practically perpetual. All of the documents have been fully signed by the City and the institute, you advise, and the institute now owns the building and has the right to occupy the underlying land by virtue of the leases.

Finally, you advise that the City Council recently has decided to appoint you to a vacancy on the Council until the next election in March of 1983. For this reason you question whether your relationship with the nonprofit foundation and the nonprofit institute would create a prohibited conflict of interest with your responsibilities as a member of the City Council.

The Code of Ethics for Public Officers and Employees in part prohibits a public officer from being an officer or director of a business entity which is selling any realty, goods, or services to his own agency. Section 112.313(3), Florida Statutes (1981). We find that this provision does not apply to your situation, as neither the nonprofit institute nor the nonprofit foundation is selling any realty, goods, or services to the City. Rather, the institute is leasing realty from the City.

The Code of Ethics also provides:

> 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 is an officer or employee . . . ; 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 private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties. [Section 112.313(7)(a), F.S. (1981).]

The first part of this provision would prohibit a City Council member from having any employment or contractual relationship with a business entity which is doing business with the City. In previous opinions, we have advised that noncompensated service as an officer or as a member of the board of directors of a nonprofit corporation does not constitute an employment or contractual relationship with that entity. See, for example, CEO 80-46 and CEO 77-167. Your service as general counsel to each of the nonprofit corporations, on the other hand, would constitute a contractual relationship with each of those clients. See CEO 80-79.

We are of the opinion that each of the nonprofit corporations is a "business entity," as that term is defined in Section 112.312(3), Florida Statutes. In addition, we are of the opinion that the institute is doing business with the City by virtue of its leasing property from the City, if not by virtue of the agreement under which the City releases funds to the institute. A similar situation appears in CEO 80-10.

However, in determining whether a prohibited conflict of interest exists it is significant that the relationship between the nonprofit corporation and the City has been fixed prior to the time of your membership on the City Council. In that respect, the Code of Ethics provides:

> Construction. -- It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his duties to the state or the county, city, or other political subdivision of the state involved. [Section 112.316, F.S. (1981).]

In previous advisory opinions, we have read this provision to imply a "grandfather clause" which would exempt from Section 112.313(7) business transactions occurring prior to the time the subject official took office. See CEO's 80-88, 77-37, 76-114, and 76-48. In light of this precedent, we are of the opinion that Section 112.313(7)(a) would not prohibit you from serving as a member of the City Council under the situation you have described. The leases, drafted before your service on the Council, for all practical purposes remove any element of discretion on the part of the City Council in the decision to renew them. Similarly,

the payment of fiduciary funds from the City to the institute is made on the request of the institute and does not require any action by the City Council.

Accordingly, we find that no prohibited conflict of interest exists where you serve as an officer, trustee, and general counsel of the two nonprofit corporations while serving on the City Council.

CEO 84-43 -- June 7, 1984

CONFLICT OF INTEREST

CITY EMPLOYEE AND PENSION BOARD MEMBER EMPLOYED BY CITY PENSION BOARDS

To: Ms. Louise E. Henderson, Account Clerk III, City of Key West

SUMMARY:

No prohibited conflict of interest exists where a city employee also is employed as secretary and bookkeeper for the city police and firemen's pension board. Based on CEO's 76-10, 76-157, and 82-42, Section 112.313(3), Florida Statutes, would not be violated, as the employee had no involvement in the board's hiring process. However, the employee is prohibited by Section 112.313(3) from being employed part-time as the secretary and bookkeeper for the city's general employees pension board, where she has been selected to serve on that board.

QUESTION 1:

Does a prohibited conflict of interest exist where you, a City employee, also are employed as secretary and bookkeeper for the City Police and Firemen's Pension Board?

This question is answered in the negative.

In your letter of inquiry and in a telephone conversation with our staff, you advised that you are employed by the City of Key West as an Account Clerk III. You also advised that in 1980 you were hired by the City's Police and Firemen's Pension Board to work part- time as their secretary and bookkeeper. However, you advised that as a City employee you had no involvement in the Board's hiring process.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> DOING BUSINESS WITH ONE'S AGENCY. -- No employee of an agency acting in his official capacity as a purchasing agent, or public officer acting in his official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his own agency from any business entity of which he or his spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or his spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to his own agency, if he is a state officer or employee, or to any political subdivision or any agency thereof, if he is serving as an

> officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
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> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.
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> [Section 112.313(3), Florida Statutes (1983).]

This provision prohibits a City employee from acting in a private capacity to sell services to any agency of the City. Nevertheless, in previous opinions such as CEO 76-10, CEO 76-157, and CEO 82-42 we have interpreted another provision of the Code of Ethics, Section 112.316, Florida Statutes, to permit a City employee to sell services to an agency of the City where the employee was not in a position to supervise or regulate the provision of those services or to give advice or recommendations regarding contracts for those services. We believe that this rationale applies equally to your part-time employment as secretary and bookkeeper for the Police and Firemen's Pension Board.

Accordingly, we find that the Code of Ethics does not prohibit you from working as secretary and bookkeeper for the Police and Firemen's Pension Board while being employed by the City as an Account Clerk III.

QUESTION 2:

> Does a prohibited conflict of interest exist where you, a City employee who has been selected to serve on the City's General Employees Pension Board, also are employed part-time as the secretary and bookkeeper for that Board?

This question is answered in the affirmative.

In your letter of inquiry and in a telephone conversation with our staff, you advised that when you were hired as secretary and bookkeeper for the Police and Firemen's Pension Board you also were hired by the City's General Employees Pension Board to act as their secretary and bookkeeper. As was the case with the Police and Firemen's Pension Board, you had no involvement as a City employee in the Board's hiring process. Approximately two years later, you were elected by the employees of the City as their representative to the Pension Board.

As we noted in response to your first question, Section 112.313(3), Florida Statutes, prohibits a City employee from acting in a private capacity to provide services to any agency of the City. However, we believe that your service on the Pension Board places your employment with that Board in a completely different light than your employment with the Police and Firemen's Pension Board. Obviously, the Board reviews your work, decides whether to retain you as an employee, and sets your compensation. Under these circumstances, we find that your employment with the Board would interfere with the full and faithful discharge of your duties as a Pension Board member; for this reason, we find that Section 112.316, Florida Statutes, does not apply here.

We note that Section 112.313(3)(c) "grandfathers in" contracts which were entered into prior to appointment to public office. However, in a telephone conversation with our staff you advised that after your selection as a representative on the Pension Board the Board voted to give you a raise as their secretary and bookkeeper, a matter upon which you abstained from voting. In our view, this indicates that you have entered into a new "contract" with the Board subsequent to your appointment to the Board. Therefore, we find that your employment with the Board has not been "grandfathered in" by this provision.

While there are a number of other exemptions to the prohibition of Section 112.313(3) which are contained in Section 112.313(12), Florida Statutes, it does not appear that any of these would apply here. In particular, you have advised that you receive more than $500 per year for the work you perform for the Pension Board, so that Section 112.313(12)(f) would not apply. See CEO 77-182.

Accordingly, we find that the Code of Ethics prohibits you from being employed as secretary and bookkeeper by the General Employees Pension Board while serving as a member of that Board.

CEO 85-40 -- May 23, 1985

CONFLICT OF INTEREST

CITY COUNCIL MEMBER OFFICER OF BANK DOING BUSINESS WITH CITY

To: Mr. John C. Wolfe, Chief Assistant City Attorney, City of St. Petersburg

SUMMARY:

No prohibited conflict of interest would be created were an officer of a bank doing business with a city as bond trustee and through a banking services agreement to be appointed to serve on the city council, as the relationships between the banks and the city would be "grandfathered in." CEO's 76-118, 77-36, and 82-10 are referenced. However, if the city were to negotiate new agreements with the bank, a prohibited conflict of interest would be created under Section 112.313(3) and (7), Florida Statutes, unless one of the exemptions in Section 112.313(12), Florida Statutes, applies.

QUESTION 1:

Would a prohibited conflict of interest be created were an officer of a bank doing business with a city as bond trustee and through a banking services agreement to be appointed to serve on the city council?

This question is answered in the negative.

In your letter of inquiry you advise that at the present time there is a vacancy on the St. Petersburg City Council which will be filled by appointment of the Council. One of the individuals being considered to fill the vacancy is the vice-president in charge of marketing for a local bank. You also advise that there are several agreements between the City and the bank under which the bank acts as trustee for various City bond issues. In addition, the City has awarded a banking services agreement to the bank after advertising for proposals. Under the agreement, the bank serves as a depository of City funds, agrees to provide certain services for the City and for City employees, and provides the City with a line of credit. The City has used some of the line of credit and presently has an outstanding loan from the bank in an amount less than the total credit line.

Section 112.313(3), Florida Statutes, prohibits a public officer from acting in his official capacity to purchase any services from a business entity of which he is an officer. In addition, Section 112.313(7), Florida Statutes, prohibits a public officer from being employed by a business entity which is doing business with his agency.

However, in previous opinions, such as CEO 76-118, CEO 77-36, and CEO 82-10, we have found that the Code of Ethics "grandfathers in" agreements entered into before a public official takes office. Therefore, we find that the Code of Ethics would not prohibit the subject bank officer from being appointed to serve on the City Council because of existing agreements between the bank and the City.

As future extensions of credit are contemplated by the banking services agreement which we find to have been grandfathered in, we conclude that the City could continue to take advantage of its line of credit with the bank if the bank's officer is appointed to the City Council. Nevertheless, the bank's officer would be prohibited from voting on future extensions of credit under the agreement by Section 112.3143, Florida Statutes (Supp. 1984), as such a loan would inure to the special gain of a principal by whom he is retained. Similarly, as the two-year banking services agreement contemplates a one-year extension by written consent of the City and the bank, we find that such an extension of the agreement also would be grandfathered in and that the bank's officer would be prohibited from voting on such an extension. See CEO 76-118, in which we approved of the annual renegotiation of a loan which had been grandfathered in, so long as the terms were substantially identical to the original loan.

Accordingly, we find that no prohibited conflict of interest would be created were the subject bank officer to be appointed to serve on the City Council while the bank is doing business with the City as bond trustee and under the banking services agreement.

QUESTION 2:

> Would a prohibited conflict of interest be created were the bank to compete for and seek a similar banking services agreement upon the expiration of the present agreement, if the subject officer of the bank were serving on the City Council?
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> This question is answered in the affirmative, subject to the exemptions noted below.

Once the present banking services agreement expires, the prohibition of Section 112.313(3) and 112.313(7), Florida Statutes, noted above, will become effective. See CEO 80-88 regarding the expiration and renegotiation of insurance policies found to have been grandfathered in under the Code of Ethics.

Section 112.313(12), Florida Statutes, provides a number of exemptions to the prohibitions of Section 112.313(3) and 112.313(7). In particular, Section 112.313(12)(g) permits a municipal officer to serve as an officer of a bank which is acting as a depository of municipal funds, so long as the governing body of the municipality has determined that the officer has not favored his bank over other qualified banks. This exemption, however, would apply only insofar as the banking services agreement contemplates the bank serving as a depository. If the business were to be awarded under a system of sealed, competitive bidding to the lowest or best bidder, the exemption of Section 112.313(12)(b) would apply.

Accordingly, with the possible exception of these exemptions, we find that a prohibited conflict of interest would be created were the bank to obtain a similar banking services agreement upon the expiration of the present agreement, if the bank's officer were to serve on the City Council at that time.

QUESTION 3:

> Would a prohibited conflict of interest be created were the bank to be the trustee on future bond issues of the City, if the subject officer of the bank were to be appointed to the City Council?

Our response to this question is the same as to your second question. Accordingly, we find that unless one of the exemptions of Section 112.313(12), Florida Statutes, applies, a prohibited conflict of interest would be created were the bank to serve as trustee on future bond issues of the City, if the subject officer of the bank were serving on the City Council at that time.

CEO 90-24 -- March 8, 1990

CONFLICT OF INTEREST

CITY COMMISSIONERS MEMBERS OF CHURCH SEEKING TO SELL PROPERTY TO THE CITY

To: Lewis W. Stone, City Attorney (Eustis)

SUMMARY:

A prohibited conflict of interest would be created were a city commissioner also to be a deacon and finance committee chairman of a church selling property to the city. Under Section 112.313(3), Florida Statutes, he would both be acting as a public officer to purchase realty for his agency from a business entity of which he is a director and acting in his private capacity to sell realty to his agency. No prohibited conflict of interest would be created were a city commissioner to be a member of the church which sells property to the city. In addition, no voting conflict of interest would be created under Section 112.3143(3), Florida Statutes, were that commissioner to vote as a member of the commission regarding purchase of the church property by the city.

QUESTION:

Would a prohibited conflict of interest be created were city commissioners to be a member or a deacon and finance committee chairman of a church seeking to seeking to sell property to the city?

Your question is answered in the negative as to the Commissioner who is a church member, and in the affirmative as to the Commissioner who is a deacon and finance committee chairman.

In you letter of inquiry, you have advised that Homer E. Royals is a Commissioner and Dougal M. Buie, III, is a Commissioner and Vice-Mayor for the City of Eustis. You advise that the City is seeking property for the purpose of expanding City offices and facilities. You indicate that the City would prefer to purchase improved real estate rather than buying unimproved land and building the needed improvements, but available improved property in the City is extremely limited. You advise that a church in the City is marketing its entire real estate holdings, including an auditorium, a family life center, recreational facilities, offices, and parking facilities. This property may be considered by the Commissioners of the City for purchase. However, the Vice-Mayor noted above is a member of the church and the Commissioner noted above is a member and chairman of the church's finance committee and a member of the church's board of deacons. The board of deacons is an advisory body with no decision-making powers. However, in any sale the board would present the issue to the membership for a vote with its recommendation. The finance committee would have no involvement in the sale. Neither Commissioner involved receives any compensation from the church. You inquire whether this transaction would present a prohibited conflict of interest.

Section 112.313(7)(a), Florida Statutes, provides:

> 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 is an officer or employee . . . ; 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 private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties.

This section prohibits employment or a contractual relationship with a business entity which is doing business with the public officer's agency. In CEO 81-33, we advised that noncompensated membership on the board of directors of a nonprofit organization does not constitute employment or a contractual relationship. Under the rationale of this and similar opinions, we find that the subject Commissioners do not have employment or a contractual relationship with the church. Therefore, this section is not applicable.

Secondly, Section 112.313(3), Florida Statutes, provides:

> DOING BUSINESS WITH ONE'S AGENCY.--No employee of an agency acting in his official capacity as a purchasing agent, or public officer acting in his official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his own agency from any business entity of which he or his spouse or child is an officer, partner, director, or proprietor or in which such officer or employee of his spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to his own agency, if he is a state officer or employee, or to any political subdivision or any agency thereof, if he is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
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> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.

The first part of this section prohibits a public officer acting in his official capacity from purchasing realty for his agency from any business entity of which he is a director. In CEO 75-201, we advised that a public officer purchases for his agency where the commission of which he is a member transacts such business. In CEO 75-210 we held that abstention from

voting would not eliminate such a conflict, finding that membership on the commission is deemed to constitute acting in one's official capacity. Under the rationale of these decisions, the subject Commissioners would be acting in their official capacity to purchase for their agency.

The next issue is whether the City would be purchasing from a business entity of which the Commissioners are "directors" under that section. In CEO 81-40, we advised that service as an uncompensated trustee of a nonprofit insurance trust was the equivalent of a "director" under the statute. We see no distinction between this situation and that of a deacon in the church. The role of the board of deacons is to present the issue and a recommendation to the congregation for a vote. In this respect, their role is similar to that of a corporate director. In addition, the definition of "business entity" provided at Section 112.312(3), Florida Statutes, would include the church. While in CEO 81-40 we ultimately found no prohibited conflict of interest based on a unity of interests between the insurance trust and the officer's agency, we do not perceive the same unity of interests here between independent parties in a real estate transaction. Therefore, with regard to the Commissioner who also serves as a deacon, he would be purchasing services from a business entity of which he is a director in violation of Section 112.313(3). However, the Commissioner who is merely a member of the church could not be considered to be a director and would not be in violation of this provision.

The second part of Section 112.313(3) would prohibit the Commissioners from acting in their private capacities to sell realty to the City. Under this provision, we find that the Commissioner who also serves as church deacon and finance committee chairman would be acting in his private capacity to sell realty to his agency. Our decisions have advised that this provision would apply where the corporation of which the public official is an officer or director sold to his agency. See CEO 76-23, CEO 78-7, and CEO 81-27. However, with regard to the Commissioner who is merely a member of the church, we find that he would not be acting in his private capacity to sell to the City. We do not conclude that merely voting as a member of the congregation on a recommendation regarding sale of the property would constitute "selling" for purposes of this provision.

As we have determined that a prohibited conflict of interest would be created were the Commissioner also to serve as a deacon and finance committee chairman, we must examine whether any of the statutory exemptions from this prohibition might apply. In reviewing the exemptions, it appears that only the exemption for sole source of supply of Section 112.313(12)(e), Florida Statutes, could potentially be applicable. This provision requires that the business entity involved is the only source of supply within the political subdivision of the officer and there is full disclosure by the officer to the governing body prior to the purchase. However, while you indicate that suitable improved land is in short supply, you have not provided any information which indicates that the church holds the only suitable property in the City. Therefore, we cannot conclude that this exemption would be applicable.

With regard to the Commissioner who is merely a member of the church and would not have a prohibited conflict of interest under the above provision, we must consider the restrictions of the voting conflicts statute with regard to any vote of the City Commission to purchase the church property. Section 112.3143(3), Florida Statutes, provides:

> No county, municipal, or other local public officer shall vote in his official capacity upon any measure which inures to his special private gain or shall knowingly vote in his official capacity upon any measure which inures to the special gain of any principal, other than an agency as defined in s. 112.312(2),

> by whom he is retained. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of his interest in the matter from which he is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. However, a commissioner of a community redevelopment agency created or designated pursuant to s. 163.356 or s. 163.357 or an officer of an independent special tax district elected on a one-acre, one-vote basis is not prohibited from voting.

This section would preclude voting by the commissioner where the measure would inure to his special private gain or to the special gain of a principal by whom he is retained. CEO 83-93 and CEO 84-50 generally indicate that where the benefit accrues to a charitable or nonprofit organization which does not retain the official in question, there is no special private gain to the official or a principal by whom he is retained, as required under that section. On this basis, the Commissioner may vote regarding purchase of the church property while a member of the church.

In addition, we would caution the Commissioners regarding potential appearance of misuse of position with regard to acquisition of the church property. Section 112.313(6), Florida Statutes, provides:

> MISUSE OF PUBLIC POSITION.--No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31.

While we are not indicating that the subject Commissioners would attempt to improperly benefit the church through their public positions, we would caution against any action which could be perceived as favoring the church at the expense of the City's interests.

Accordingly, we find that a prohibited conflict of interest would be created were a City Commissioner also to be a deacon and finance committee chairman of a church which sells property to the City. However, no prohibited conflict of interest would be created were a City Commissioner to be a member of the church. That Commissioner would not be prohibited from voting on the purchase of the property by the City from the church.

CEO 96-30 -- December 3, 1996

CONFLICT OF INTEREST

COUNTY COMMISSIONER SERVING ON BOARD OF DIRECTORS OF NONPROFIT CORPORATION CONTRACTING WITH COUNTY TO PROVIDE MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES

To: R. A. ABuzzy@ Green, Bradford County Attorney (Starke)

SUMMARY:

No prohibited conflict of interest is created under Section 112.313(3), Florida Statutes, where a county commissioner sits on the board of directors of a nonprofit corporation providing mental health and substance abuse services to the county. As the current year=s contract was entered into prior to the county commissioner=s qualification for and election to the county commission, it would be grandfathered-in pursuant to Section 112.313(3)(b), Florida Statutes. Future years= contracts also would not violate Section 112.313(3), Florida Statutes, inasmuch as the county commission has a seat on the corporation=s board of directors and appointed the commissioner to fill that seat as its designee. Further, since the commissioner is not compensated for his service on the corporation=s board of directors, he would not have an employment or contractual relationship with it for purposes of Section 112.313(7)(a), Florida Statutes.

QUESTION:

Would a prohibited conflict of interest be created were a newly elected county commissioner to continue to serve on the board of directors of a nonprofit corporation contracting with the county to provide mental health and substance abuse services?

Your question is answered in the negative under the circumstances presented.

In your letter of inquiry and through other information provided by you to our staff, we are advised that you seek this opinion on behalf of a newly elected member of the Bradford County Board of County Commissioners, Herman Johnson. Prior to Mr. Johnson=s election to office, the County Commission appointed him to the board of directors of a private, nonprofit corporation as its designee to the board. We are advised that the corporation, by annual contract, provides mental health and substance abuse services to the County. Although the current contract was approved prior to the Commissioner=s taking office, you question whether the Commissioner can continue to serve on the corporation=s board of directors without violating the Code of Ethics for Public Officers and Employees.

There are two provisions of the Code of Ethics which are implicated by your inquiry, the first of which is Section 112.313(3), Florida Statutes. It provides:

> DOING BUSINESS WITH ONE'S AGENCY.--No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer=s or employee=s spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer=s or employee=s spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer=s or employee=s own agency, if he or she is a state officer or employee, or to any political subdivision of any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
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> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.
>
> [Section 112.313(3), Florida Statutes (1995).]

Section 112.313(3) prohibits a public officer from acting in his public capacity to purchase services for his agency from a business entity in which he is an officer, partner, director, or proprietor. However, it expressly does not affect contracts entered into prior to the officer=s qualification for elective office. See Section 112.313(3)(b), Florida Statutes. Therefore, with regard to the present contract with the corporation, Section 112.313(3) is not violated by the Commissioner=s continued service on the corporation=s board of directors. See CEO 84-10, Question 2.

As for any future contracts between the corporation and the County Commission, CEO 84-10 is also pertinent. In that opinion, we recognized that there was a unity of interests where a port authority commissioner was the executive director of a nonprofit corporation of which the port authority was a member, sat on its board of directors, and provided funding. That opinion applied Section 112.316, Florida Statutes, to find no conflict under those circumstances.[1] See also CEO 84-63. Analogously, the County Commission has designated the Commissioner, before he was elected to office, to occupy a seat on the board of directors. Further, the Commissioner is not compensated for his service on the corporation=s board of directors and does not appear to be in a position to further his own interests. Instead, it appears that he is seated on the board of directors to represent the County=s interests. For these reasons and under these circumstances, we are of the view that Section 112.313(3) would not be violated where a county commissioner sits on the board of directors of a corporation providing services under contract to the county.

The situation also implicates Section 112.313(7)(a), Florida Statutes, which restricts employment or contractual relationships with business entities doing business with one=s

agency. However, Section 112.313(7)(a) is not implicated by the foregoing situation because the Commissioner receives no compensation for his service on the organization=s board of directors. Our opinion precedent recognizes that there can be no employment or contractual relationship for purposes of Section 112.313(7)(a) where the public officer receives no compensation for his service on the organization=s board of directors. See CEO 91-29, Question 2.

Accordingly, under the circumstances presented we find that no prohibited conflict of interest is created where a county commissioner serves on the board of directors of a nonprofit corporation providing mental health and substance abuse services, by annual contract, to the county.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 3, 1996 and **RENDERED** this 5th day of December, 1996.

Mary Alice Phelan
Chair

[1] Section 112.316, Florida Statutes, provides:

Construction.--It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

CEO 96-31 -- December 3, 1996

CONFLICT OF INTEREST

CITY COUNCIL MEMBER OWNING SUBSTANTIAL INTEREST IN CORPORATION WHICH IS ASSIGNEE OF LEASEHOLD OF CITY-OWNED PROPERTY

To: Don J. Caton, City Attorney (Pensacola)

SUMMARY:

No prohibited conflict of interest is created by a city=s consenting to the assignment of a leasehold of city-owned property from one corporation to another in which a newly appointed member of the city council owns a substantial interest and where the terms of the lease agreement remain substantially the same as they had been prior to the assignment and the city councilman=s appointment. Because the assignee corporation is leasing the property from the city, rather than to the city, Section 112.313(3), Florida Statutes, does not apply. Although the city councilman would have a contractual relationship with a business entity doing business with his agency, where the terms of the lease agreement between the assignee lessee and the city remain the same, the lease agreement is Agrandfathered-in.@ CEO 85-40 is referenced. However, the city councilman is prohibited by Section 112.3143(3)(a), Florida Statutes, from voting on the city=s giving its written consent to the assignment of the leasehold, as the vote would inure to his special private gain or loss.

In addition, where the Councilman=s business partners and/or co-investors are involved in separate businesses that are doing business with the city and have invested their personal funds in the business venture with the Councilman, no prohibited conflict of interest is created, because the Councilman=s contractual relationship is with his business partners and/or investors individually, rather than with a business entity doing business with his agency. As the councilman=s business partners and/or co-investors are his Abusiness associates,@ Section 112.3143(3)(a), Florida Statutes, prohibits him from voting on transactions between the city and the businesses of his business partners and/or co-investors.

QUESTION 1:

Would a prohibited conflict of interest be created if a corporation in which a newly appointed member of the City Council owns a substantial interest were to become the assignee of the leasehold of city-owned property?

Your question is answered in the negative.

On behalf of Douglas Halford, a newly appointed City Councilman, you write that the City owns a parcel of land which was first leased and developed as a marina in 1985. The 1985 lease, you advise, has a term of thirty (30) years, which is renewable at the option of the lessee for an additional thirty (30) year term. You advise that the lease agreement also provides that the lessee may assign its interest in the leasehold provided that the lessee obtains the prior written consent of the City, which consent shall not be unreasonably withheld. Since the completion of the construction of the marina, the leasehold interest previously has been assigned twice with the City's consent, you advise.

You advise that on May 20, 1996, the current lessee and another company of which a substantial interest is owned by the subject City Councilman entered into an agreement in which the leasehold interest was assigned to the latter corporation, subject to the City's consent. The agreement, you advise, contemplated that the transaction would be closed on July 20, 1996. However, a need to resolve certain environmental issues concerning the leased property resulted in the postponement of the closing date until October 21, 1996. The Councilman was appointed to fill a recently-vacated seat on the City Council on September 19, 1996.

You advise that when the matter of the assignment of the leasehold to the assignee company came before the City Council for its consent in early October, the newly appointed member to the City Council abstained from voting. Notwithstanding his abstention, the City Councilman still is concerned about the possible existence of a prohibited conflict of interest due to his owning a substantial interest in a corporation which has become a lessee of City-owned property.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> DOING BUSINESS WITH ONE'S AGENCY.--No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer=s or employee=s spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer=s or employee=s spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer=s or employee=s own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.
>
> [Section 112.313(3), Florida Statutes.]

> 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. [Section 112.313(7)(a), Florida Statutes.]
>
> VOTING CONFLICTS.--No county, municipal, or other local public officer shall vote in an official capacity upon any measure which inures to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(3); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer=s interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. [Section 112.3143(3)(a), Florida Statutes.]

Section 112.313(3), Florida Statutes, prohibits the City Councilman from acting in his official capacity to purchase, rent or lease any goods, realty or services for his agency, the City Council, from a business entity of which he or his spouse or child is an officer, partner, director, or proprietor, or in which he or his spouse or child owns more than a five percent interest, and from selling any services or goods or leasing any realty to the City Council or the City in his private capacity. Because it appears that the assignee company is leasing property from the City, rather than to the City, we are of the opinion that this provision does not apply. See CEO 86-14.

Section 112.313(7)(a), Florida Statutes, prohibits the City Councilman from having any employment or contractual relationship with a business entity which is doing business with or is subject to the regulation of the City Council or which creates a continuing or frequently recurring conflict between his private interests and the performance of his public

duties. We have repeatedly opined that part-ownership or stock ownership of a corporation constitutes having a contractual relationship with that corporation. See CEO=s 80-11, 82-65, 83-48, 86-36, 93-35, and 94-47. Thus, we are of the opinion that by virtue of his ownership interest in the assignee company, the City Councilman has a contractual relationship with that company. Furthermore, it is clear that by accepting the assignment of the lease with the City and, thereby, leasing the City=s property, the assignee company is doing business with the City. Consequently, we are of the opinion that the City Councilman has a contractual relationship with a business entity doing business with his agency. Nevertheless, under the circumstances presented, we do not believe that this contractual relationship is prohibited under Section 112.313(7)(a), as long as the terms of the lease agreement remain substantially identical to the terms of the lease agreement that was originally signed by the City.

In CEO 85-40, we found that no prohibited conflict of interest would be created were an officer of a bank doing business with a city as bond trustee and through a banking services agreement to be appointed to serve on the City Council, as the relationship between the banks and the city would be Agrandfathered in.@ In support of our finding, we cited CEO 76-118, CEO 77-30, and CEO 82-10, where we found that the Code of Ethics Agrandfathers in@ agreements entered into before a public official takes office. We also noted in CEO 85-40 that because future extensions of credit were contemplated by the banking services agreement, the city could continue to take advantage of its line of credit with the bank even after the bank officer was appointed to the City Council, although the bank officer would be prohibited by Section 112.3143, Florida Statutes, from voting on the future extensions of credit. We also found that since the two-year banking services agreement contemplated a one-year extension by written consent of the city and the bank, an extension of the agreement also would be Agrandfathered-in,@ although the bank officer would be prohibited from voting on such an extension here as well. However, we opined that expiration or renegotiation of the banking services agreement, where the terms are substantially different than the original agreement, would bring into play the prohibitions of Sections 112.313(3) and 112.313(7)(a), Florida Statutes. See also CEO 76-118 where we observed

> As the essential purpose of s. 112.313(7) is to prevent a public officer from using his official position to secure business for his private employer, no conflict of interest is deemed to exist while the contract is in its executory stage, so long as the annual renegotiation of terms remains substantially the same as those in the original contract.

Similarly, here, where the terms of the lease agreement between the assignee lessee and the City remain the same, we are of the opinion that the lease agreement is Agrandfathered-in.@ This is not a situation where the City Councilman is using his official position to secure either business or an advantage or benefit for the assignee company through the use of his public position. Rather, the agreement between the City and the assignee lessee will remain essentially the same.

Although we find that no conflict of interest under Section 112.313(7)(a) is created as a result of the assignment of the lease, we are of the opinion that Section 112.3143(3)(a) prohibits the Councilman from voting on the City=s giving its written consent to the assignment of the leasehold. Section 112.3143(3)(a) prohibits the Councilman from voting on a matter which would inure to his special private gain or loss, to the special private gain or loss of a principal by whom he is retained, or to the special gain or loss of his relative or

business associate. It also contains an affirmative duty of disclosure so that interested parties and the public will understand why he is abstaining from voting. Inasmuch as the City=s approval of the lease assignment would appear to inure to the special gain or loss of the assignee company in which the Councilman owns a substantial interest and, therefore, to the special private gain or loss of the Councilman, he would be prohibited from voting on the assignment of the lease. He also should file his memorandum of voting conflict (CE Form 8B) within 15 days after the vote occurs.

Accordingly, we find that no prohibited conflict of interest is created under Section 112.313(7)(a) by the City=s consenting to the assignment of a leasehold of City-owned property to a corporation in which a newly appointed member of the City Council owns a substantial interest where the terms of the lease agreement remain substantially the same as they had been prior to the assignment of the leasehold interest and the Councilman=s recent appointment to the City Council.

QUESTION 2:

> Would a prohibited conflict of interest be created under the Code of Ethics were the co-investors or business partners of the City Councilman to do business with the City, where the City Councilman neither holds any interest nor is an investor in the business being transacted with the City?

You advise that the City Councilman also is a commercial real estate broker and a business partner with other persons who may do business with the City. For instance, you advise that one of the City Councilman's co-investors in the assignee company is an individual who is negotiating a different lease transaction with the City. In that transaction, the Councilman's co-investor=s or business partner=s company might become the lessee of another parcel of City-owned property. The Councilman would not be an investor or have any interest in that potential transaction, you advise. However, the Councilman is concerned about whether CEO 94-10 has any application to him such that he would have to consider terminating his business partnerships, you advise.

In CEO 94-10, we found that absent an exemption under Section 112.313(12), Florida Statutes, a prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were businesses which are insurance clients of a county commissioner=s insurance agency to contract with the county commission to provide goods or services to the county. We also found that under Section 112.3143(3)(a) the county commissioner/insurance agent would be prohibited from voting on measures that would inure to the special gain of insurance clients or persons with whom the commissioner jointly owns an office building. For purposes of the voting conflicts law, we found that the county commissioner=s insurance clients would constitute Aprincipals by whom he is retained@ and the co-owners of the office building would come under the definition of Abusiness associates.@

In CEO 94-10 we also observed that despite the existence of an ongoing contract between the insured and the insurance company, as long as an insurance policy is in effect, the insurance agency has a continuing duty to service the insured=s account and to keep records. Consequently, we found that the county commissioner remains the agent of the insured throughout the term of the policy. In contrast, once a real estate transaction is completed, the City Councilman=s obligation, in his role as real estate broker, to the buyer or seller terminates. Thus, we find that the Councilman would not have a prohibited conflict of interest

under Section 112.313(7)(a) were one of his former real estate clients to do business with the City.

However, with respect to your question concerning the Councilman=s relationship with his business partners or co-investors who may be doing business with the City, we are of the opinion that, despite the Councilman=s having no interest in the business being transacted with the City, he would have a prohibited contractual relationship with a business entity doing business with his agency contrary to the prohibitions of Section 112.313(7)(a) if his business partner or co-investor is a Abusiness entity,@ as that term is defined at Section 112.312(5), Florida Statutes, and the Abusiness entity@ is doing business with the City. The term Abusiness entity@ is defined to mean

> any corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously names or not, doing business in this state.

Under these circumstances, the Councilman would have a contractual relationship with a business entity doing business with his agency. However, if the Councilman=s business partner=s or co-investor=s corporation, for example, was doing business with the City and the business partner or co-investor was acting in his or her individual capacity as an investor, rather than on behalf of the corporation, then the Councilman would not have a contractual relationship with a business entity doing business with his agency and no prohibited conflict of interest under Section 112.313(7)(a) would be created.

In CEO 83-71, we advised that Section 112.313(7) would not prohibit a member of a city housing authority from being engaged in a real estate partnership with an individual who was a partner in the accounting firm which audited the authority=s books. We found that the authority member did not have any employment or contractual relationship with the accounting firm; rather, his contractual relationship was with the individual who was a partner in the firm. Similarly, in CEO 86-37, with respect to a member of a mayor=s law firm who was an equity investor in a development company which proposed to lease and develop property owned by the city, we opined that as the investment by the firm member in the development company was made with the firm member=s own private funds and was not connected with the mayor=s law firm, the mayor=s indirect relationship with the proposed developer would be too attenuated to be prohibited by Section 112.313(7).

Accordingly, we are of the opinion that as long as the City Councilman=s partners or co-investors with whom he has contractual relationships are not personally doing business with the City, no prohibited conflict of interest would be created. However, as Section 112.3143(3)(a), Florida Statutes, prohibits the Councilman from voting on a matter which would inure to the special private gain or loss of a business associate, he would be prohibited from voting on transaction between the City and the business of his business partner or co-investor.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 3, 1996 and **RENDERED** this 5th day of December, 1996.

Mary Alice Phelan

Chair

CEO 96-32 -- December 3, 1996

CONFLICT OF INTEREST; VOTING CONFLICT

DISTRICT SCHOOL BOARD MEMBER EMPLOYED BY CORPORATION DOING BUSINESS WITH DISTRICT

To: Mr. Richard S. Fitzpatrick, Attorney for Citrus County School District (Inverness)

SUMMARY:

A prohibited conflict of interest would not exist under Sections 112.313(3) and 112.313(7)(a), Florida Statutes, were a corporation (which employs a school board member) and a photocopy equipment company to do business with the school district, provided the business is Agrandfathered,@ comes within an exemption contained in Section 112.313(12), Florida Statutes, or is entered into pursuant to a State bid/contract list without the member=s acting in a private capacity to sell or lease to the district. However, the member must abstain from voting and comply with the other requirements of Section 112.3143(3)(a), Florida Statutes, regarding board measures which would inure to the special private gain or loss of her corporate employer or her relative. CEO=s 95-13, 94-3, 84-84, and 76-124 are referenced.

QUESTION:

Does a prohibited conflict of interest exist where a district school board member is employed by a corporation that is selling office supplies and marketing photocopy machines to the district?

Your question is answered as set forth below.

By your letter of inquiry, we are advised that Sandra Sam Himmel (hereinafter Athe member@) was elected as a member of the Citrus County District School Board on November 5, 1996, with her term of office beginning November 19, 1996. In addition, we are advised that the member is an employee of a corporation owned entirely by her father that does business as an office supply and equipment store. You further advise that she has worked thirteen years as a salesperson and, later, as manager of the corporation=s office supply store. In addition to her functions as store manager, you advise, the member participates in the marketing of photocopy machines through a contract between a major photocopy company and the corporation. Further, you advise that the member does not own, and has never owned, any interest in the corporation or had any right to vote the stock of the corporation.

You advise that the District in the past has purchased office supplies from the corporation and that it may desire to continue the practice of purchasing supplies from the corporation in the future. Further, you advise that the District has entered into contractual lease agreements with the photocopy company for the lease of copy machines throughout the District, based on the State bid list[1]. In addition, you advise that as a result of the lease agreements with the photocopy company, the corporation receives a commission for

photocopy equipment placed within the geographical area assigned to the corporation by the photocopy company. You advise that no payments are made directly to the member by the District or by the photocopy company as a result of photocopy lease agreements, the member functioning only as an employee of the corporation.

In addition, via a telephone conversation with our staff, you advise that the member, after her assumption of office, will have no personal contact in her private capacity with the District regarding its business with the photocopy company and that the contracts for the photocopy equipment are between the District and the photocopy company rather than between the District and the corporation owned by the member=s father.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> DOING BUSINESS WITH ONE'S AGENCY.--No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision of any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.
>
> [Section 112.313(3), Florida Statutes.]

> 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 . . .; 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. [Section 112.313(7)(a), Florida Statutes.]

Subject to applicable Agrandfathering@ and certain exemptions which will be discussed below, we find that a prohibited conflict would exist under the second part[2] of Section 112.313(3) were the District to purchase goods or services from the corporation which employs the member, after the member assumes her public office, if the member acts in a private capacity to provide office supplies or copying equipment to the District. In order to avoid Aacting in a private capacity,@ the member must, in regard to District sales and leases, have no client/buyer contact and must not engage in business solicitation. See CEO 94-3. Also, assuming that the member does not act in a private capacity to provide copying equipment to the District, CEO 76-124 and CEO 84-84 buttress our finding of no conflict based upon the photocopy company=s renewal of business with the District after the member=s assumption of public office. In CEO 76-124, we found that no prohibited conflict existed where a city councilman employed by an electrical equipment manufacturers= sales agent received a bonus based, in part, upon the commission received by his employer for sales made in a particular geographical area by the manufacturers.[3] In CEO 84-84, we recognized that Section 112.313(7)(a) would not be violated were a business which employed a member of the Florida High Speed Rail Transportation Commission to sell or lease equipment to that Commission pursuant to a State contract awarded by the former Department of General Services= (now Department of Management Services) Division of Purchasing.[4]

Also, subject to grandfathering and certain exemptions, we find that a prohibited conflict would be created under Section 112.313(7)(a) were the District to purchase goods or services from the corporation, by virtue of the member=s holding employment with a business entity that is doing business with her public agency (the District). However, we do not find that a prohibited conflict would be created under Section 112.313(7)(a) regarding the photocopy equipment, because the member, while holding employment with the corporation owned by her father, does not hold employment or a contractual relationship with the photocopy company that is doing business with the District.

As to grandfathering, we find that any contracts between the member=s father=s corporation or the photocopy company and the District, entered into prior to the member=s assumption of public office, will not be violative of either Section 112.313(3) or Section 112.313(7)(a), due to the language of Section 112.313(3)(b) and Section 112.316, Florida Statutes.[5] See, for example, CEO 95-13. However, renewals of the contracts taking place after the member takes office are not grandfathered, and thus will violate Section 112.313(3) and/or Section 112.313(7)(a), if the elements of these prohibitions (discussed above) are met and if the renewals do not come within one of the exemptions contained within Section 112.313(12), Florida Statutes.[6]

Additionally, as you recognize in your letter of inquiry, the member would be subject to the requirements of Section 112.3143(3)(a), Florida Statutes, regarding District Board measures which would inure to the special private gain or loss of her principal (her father=s corporation that employs her) or her relative (her father)[7], such as measures to purchase from the corporation or measures which generate commissions to the corporation via the photocopy company=s geographical sales. These requirements include abstention from voting, public statement of interest, and proper filing of CE Form 8B. Section 112.3143(3)(a) provides:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(3); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

Further, the member should be aware of Sections 112.313(6) and 112.313(8), Florida Statutes, and take care that she does not violate them by misusing her public position or using Ainside information@ to further her private interests or those of her father, his corporation, the photocopy company, or others. These two statutes provide respectively:

> 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. This section shall not be construed to conflict with s. 104.31. [Section 112.313(6), Florida Statutes.]

For purposes of this provision, the term "corruptly" is defined as follows:

> 'Corruptly' means 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. [Section 112.312(9), Florida Statutes.]

> DISCLOSURE OR USE OF CERTAIN INFORMATION.--No public officer, employee of an agency, or local government attorney shall disclose or use information not available to members of the general public and gained by reason of his or her official position for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), Florida Statutes.]

Accordingly, we find that a prohibited conflict of interest would not exist were the corporation, which employs the subject School Board member, and the photocopy company to do business with the School District, subject to the limitations set forth above.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 3, 1996 and **RENDERED** this 5th day of December, 1996.

Mary Alice Phelan
Chair

[1] By way of a telephone conversation with our staff, you advised us that the State bid list specifies providers and products which can be purchased by governmental entities without the need for individualized competitive bidding, due to the State=s prior approval and acceptance of certain products at certain prices.

[2] Notwithstanding that a member of a public board acts in her official capacity to obtain items for her public agency by virtue of the collegial actions of her public body, the first part of Section 112.313(3) would not be violated in the situation described in your letter because the member is not an officer, partner, director, proprietor, or material interest holder of the corporation or of the photocopy company. Further, while you represent that the member=s father is the sole owner of the corporation, the first part of Section 112.313(3) only addresses the business ownership/control status of the public officer and that of her spouse and child, not that of her father.

[3] We note that the member that is the subject of this opinion is not even receiving such a bonus from the photocopy company.

[4] Section 287.042(2)(a), Florida Statutes (Supp. 1996), provides, in pertinent part, that a function of the Division is A[t]o plan and coordinate purchases in volume and to negotiate and execute purchasing agreements and contracts for commodities and contractual services under which a . . . county, municipality, . . . or other local public agency may make purchases.@

[5] While Section 112.313(3)contains an express grandfather clause, grandfathering under Section 112.313(7)(a) derives from the Commission=s recognition of the meaning of Section 112.316, Florida Statutes, which provides: AIt is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his duties to the state or the county, city, or other political subdivision of the state involved.@

[6] The exemptions that could possibly be applicable appear to be the competitive bidding exemption and the rotation exemption. Note that the competitive bidding exemption requires, inter alia, the member=s filing of CE Form 3A prior to or at the time of the submission of the bid.

[7] Unlike Section 112.313(3), Section 112.3143, Florida Statutes, includes one=s Afather@ within its prohibitions.

CEO 02-14 -- July 30, 2002

CONFLICT OF INTEREST; VOTING CONFLICT

SCHOOL BOARD MEMBER EMPLOYEE OF INVESTMENT BANKING FIRM MARKETING SCHOOL DISTRICT BONDS

To: Edward Garcia, Member of School Board of Palm Beach County (West Palm Beach)

SUMMARY:

A prohibited conflict of interest does not exist where a school board member is employed by an investment banking firm marketing school district bonds under an agreement entered into before the member took office; and a prohibited conflict of interest would not be created were the agreement to be renewed, as provided in the agreement, for two additional one-year terms, provided the provisions of the renewed agreement remain the same as those of the original. Section 112.316, Florida Statutes, acts as a "grandfather clause" to negate the literal language of Section 112.313(7)(a), Florida Statutes, regarding contracts entered into prior to one's taking public office.

The member would be subject to the voting conflicts law codified at Section 112.3143(3)(a), Florida Statutes, regarding district votes/measures concerning bond issues involving his employer or the district's senior underwriting firm connected to his employer. CEO's 80-88, 85-29, 85-40, 87-14, 88-80, 91-7, 95-13, and 96-23 are referenced.

QUESTION 1:

Does a prohibited conflict of interest exist under Section 112.313(7)(a), Florida Statutes, where you, a School Board member, are employed by an investment banking firm that markets School District bonds under an agreement entered into prior to your taking public office?

Your question is answered in the negative.

By your letter of inquiry, a memorandum accompanying the letter, a written response to a request to you from our staff for additional information, and materials supplied in your behalf since we initially considered your opinion request at a previous meeting of ours,[1] we are advised that you serve as a member of the School Board of Palm Beach County, having been appointed by the Governor to fill a vacancy on the Board (taking office January 16, 2002). In addition, we are advised that the Board awarded (by its vote of December 12, 2001) a contract for two firms[2] to act as senior underwriters (or senior managers) for bond issues for School District capital projects. Further, we are advised that one of the senior underwriters, Salomon Smith Barney (SSB), includes in the arrangement with the Board the use of a Statewide and inter-local minority business enterprise certified firm (MBE)[3] which employs the member. Also, we are advised that SSB and MBE, along with other firms, act as managers for District financings, but that the member (as an employee of MBE) will not be involved in MBE's delivery of services; that MBE is not SSB's agent; that with respect to the transactions for which SSB acts as senior manager, its role is similar to MBE's, in that it is responsible for marketing the District's bonds/certificates of participation (COPs) to potential buyers; that MBE is a co-manager for District capital offerings (although you also represent that the contract awarded in December does not name MBE as a contracting party); that SSB does not facilitate the buying of District bonds/COPs from MBE, but, rather, SSB simply agreed to accept a lower participation level in the District's financings (forty percent rather than forty-four percent) as senior manager, in exchange for the District's inclusion of MBE as a four percent co-manager; that MBE is responsible for marketing its allocation of District bonds/COPs to potential buyers and receives only its level of takedown (which it earns on an individual or group basis) pursuant to the agreement between the underwriters and pursuant to the District's approved priority of orders; and that the only contract between SSB and MBE is the standard Agreement Among Underwriters (that is based on The Bond Market Association's form), of which all members of the District's underwriting team are parties and which is executed in connection with each District financing.

The Code of Ethics for Public Officers and Employees provides in part[4]:

> 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 . . .; 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. [Section 112.313(7)(a), Florida Statutes.]

In previous opinions we have found that a prohibited conflict of interest exists under Section 112.313(7)(a) where a company which employs a public officer acts as an underwriter for bond issues of the officer's public agency, absent "grandfathering" under Section 112.316, Florida Statutes, or the applicability of an exemption under Section 112.313(12), Florida Statutes. See CEO 96-23, CEO 88-80, and CEO 85-29.

In accord with our precedent, we find that your situation regarding Question 1 is "grandfathered," and thus that it is not conflicting under Section 112.313(7)(a), inasmuch as the contract under which your private employer is a District bond/COPs underwriter was entered into in behalf of the School District prior to your becoming a member of the District's governing Board, a time when you possessed no public office or public powers which you would have been tempted to compromise due to your private employment.[5] See CEO 80-88.[6]

QUESTION 2:

Would a prohibited conflict of interest be created under Section 112.313(7)(a) were the contract under which MBE is a District underwriter to be renewed or extended for one or two additional terms of one year each, as provided for in the original contract?

The question also is answered in the negative.

Although we have found that public agency actions regarding business relationships with private entities (actions sometimes labeled "contract renewals") can remove a situation from the "grandfathering" effect of Section 112.316 (see, for example, CEO 95-13), we also have found that where an original contract specifically provides for time-certain extensions, then "grandfathering" will not be inapplicable due to exercise of the renewals, provided the terms of the contract remain the same as those of the original. See CEO 85-40. We find that the applicable contract in the instant situation[7] does in fact provide for such time-certain extensions, under SECTION 1--Term of Contract, which states:

> This contract shall be for the period beginning December 13, 2001 through December 12, 2004. The contract may be renewed for two additional one-year periods at the annual anniversary date. The contract will not extend beyond the fifth year.

Thus, we find that your situation in Question 2 is in accord with CEO 85-40 and that renewals whereby MBE remains a District underwriter under circumstances the same as those of the original contract involving itself, SSB, and the District will be "grandfathered" and will not create a prohibited conflict of interest. However, please be advised that you must comply with the voting conflicts law [Section 112.3143(3)(a), Florida Statutes] regarding votes/measures concerning the renewals, inasmuch as they would affect MBE (your employer/a principal by whom you are retained).

QUESTION 3:

Would a voting conflict requiring your abstention and other compliance with Section 112.3143(3)(a), Florida Statutes, exist regarding School Board measures concerning District bond issues involving MBE or involving extensions or renewals of SSB's contract with the School Board?

This question is answered in the affirmative.

Section 112.3143(3)(a), Florida Statutes, the portion of the voting conflicts law applicable to elected, local public officers such as yourself,[8] provides:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

We find that the statute is applicable to District votes/measures involving MBE and SSB, inasmuch as MBE (your employer/principal) is affected by votes/measures that concern its business/money-making interface with the District and that concern SSB's (the company that facilitates its proprietary interface with the District) relationship with the District.

QUESTION 4:

> Would a voting conflict exist regarding measures concerning the other senior co-manager (the co-manager not connected to MBE), such as extensions or renewals of the competitor's contract with the District?

In addition to your representations to us referred to at the beginning of this opinion, you advise that the bond-issue transactions will be alternated between two senior managers (SSB and a competitor[9] of SSB's) and that MBE will not receive orders from transactions where the competitor is the designated senior underwriter.

We decline to answer this question, inasmuch as it is not sufficiently framed. In other words, there likely are factual variables [such as the particulars of the process whereby another senior manager, possibly SSB (which is connected to MBE), would be selected in lieu of the competitor] concerning a particular, concrete measure which may actually come before the School Board that would affect our answer. Therefore, we invite you to contact us (or our staff) for further advice if and when particular measures come before the Board.

QUESTION 5:

> Would a voting conflict exist regarding measures concerning school renovation/construction possibly necessitating financing through bond issues?

Again, we decline to answer because of the lack of a specific, concrete measure. However, suffice it to say that a voting conflict likely would exist in situations in which bond financing for renovation/construction seems likely and in which only SSB/MBE and the one competitor are poised for the resulting underwriting business. See CEO 91-7.

Accordingly, we find that your existing situation is grandfathered; that the renewals will be grandfathered; that votes/measures concerning SSB/MBE necessitate your abstention and other compliance with the voting conflicts law; and that your other voting inquiries are not specific enough to be answered.[10]

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 25, 2002 and **RENDERED** this 30th day of July, 2002.

Patrick K. Neal
Chair

[1] Items supplied since our initial consideration: Contract between the School Board and UBS PaineWebber, Inc., dated December 12, 2001; Contract between the School Board and Salomon Smith Barney, Inc., dated December 12, 2001; Agreement Among Underwriters dated February 25, 2002; Agreement Among Underwriters dated March 13, 2002; Salomon Smith Barney response to School District RFP; letter from School Board's Chief Counsel received July 12, 2002.

[2] Salomon Smith Barney and UBS PaineWebber.

[3] Sterling Financial Investment Group, Inc.

[4] We see no indication that Section 112.313(3), Florida Statutes, is applicable to your inquiry, inasmuch as you represent that you will not be acting on behalf of MBE to provide District-related services and inasmuch as you have not indicated that you hold a leadership position or material interest in MBE. Section 112.313(3) provides:

> No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision of any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.

[5] The language of Section 112.316, which we have recognized as supporting "grandfathering" which negates the literal language of Section 112.313(7)(a), provides:

> CONSTRUCTION.--It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

[6] We have not overlooked the issue you raise regarding whether or not MBE is "doing business with" the School District for purposes of Section 112.313(7)(a). However, in view of the "grandfathering"recognized herein, consideration of the issue is not necessary to our decisions in this opinion. Nevertheless, notwithstanding that the District's contract award to SSB and UBS PaineWebber did not name your employer (MBE/Sterling Financial) as a contracting party, we likely would find it difficult to determine that your employer is not doing business with the District, given that it is responsible for underwriting/managing/marketing a portion of the District's bonds/COPs.

[7] Contract between the School Board and Salomon Smith Barney, Inc., dated December 12, 2001.

[8] Your Gubernatorial appointment notwithstanding, you are not subject to Section 112.3143(4), Florida Statutes, because the position you hold is not an appointive position; rather, it is a position which is regularly filled by election. See CEO 87-14.

[9] UBS PaineWebber.

[10] Section 230.23(10)(I), Florida Statutes, mentioned in your inquiry, is not within our jurisdiction to interpret. We suggest that you contact the Office of the Attorney General regarding the statute.

CEO 02-19 -- December 11, 2002

CONFLICT OF INTEREST

EMPLOYEE COUNTY ATTORNEY FORMER PARTNER IN LAW FIRM CONTRACTING WITH COUNTY

To: Name withheld at person's request

SUMMARY:

No prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were an employed county attorney to receive fees and profit-sharing from his former law firm which does business with the county under contracts entered into before he became county attorney. Section 112.316, Florida Statutes, acts as a "grandfather" clause insulating him from the literal language of Section 112.313(7)(a). CEO's 02-14, 94-35, 94-14, 94-3, and 92-48 are referenced.

QUESTION 1:

Would a prohibited conflict of interest be created were you, a full-time-employee county attorney, to receive a percentage of gross fees collected in the future by your former law firm on files you brought to the firm (not including files where the county is the client), where the firm provides legal services to the county under contracts entered into prior to your becoming county attorney?

This question is answered in the negative.

By your letter of inquiry, materials submitted with the letter, and additional information provided at your direction to our staff via e-mail, we are advised that you are employed full-time as the County Attorney for Orange County, assuming the position on October 28, 2002.[1] Additionally, you advise that previously you were a partner in a law firm that has served as task-specific legal counsel to the County for the past several years, via the services of firm members other than yourself; that you no longer have any rights or obligations related to the operation, control, and/or management of the firm; and that you have terminated your relationship with the firm, with the exception of an arrangement (currently verbal/unwritten, but which may be memorialized) between you[2] and the firm under which you will be entitled to receive a percentage of future fees collected from clients you brought to the firm and a percentage of the firm's future profits for three years.

Further, we are advised that all of the legal services contracts between the firm and the County were entered into prior to your becoming County Attorney; that none of these contracts has changed since you became County Attorney; and that one of the contracts (a construction law contract) will expire in December 2002, but that it expressly provides that it may be renewed for two additional one-year periods.

Section 112.313(7)(a), Florida Statutes,[3] provides:

> 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 . . .; 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 statute apparently would prohibit your holding a contractual relationship (i.e., the fee/profit-sharing arrangement) with the firm, inasmuch as the firm is a business entity doing business with the County by virtue of the various legal services agreements. However, on numerous occasions, we have found that Section 112.313(7)(a) is not to be applied in isolation, but, rather, is to be construed in conjunction with Section 112.316, Florida Statutes, which provides:

> CONSTRUCTION.--It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

Thus, we have utilized Section 112.316 as a "grandfather" clause to negate the literal language of Section 112.313(7)(a), reasoning that a public officer cannot be tempted to dishonor regarding contracts between a private firm (with which he holds a contractual relationship) and his public agency entered into before he assumed his public position. See, for example, CEO 02-14 and our opinions cited therein.

Therefore, in accord with our precedent, we find that Section 112.313(7)(a) would not be violated were you to receive a portion of fees and profits as set forth in Question 1.[4]

QUESTION 2:

> Would a prohibited conflict of interest be created were you to receive a percentage of the firm's future net profits (for three years) which would include profits from fee payments received by the firm from the County?

This question also is answered in the negative.

Although you represent (via e-mail response) that the County Attorney's Office refers particular work to the firm on an "as needed" basis under the construction law contract and that billings by the firm for this work are reviewed by the County Attorney's Office, we do not find that this referral and review defeats the grandfathering of Section 112.316. See CEO 92-48, in which we found that FDOT Bureau of Motor Carrier Compliance employees working privately for road-construction firms would not necessarily be tempted to disregard traffic laws or other standards in an effort to curry favor with their private employers. See also CEO 94-3, CEO 94-14, and CEO 94-35.

This question is answered accordingly.

QUESTION 3:

Would a prohibited conflict of interest be created were you to receive a percentage of the firm's net profits for the next three years, excluding profits generated from fees received from the County?

In accord with our answers to Questions 1 and 2 above, this Question is answered in the negative.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 5, 2002 and **RENDERED** this 10th day of December, 2002.

Patrick Neal
Chair

[1] The letter of inquiry states that you assumed the position on October 21, 2002; however, your later e-mail corrects the representation to October 28, 2002.

[2] You advise that you were a member of the firm and that you are party to the arrangement through a professional services corporation wholly owned by you.

[3] Section 112.313(7)(a) is applicable to your inquiry because you are a public "employee." If you were merely an independent contractor, Section 112.313(7)(a) would not be applicable. See Section 112.313(16), Florida Statutes, which provides:

> (16) LOCAL GOVERNMENT ATTORNEYS.--
>
> (a) For the purposes of this section, >local government attorney= means any individual who routinely serves as the attorney for a unit of local government. The term shall not include any person who renders legal services to a unit of local government pursuant to contract limited to a specific issue or subject, to specific litigation, or to a specific administrative proceeding. For the purposes of this section, >unit of local government= includes, but is not limited to, municipalities, counties, and special districts.
>
> (b) It shall not constitute a violation of subsection (3) or subsection (7) for a unit of local government to contract with a law firm, operating as either a partnership or a professional association, or in any combination thereof, or with a local government attorney who is a member of or is otherwise associated with the law firm, to provide any or all legal services to the unit of local government, so long as the local government attorney is not a full-time employee or member of the governing body of the unit of local government. However, the standards of conduct as provided in subsections (2), (4), (5), (6), and (8) shall apply to any person who serves as a local government attorney.
>
> (c) No local government attorney or law firm in which the local government attorney is a member, partner, or employee shall represent a private individual or entity before the unit of local government to which the local government attorney provides legal services. A local government attorney whose contract with the unit of local government does not include provisions that authorize or mandate the use of the law firm of the local government attorney to complete legal services for the unit of local government shall not recommend or otherwise refer legal work to that attorney's law firm to be completed for the unit of local government.

[4] We also find that contracts between the County and the firm entered into before you became County Attorney and containing express renewal language for time-certain periods can be renewed even though you hold the position of County Attorney at the time of the renewal(s), provided the provisions of the renewed contract remain the same as those of the original. See CEO 02-14 (school board member employed by investment banking firm marketing school district bonds).

CEO 03-17 -- December 9, 2003

CONFLICT OF INTEREST

PORT AUTHORITY MEMBER CHAIRMAN OF SHIPPING COMPANY

To: Name withheld at the person's request.

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were a chairman of a shipping company to be appointed to a port authority. Assuming arguendo that business between the port and the company could be "grandfathered," a prohibited conflict would exist via regulation by the port; and a continuing or frequently recurring conflict of interest or an impediment to the full and faithful discharge of public duty would exist because of the chairman/authority member's simultaneous private/public interests regarding his company's shipping operations at the port, including carriage of a very large percentage of refined petroleum products into the port. CEO's 84-63, 96-31, and 02-14 are referenced.[1]

QUESTION:

Would a prohibited conflict of interest be created were you, chairman of a shipping company operating at a port, to become a member of the port authority?

This question is answered in the affirmative.

By your letter of inquiry, materials accompanying your letter, and a letter and accompanying materials from an attorney in your behalf, we are advised that you are chairman of a shipping company (headquartered in Tampa) whose subsidiaries own and/or operate petroleum tankers, tank barges, and tug boats in the United States coastwise trade[2] and that you intend to submit your name to the Governor for appointment to a vacant position on the Tampa Port Authority. In addition, you advise that your company leases land from the Authority (as a successor in interest under a lease between a tenant and the Authority executed in 1980), that the lease expires on December 31, 2004, that the lease provides options for renewal for ten-year periods, and that rates for renewals must be renegotiated. Further, we note that relevant language of the lease (found in Addendum II) reads:

> Option period rental to be negotiated beginning one year prior to expiration of previous period to allow at least ninety (90) days notice of decision to exercise. Negotiated rental to be a reasonable rate for the bare land as described in Attachment 'A' and any disagreement as to the amount of the rent which cannot be settled between the Tenant and the Authority shall be decided under the provisions of the Florida Arbitration Code.

In addition, we are advised that your company is a holding company, that it neither owns nor operates vessels, that it is the owner of another holding company which owns two other companies, that the other two companies own a number of corporations whose sole asset is a tanker, barge, or tug boat, and that the vessels are all bareboat chartered[3] to yet another company.[4] Further, you advise that vessels owned and operated by your company's subsidiaries carry petroleum products throughout the United States and that you enter into private charters with oil company customers to carry their product to various ports where the product is discharged at private company facilities. You also advise that your companies carry approximately forty percent of all refined petroleum products that are imported into the Port and approximately twenty-five percent of all petroleum products brought into Florida, but that your companies have no contracts with the Port relating to marine transportation. Further, you advise that the Authority sets rates for various port services involving public

facilities owned by the Port, including fees for dockage and water, and that your company has routine maintenance and upgrading of its vessels and barges performed at shipyards leasing their facilities from the Authority, but that the Authority does not operate the shipyards.

Section 112.313(7)(a), Florida Statutes, the portion of the Code of Ethics for Public Officers and Employees that contains the prohibitions relevant to your inquiry,[5] provides:

> 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 . . .; 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 Section 112.313(7)(a) ostensibly would prohibit your serving on the authority due to your company's lease with the Authority, inasmuch as you would hold a contractual relationship (via your chairmanship) with a business entity (your company) which is doing business with your public agency (the Authority) via the lease. However, in situations such as yours (situations where the contract or other business between a public agency and a public officer's company was entered into before the public officer took public office) we have applied Section 112.316, Florida Statutes, as a "grandfather clause" to negate the literal effect of the first part of the statute. See, for example, CEO 02-14 (school board member employee of investment banking firm marketing school district bonds). Thus, in your situation, we also would apply Section 112.316 in your favor regarding the existent lease. Similarly, if the lease is renewed prior to your becoming a member of the Authority, we also would apply Section 112.316. However, if the lease is renewed after you become an Authority member, we find that it would be grandfathered only if the renewal is for a time certain provided for in the original lease and only if the terms (provisions) of the renewal remain the same as those of the original contract. See CEO 02-14, Question 2.[6]

In addition, while the Coast Guard and other governmental agencies are charged with regulation of your company's corporate operations in and around the Port, we find that the Authority also regulates your company's corporate interests, thus creating a prohibited conflict of interest under Section 112.313(7)(a) independent of any business relationship which could be grandfathered. Regarding "regulation" by the Port, we note that your company's counsel has represented that "the Port Authority does get involved in some vessel movement issues in the Port, which are primarily associated with the use of the Port Authority's facilities," that "[your company's] vessels do occasionally use public docking facilities, and therefore may be affected by some Port Authority requirements affecting the use of those facilities," and that "the Port Authority has recently adopted amendments to its tariff which granted it the authority to take the actions regarding vessel movements within the Port."[7] Also, regarding the issue of regulation, we note that Chapter 95-488, Laws of Florida, the special act of the Legislature concerning the Port, provides, inter alia, in various subsections of Section 7 (POWERS), that the Authority has the following powers:

> (n) To exercise such police powers as it deems necessary for the effective control and regulation of all facilities, areas, and districts under its jurisdiction.
>
> (o) To have and to exercise all of the powers, rights, and authority now vested by the Florida Statutes for the operation of ports and harbors, except the examination, appointment, and licensing of pilots and the fixing of rates of pilotage.

> (s) To adopt rules and regulations governing the speed, operation, docking, movement, and stationing of all watercraft plying waterways in the port district under the jurisdiction of the port authority, subject to the provisions of section 19 of this act.

Further, and perhaps most importantly, we find that your serving as a member of the Authority while serving as chair of a company that, among other things, carries approximately forty percent of all refined petroleum products that are moved into the Port would create a continuing or frequently recurring conflict between your private interests and the performance of your public duties or would impede the full and faithful discharge of your public duties.Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).The terms "conflict" and "conflict of interest" are defined, at Section 112.312(8), Florida Statutes, to mean "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest."

In making our findings, we have considered your position that a person of your maritime industry expertise would serve the Port and Authority well. However, the Legislature has not yet seen fit to "waive" the conflicts identified by us herein via applying to the Port of Tampa language similar to that employed in the special act regarding a sister port (Port Everglades). See CEO 84-63, in which we found that no prohibited conflict of interest would be created under Section 112.313(7)(a) were a vice president of a shipping company doing business with Port Everglades to be appointed to the Port Everglades Authority, reasoning that Section 112.313(7)(b), Florida Statutes,[8] negated the conflict because the Port Everglades special act provided that ". . . the other person so appointed shall be a representative of business entities doing business with or at the port."

Accordingly, we find that a prohibited conflict of interest would be created were you to be appointed to the Tampa Port Authority.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 4, 2003 and **RENDERED** this 9th day of December, 2003.

Richard L. Spears
Chairman

[1]Prior opinions of the Commission on Ethics are viewable on its website: www.ethics.state.fl.us

[2]Your inquiry specifies your extensive shipping industry experience, including :chairman of an association of major U.S. flag vessel operators, chairman of a London-based international insurer of vessels, and chairman of an international association of tanker operators.

[3]Black's Law Dictionary (5th ed. 1979) defines "[b]are boat charter" to mean

> [c]harter where ship owner only provides ship, with charterer providing personnel, insurance and other necessary materials and expenses.

[4] Your inquiry materials include a chart of your company's corporate structure.

[5]We find that the prohibitions of Section 112.313(3), Florida Statutes, are not at issue regarding your inquiry inasmuch as your scenario does not indicate that your company is renting, leasing, or selling anything to the Port. The statute provides:

> DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the

officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:

(a) October 1, 1975.
(b) Qualification for elective office.
(c) Appointment to public office.
(d) Beginning public employment.

[6] We recognize that it might be difficult for the terms of a renewal to remain the same in your situation due to the original lease's providing for a renegotiation of rental rates regarding a renewal. However, since the issuance of CEO 96-31 (our opinion cited in your inquiry that apparently recognizes a grandfathering when the terms of a renewal remain "substantially the same" or "substantially identical"), we have clearly and recently stated our view that the terms of a renewal must remain the same. CEO 02-14, Question 2.

[7] We note that your company's legal counsel, in a letter to our staff, cited United States v. Locke, 529 U.S. 89, 120 S.Ct. 1135 (2000), regarding state regulation of ports and waterways.However, we do not view the case as holding that all non-Federal regulation is preempted by Federal law such that Port regulation of your company's operations cannot exist. Rather, it appears that the case held that Federal law allows a state to regulate its ports and waterways, so long as the regulation is based on the peculiarities of local waters that call for special precautionary measures.

[8]Section 112.313(7)(b) provides:

> This subsection shall not prohibit a public officer or employee from practicing in a particular profession or occupation when such practice by persons holding such public office or employment is required or permitted by law or ordinance.

CEO 08-4 -- March 5, 2008

CONFLICT OF INTEREST; VOTING CONFLICT

COUNTY COMMISSIONER PAID DIRECTOR OF BANK CONTRACTING WITH COUNTY UNDER S.H.I.P. PROGRAM AND UNPAID DIRECTOR OF PHILANTHROPIC ORGANIZATIONS

To: Name withheld at person's request (Escambia County)

SUMMARY:

A prohibited conflict of interest exists under Sections 112.313(3) and 112.313(7)(a), Florida Statutes, where a county commissioner serves as a director of a bank contracting with the county regarding a housing program. Under Section 112.313(3), the commissioner acted in his official capacity to purchase services from a business entity of which he is a director and he acted in a private capacity to sell services to the county, his political subdivision. Under Section 112.313(7)(a), the commissioner holds employment or a contractual relationship with the bank, a business entity doing business with his public agency under the contract or agreement between the county and the bank. In addition, a voting conflict of interest was created when the county commissioner voted to approve his bank for entry into the agreement with the county. No definitive answer can be provided regarding whether a prohibited conflict would be created under Sections 112.313(3) and 112.313(7)(a) based on the commissioner's service as an unpaid director of various philanthropic organizations; the commissioner is invited to submit particular scenarios for review, should such arise. But no voting conflict would be created regarding votes/measures affecting the philanthropic organizations because they are not principals by whom the commissioner is "retained." Other directors of the bank's board of directors are not, by virtue of being directors, "business associates" of the commissioner regarding the voting conflicts law. CEO 79-33, CEO 81-2, CEO 84-50, CEO 85-89, CEO 86-24, CEO 90-24, CEO 93-23, CEO 93-32, CEO 97-6, CEO 98-9, CEO 98-24, CEO 01-17, CEO 02-14, and CEO 07-11 are referenced.[1]

QUESTION 1:

Does a prohibited conflict of interest exist where you, a county commissioner, serve as a compensated director of a bank which is contracting with the county under the State Housing Initiatives Partnership program (SHIP)?

This question is answered in the affirmative.

By your letter of inquiry and additional information provided by you at the request of our staff, we are advised that you serve as a member of the Escambia County Commission, having taken office on November 21, 2006, and that you also are, since December 2002, a paid member of the board of directors of a local bank.[2] In addition, you advise that the County (and the City of Pensacola) and the bank are under contract (via an agreement entered into in November 2007)[3] regarding the State Housing Initiatives Partnership program (SHIP), which was created by the Legislature (see Part VII, Chapter 420, Florida Statutes) to create and preserve affordable housing. Under the agreement, you advise, the County and the City agree to provide funds from a trust account for down payments and closing costs for mortgage financing provided by the bank for eligible families, and the bank and other participating lenders[4] have access to the SHIP First Time Homebuyer Incentive Fund.[5]

The Code of Ethics for Public Officers and Employees provides in part:

> DOING BUSINESS WITH ONE'S AGENCY.-No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
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> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment. [Section 112.313(3), Florida Statutes.]
>
> 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 . . .; 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. [Section 112.313(7)(a), Florida Statutes.]

Absent "grandfathering" or the applicability of an exemption under Section 112.313(12), Florida Statutes, the first part of Section 112.313(3) prohibits a public officer acting in his official capacity from purchasing services from a business entity of which he is, among other things, a director, and the second part of Section 112.313(3) prohibits a public officer from acting in a private capacity to sell services to his political subdivision or any agency of his political subdivision. Also, absent grandfathering or applicability of an exemption, Section 112.313(7)(a) prohibits a public officer from holding employment or a contractual relationship with a business entity which is doing business with the officer's public agency.[6]

We find that a prohibited conflict of interest exists for you under both statutes due to the relationship between the County (your political subdivision or agency) and the bank (a business entity of which you are a director and with which you hold employment or a contractual relationship). Your situation meets the required elements of Section 112.313(3): as a County Commissioner, you are a "public officer" [defined at Section 112.313(1), Florida Statutes]; as a corporation or similar entity, the bank is a "business entity" [defined at Section 112.312(5), Florida Statutes]; as a member of the board of directors of the bank you are a director of the business entity (see, for example, CEO 97-6); when the County Commission acted to enter into the agreement with the bank, you acted to purchase services for the County from a business entity of which you are a director (see, for example, CEO 90-24); and as a director of the bank, you acted in a private capacity to sell services to the County when the bank acted to do so (see, for example, CEO 81-2). Your situation also meets the required elements of Section 112.313(7)(a): as a County Commissioner, you are a public officer; by virtue of being a paid director of the bank you hold employment or a contractual relationship with a business entity (see, for example, CEO 85-89); and by virtue of the agreement between the bank and the County, the business entity with which

you hold employment or a contractual relationship is "doing business with" your public "agency." See, for example, CEO 86-24 and CEO 07-11, in which we found that a business entity is doing business with a public agency where the parties have entered into a lease, contract, or other type of arrangement where one party would have a cause of action against the other in the event of a default or breach.

This question is answered accordingly.[7]

QUESTION 2:

Does a prohibited conflict of interest exist for you regarding your service as an unpaid member of the boards of directors of various philanthropic organizations?[8]

We cannot give a definitive answer to this question without knowing the particular facts of situations, perhaps many and varied, relevant to this question. If you have a particular situation which you would like to present to us, please contact us or our staff in the future.

QUESTION 3:

Was a voting conflict of interest created for you when you voted on the list of banks, including your bank, authorized in relation to SHIP, in 2007?

This question is answered in the affirmative.

The voting conflicts law provides, regarding local, elective, public officers:

> VOTING CONFLICTS.-No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. [Section 112.3143(3)(a), Florida Statutes.]

Section 112.3143(3)(a) prohibits a local public officer (e.g., a county commissioner) from voting on a measure which the officer knows would inure to the special private gain or loss of a principal by whom the officer is retained, requires the official to state his interest or that of his principal in the matter, and requires timely filing of a memorandum of voting conflict (CE Form 8B).

In your situation, you acknowledge that you voted to approve the list of authorized banks, including your bank, thereby enabling your principal (the bank, by virtue of your paid relationship with it) to make and profit from SHIP-related loans.

This question is answered accordingly.

QUESTION 4:

Would a voting conflict of interest be created for you regarding County Commission measures affecting philanthropic organizations which you serve as an uncompensated director?

This question is answered in the negative.

While such an organization might in some sense be your "principal," Section 112.3143(3)(a) requires that you be "retained" by your principal in order for the relationship to give rise to a voting conflict. We consistently have found that "retention" requires pay or similar consideration. See, for example, CEO 84-50 (county planning council member voting to approve land use amendment regarding property of nonprofit organization he serves as uncompensated director). See also CEO 98-24 and CEO 90-24.

This question is answered accordingly.

QUESTION 5:

Would a voting conflict of interest be created for you regarding County Commission measures affecting fellow directors of the bank you serve as a director, where the measures do not also affect the bank?

This question is answered in the negative.

You question whether the voting conflicts law would apply regarding County Commission votes/measures that affect the other directors in "nonbank" matters. Besides the voting conflicts law encompassing measures inuring to the special private gain or loss of a principal by whom one is retained, it encompasses measures affecting one's "business associate," which is codified at Section 112.312(4), Florida Statutes, to mean

> any person or entity engaged in or carrying on a business enterprise with a public officer, public employee, or candidate as a partner, joint venturer, corporate shareholder where the shares of such corporation are not listed on any national or regional stock exchange, or coowner of property.

Prior to the inclusion of "business associate" in the voting conflicts law,[9] the law did not encompass measures affecting persons who happened to be one's partners or fellow stockholders in business ventures unrelated to the measure pending before the officer's agencies, such as the situation in which a school board was considering an architect, who, independent of his practice, was a partner in a real estate development partnership with a school board member. See CEO 79-33 and CEO 93-32.

While a simplistic view of your situation might yield a conclusion that you and your fellow members of the bank's corporate board of directors are, by virtue of your membership on the bank's collegial governing board, engaged in or carrying on a business enterprise with each other, and thus that you are "business associates" with one another, we recognize that the wording of Section 112.312(4) is not properly read so simply. It is apparent from its language that the definition was intended to bring within the reach of the law partnership endeavors or similar enterprises in which individuals or business entities combine themselves, through enumerated vehicles (e.g., holders of non-publicly-traded stock of a close corporation), relationships previously absent from the law's reach, and that it was not intended to reach situations where several persons merely hold similar responsibilities for the same corporate entity or situations where they merely occupy a nominal status in relation to each other. See CEO 93-32 (Question 1), CEO 98-9 (Question 1), and CEO 01-17. Also, Section 112.312(4) does not enumerate co-directors or fellow directors of a corporation as persons coming within the relationship subject to the prohibition. Thus, given the intent of Section 112.312(4), as gleaned from the terms

used by the Legislature (and in view of the "partnership loophole" previously existing in the law), and given the strict judicial construction applicable to penal statutes such as the statutes within the Code of Ethics [see City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993)], we find that your fellow members on the bank's board of directors are not your "business associates" for purposes of the voting conflicts law. See CEO 01-17, note 4.

Accordingly, we find that the other members of the bank's board of directors are not your "business associates" by virtue of your and their service as directors,[10] and thus that you are not subject to the voting conflicts law regarding measures/votes of the County Commission which would inure to the special private gain of the other directors of the bank.

ORDERED by the State of Florida Commission on Ethics meeting in public session on February 29, 2008 and **RENDERED** this 5th day of March, 2008.

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Albert P. Massey, III, Chairman

[1]For prior opinions of the Commission on Ethics, go to www.ethics.state.fl.us, go to Research, go to Advisory Opinions, go to the year, and go to the particular opinion number.

[2]Also, at your request, we are advised by telephone by the County Attorney's Office that no stock is issued or traded for the bank of which you are a director (First Gulf Bank) but, rather, that First Gulf Bank is a wholly-owned subsidiary of Alabama National Bancorporation, whose stock is listed on a national or regional stock exchange.

[3]You describe the agreement as "a continuing agreement that started before [you] came onto the Board [of County Commissioners] and is approved annually." Also, you advise that you abstained from the vote (approval of a list of banks to enter into an agreement, including your bank) in 2006 but that you voted for approval on a 2007 consent agenda of the County Commission.

[4]You advise that the County Commission approved several banks to participate in the program, that banks were sought via a general advertisement (not via sealed, competitive bidding), and that provided an interested bank followed appropriate lending guidelines, it was selected to participate in the program.

[5]You state that it is your understanding that the agreement is not directly a part of the bank's business operations; that the bank merely acts as a conduit and gets applicants to the SHIP program (that the bank refers its customers to the program); that the bank loans its money (not the County's money) to the applicant, resulting in the bank's "indirectly" having a loan with the applicant for which the bank will receive interest; and that the County provides assistance at closing to the homebuyer, with the County taking a second mortgage or a lien. In other words, you state that the bank does not receive any funds from the County but instead acts as an "applicant point"-that is, when a potential homebuyer visits the bank, the bank's loan officer forwards the application to the SHIP program for processing, and, if the applicant is approved, the County supplies assistance for the down payment and closing costs to the applicant at closing.

[6]We find that the facts of your inquiry do not indicate a grandfathering. Despite your view that the relationship between your bank and the County amounts to a continuing agreement beginning before you took office, we find, as we did in CEO 02-14, that new contracts, or renewals/extensions of existing contracts not specifically provided for in earlier contracts for periods/terms certain and which are not the same as the original contract, are not grandfathered for purposes of Section 112.313(7)(a), reasoning that any extension/renewal must be expressly contemplated in an original agreement. In your situation, the 2007 contract contains no wording indicating it is such a renewal/extension; rather, it appears to be a new contract. Under similar reasoning, we see no grandfathering under Section 112.313(3).

[7]You letter of inquiry also states that you have been engaged in business as a commercial real estate broker. We cannot determine in the context of this opinion whether this pursuit would implicate the Code of Ethics because we have not been presented with a specific factual scenario. However, if a specific situation presents itself in the future, do not hesitate to contact us or our staff for further advice.

[8]Baptist Hospital Foundation, Junior Achievement of Northwest Florida, and Pensacola Junior College Foundation.

[9] Via Chapter 91-85, Laws of Florida, effective October 1, 1991.

[10] However, if you and another director are "business associates" by virtue of your both holding closely-held stock of a corporation, being partners in an enterprise, etc., note that the voting conflicts law is applicable to you regarding measures/votes affecting the other

person; and note that the law is applicable to votes affecting the bank, a principal by which you are retained.

CEO 08-6 -- March 5, 2008

CONFLICT OF INTEREST

CITY COMMISSIONER EMPLOYED BY SHERIFF'S OFFICE CONTRACTING LAW ENFORCEMENT SERVICES TO CITY

To: Name withheld at person's request (City of Pahokee)

SUMMARY:

A prohibited conflict of interest does not exist under Section 112.313(7)(a), Florida Statutes, where a member of a city commission is employed by a sheriff's office providing law enforcement services to the city under an agreement entered into and amended before the member took office. Under the circumstances presented and subject to the condition that the member's employment is not connected to her employer's provision of services to the city, a prohibited conflict would not be created were the city and the sheriff's office to contract anew. The existing agreement is grandfathered, intergovernmental agreements rarely constitute "doing business," and no frequently recurring conflict or impediment to the full and faithful discharge of the member's public duties is indicated. CEO 76-2, CEO 77-36, CEO 79-13, CEO 80-87, CEO 81-5, CEO 82-50, CEO 86-24, CEO 90-51, CEO 95-23, CEO 02-14, CEO 04-9, CEO 06-2, and CEO 07-11 are referenced and CEO 77-65 is distinguished.[1]

QUESTION:

Does a prohibited conflict of interest exist where a member of a city commission is employed by a sheriff's office that provides law enforcement services to the city under a contract entered into before she became a city commissioner, or under a new contract entered into while she is a member of the city commission?

Under the situation presented and subject to the condition that the member's employment is not connected to her employer's provision of services to the city, the question is answered in the negative.

By your letter of inquiry, an earlier letter from the then City Attorney, and additional information provided to our staff, we are advised that ... (member) serves as a member of the City Commission of the City of Pahokee, having recently been appointed by the City Commission to fill a vacant seat on the City Commission, and that her term ends in March 2008, at which time she will have to run for election to keep the seat. In addition, we are advised that the member is employed by the Palm Beach County Sheriff's Office (PBSO), working with schools in the City and in neighboring cities as a case manager whose responsibilities include providing services to families of truant or runaway juveniles. We are advised that the member has held this position with PBSO since August 2006, prior to that time working with PBSO in a corrections support position.

Continuing, you advise that in February 2006 the City dissolved its police department and contracted with PBSO to provide law enforcement services in the City, paying for the services solely from the City's general revenue funds.[2] You advise that the agreement for law enforcement services between the City and PBSO was entered into on February 12, 2006; that it automatically terminates on September 30, 2008, unless renewed; that notice of intent to renew must be given by the City to PBSO no later than May 31, 2008; and, therefore, that the decision to have PBSO continue to provide law enforcement services to the City must be voted on by the City Commission prior to May 31.

The standard of conduct applicable to the member (as a "public officer" due to her membership on the City Commission) and at issue in this inquiry is Section 112.313(7)(a), Florida Statutes,[3] which provides:

> 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 . . .; 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.

In making a determination as to whether a new agreement (one entered into after the member's taking of office)[4] would create a prohibited conflict for her under Section 112.313(7)(a), we must first determine whether such an agreement would constitute "doing business"[5] within the meaning of the law. Generally, we have found that a business entity is "doing business with" a public agency where the parties have entered into a lease, contract, or other type of legal arrangement under which one party would have a cause of action against the other in the event of a default or breach. See, for example, CEO 07-11, CEO 86-24, CEO 82-50, CEO 80-87, and CEO 77-36. However, we also have found that agreements between governmental entities for the provision of governmental services generally do not constitute "doing business," reasoning that a purpose of the Code of Ethics is to prevent private gain at public expense, not to prevent dealings between governmental entities for the delivery of services to the public. See, for example, CEO 06-2, CEO 04-9 (Question 3), CEO 81-5, and CEO 76-2.

Particular opinions of ours highly relevant to our determination of whether the City and PBSO are "doing business" with each other are CEO 77-65 (Florida Bicentennial Commission member employed as professor at University of Florida where University projects are funded by Commission), CEO 79-13 (sheriff's office contracting with a port authority to provide security at the port), CEO 90-51 (school board member serving as employee of city police department where police department provides educational programs to county schools at no charge), and CEO 95-23 (county juvenile services board member employee of state university contracting with board). In CEO 77-65, we found that the State Bicentennial Commission and the State university would be "doing business" in a situation where the Commission's grants or funding to the university allowed the member/professor to prepare for publication of a manuscript and to participate in a particular university project. In contrast, in the instant situation of the City Commission member, there is no indication that the City's funding of law enforcement services within the City, via its contracting with PBSO, funds the member's position with PBSO, her employment with PBSO apparently being unrelated to the law enforcement (essentially, "road patrol") services which are the subject of the agreement between the City and PBSO. In CEO 79-13, we concluded that provision of assistance by a sheriff's office to a port security department did not constitute "doing business," despite the fact that the sheriff's office was reimbursed (paid) by the port for its costs in providing the assistance or requested services. Our finding in CEO 90-51, that a school district and a city police department were not "doing business," was based on the arrangement constituting an intergovernmental relationship for the delivery of services and our view that "doing business" also required some exchange of consideration from the public officer's agency to her employing agency, which was not present because the city, and not the school board of which she was a member, funded the program she worked in as a city police officer. Likewise, in the instant inquiry, the City's contract with PBSO is not related to the member's PBSO employment. In CEO 95-23, we determined that a county juvenile welfare services board and a State university were not "doing business" where the university contracted with the board to train and assist providers of services to children and their families, because the relationship between the two public agencies facilitated the delivery of governmental services and because the board member/university employee would derive no private gain from the contract. Similarly, here the member's PBSO employment is not connected to the Sheriff's law enforcement delivered to the City.

In view of our prior decisions, in the instant inquiry, we find that a renewed/extended contract or even a new law enforcement services agreement between the City and PBSO would not constitute "doing business" between the two public agencies,[6] provided the member's employment with PBSO is not in conjunction with

PBSO's provision of law enforcement services to the City under the agreement. Thus, we find that a prohibited conflict of interest would not be created for the member under Section 112.313(7)(a)[7] were the City and PBSO to contract anew for law enforcement services. We believe our determination herein to be in harmony with our general view that intergovernmental agreements for the delivery of services do not amount to "doing business" because it is a purpose of the Code of Ethics to prevent private gain at public expense, not to interfere with cooperation between governmental agencies to foster the delivery of public services. Also, we find that lack of a connection between the member's PBSO job and PBSO's agreement with the City distinguishes her situation from that of CEO 77-65 in which funding of a public officer's employment with another agency was through the relationship between the two public agencies.[8]

Accordingly, we find that a prohibited conflict of interest does not exist for the member based upon an agreement between the City and PBSO for law enforcement services entered into and amended before she took office, and, under the facts presented and subject to the condition that her PBSO employment not be connected to her employer's provision of services to the City, we find that a prohibited conflict would not be created for the member were the City to contract anew with PBSO for law enforcement services.

ORDERED by the State of Florida Commission on Ethics meeting in public session on February 29, 2008 and **RENDERED** this 5th day of March, 2008.

Albert P. Massey, III, Chairman

[1]For prior opinions of the Commission on Ethics, go to www.ethics.state.fl.us, go to Research, go to Advisory Opinions, go to the year, and go to the particular opinion number.

[2]We are advised that under the agreement between the City and PBSO, the Sheriff maintains "the responsibility for and control of the delivery of services, the standards of performance, the discipline of personnel, and other matters incident to the performance of the services, duties, and responsibilities as described and contemplated [in the agreement]," and "the Sheriff will notify and review with the City Manager the removal, transfer, or replacement of any personnel currently assigned to the CITY."

[3]The member's situation does not implicate Section 112.313(10)(a), Florida Statutes, because she is not employed by the City on whose governing board she sits. Also, whether the member's situation implicates the "dual office-holding" prohibition of Article II, Section 5(a), Florida Constitution, is not an issue within the jurisdiction of the Commission on Ethics. The member may want to contact the Office of the Attorney General regarding Article II, Section 5(a). These provisions provide:

> EMPLOYEES HOLDING OFFICE.-No employee of a state agency or of a county, municipality, special taxing district, or other political subdivision of the state shall hold office as a member of the governing board, council, commission, or authority, by whatever name known, which is his or her employer while, at the same time, continuing as an employee of such employer. [Section 112.313(10)(a), Florida Statutes.]
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> PUBLIC OFFICERS.--. . . No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein . . . . [Article II, Section 5(a), Florida Constitution.]

[4]The existing agreement and its two amendments, entered into before the member took office as a City Commissioner, likely would be "grandfathered." See CEO 02-14. However, even without grandfathering, we find that no prohibited conflict would exist because of our reasoning set forth below regarding intergovernmental agreements.

[5]We see no indication in your inquiry that PBSO is "subject to the regulation of" the City.

[6]Because we have found that the two agencies herein are not "doing business," and thus that the situation does not present a prohibited conflict, it is not necessary for us to consider whether an exemption under Section 112.313(12), Florida Statutes, such as the "sole source of supply" exemption, would apply.

[7]Section 112.313(3), Florida Statutes, is not implicated by the instant inquiry because PBSO is an "agency," not a "business entity," and because the member is not acting in any capacity, much less in a private capacity, to sell law enforcement services to the City. See CEO

95-23. Section 112.313(3) provides:

> DOING BUSINESS WITH ONE'S AGENCY.-No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
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> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.

[8] Also, we find that a prohibited conflict of interest would not be created under the second part of Section 112.313(7)(a), under the circumstances presented and subject to the condition noted.

CEO 08-8 -- April 23, 2008

CONFLICT OF INTEREST

COUNTY COMMISSIONER ENGINEER DOING BUSINESS IN COUNTY

To: Kenneth W. Doherty, P.E. (Charlotte County)

SUMMARY:

Absent a renewal or extension of a contract with the county, an engineer's firm's work related to the contract will be "grandfathered," and thus not prohibitively conflicting, under Sections 112.313(3) and 112.313(7)(a), Florida Statutes, should the engineer become a member of the county commission. Absent an exemption, a prohibited conflict of interest would be created under Sections 112.313(3) and 112.313(7)(a) were his firm to contract with the county, and a prohibited conflict would be created under Section 112.313(7)(a) were his firm to contract with another company contracting with the county if his firm's business with the other company is conducted under his professional licensure. No frequently recurring conflict or impediment to the full and faithful discharge of his public duties under the second part of Section 112.313(7)(a) would be created were his firm to work on some types of private sector projects in the county; but it would be conflicting for him or a member of his firm to represent a client before the county commission. CEO 08-6, CEO 07-2, CEO 02-14, CEO 01-15, CEO 95-28, CEO 94-37, CEO 89-48, CEO 88-43, CEO 88-40, CEO 84-1, CEO 78-83, and CEO 77-126 are referenced.

QUESTION 1:

Would a prohibited conflict of interest be created were you, an engineer whose company contracts with an architectural firm which holds an existing contract with the County, to qualify as a candidate for election to the County Commission and, if successful, take office as a Commissioner?

Question 1 is answered in the negative.

By your letter of inquiry, we are advised that you are considering becoming a candidate for election to the Charlotte County Commission. In addition, you advise that you have been a resident of the County since 1973, that you are a registered civil engineer in Florida and several other jurisdictions, and that you are the "qualifying P.E.," the president, a director, and a shareholder of your for-profit engineering company. Further, you advise that for approximately the last twenty years, your primary career focus has been the design of professional and collegiate sports facilities, including your current participation on design teams for professional sports facilities in New York City, Washington D.C., Minnesota, and Arizona, and your current participation regarding renovations to the Charlotte Sports Park in Port Charlotte, which will become the spring training facility in 2009 for the Tampa Bay Rays (formerly, the Tampa Bay Devil Rays), regarding which your company is part of a design/build team contracting with the architectural firm hired by the County.

The prohibitions within the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes) relevant to this question provide:

> DOING BUSINESS WITH ONE'S AGENCY.-No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business

> entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
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> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.
> [Section 112.313(3), Florida Statutes.]
>
> 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 . . .; 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. [Section 112.313(7)(a), Florida Statutes.]

We find that a prohibited conflict of interest would not be created under either Section 112.313(3) or Section 112.313(7)(a), Florida Statutes, regarding the existing renovation contract were you to take office as a Commissioner.[1] Under the situation presented, assuming for the sake of argument that you or your company would be acting in a private capacity to provide services to the County, rather than to the architect hired by the County, Section 112.313(3)(b), Florida Statutes, expressly "grandfathers" out of the prohibition contracts entered into prior to qualification for elective office (such as the architectural firm's contract with the County, obviously entered into prior to your qualification for office). Similarly, we find as to your situation, as we have regarding others, that Section 112.316, Florida Statutes, serves to "grandfather" the existing contract out of the prohibitions of Section 112.313(7)(a). See, for example, CEO 08-6 (note 4) and CEO 02-14. Section 112.316 provides:

> CONSTRUCTION.-It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

However, note that the grandfathering can cease after you take office if a new renovation contract is entered into after you take office, or if the existing contract is extended or renewed, absent particular circumstances and provisions in the original contract. See, for example, CEO 02-14.

Question 1 is answered accordingly.

QUESTION 2:

Would a prohibited conflict of interest be created for you were your firm to provide services to businesses doing business with the County?

Question 2 is answered as set forth below.

In addition to the facts provided by you set forth above, you advise that you are the certifying professional engineer who signs and seals the documents submitted in furtherance of seeking permits or approvals from the County, and that currently you are the only professional engineer of your company authorized to sign and seal for the firm, regarding the provision of engineering services both inside and outside Florida.

Regarding Section 112.313(3), as you recognize in your inquiry, and as we find herein, the statute would prohibit your firm's contracting with Charlotte County, should you become a Commissioner, absent applicability of an exemption under Section 112.313(12), Florida Statutes.[2] You would be acting as a public officer to purchase services for your public agency from a business entity (your firm) with which you hold one or more relationships (e.g., director, officer) enumerated in the statute, and you would be acting in a private capacity to sell services to your political subdivision or agency. However, we do not find that the statute would prohibit your firm's contracting with another company (in which you own no interest and occupy no position of governance) which, in turn, is contracting with the County. We have found that "indirectly" doing business does not include situations where the public officer's corporation does business with another business entity that is selling services to his or her agency, and we have found that a public officer does not "act in a private capacity" to sell to his political subdivision or an agency thereof when his company subcontracts with another company that in turn is selling services to his political subdivision or agency. See, for example, CEO 78-83, CEO 88-43, and CEO 07-2.

Regarding the first part of Section 112.313(7)(a), we find that your firm's being hired by (contracting with) the County after you take office would create a prohibited conflict for you because you would hold employment or a contractual relationship with a business entity (your firm) which, by virtue of the hiring/contract, would be doing business with your public agency.[3] In addition, we find that a prohibited conflict would be created for you under the first part of the statute were your firm to be hired by another company which is doing business with the County AND were you to be the member of your firm under whose professional (government) licensure your company's work for the other company is handled or delivered, because we find that your personal provision of licensed services to a business entity would constitute a contractual relationship between you and the business entity.[4] See, for example, CEO 94-37, recognizing that a contractual relationship exists between a licensed insurance agent operating in an incorporated insurance agency and an insured or client of the agency whose business is handled under the license of the agent, and see CEO 95-28, in which we found that a licensed or certified appraiser held a contractual relationship with a client whose appraisal he reviewed and signed.[5]

Question 2 is answered accordingly.

QUESTION 3:

Would a prohibited conflict of interest under Section 112.313(7)(a) be created for you were you to continue providing private sector engineering services in Charlotte County such as are described below?

Question 3 is answered in the negative.

You advise that your company also provides civil engineering services for private sector site development projects, primarily in Desoto and Charlotte Counties, that it rarely is involved in a project requiring approval directly from the Board of County Commissioners, and that it has no intention of seeking professional service contracts directly with Charlotte County. However, you advise, your company regularly provides engineering services associated with obtaining approvals for projects from the County's development review committee (key staff) and associated County departments, although typically you do not attend the related meetings with County personnel. In addition, via a telephone conversation between you and our staff, we are advised that the County Commission must approve all proposed subdivisions, and that your firm rarely is involved in subdivision work in the County (currently being involved in no such work). Rather, you advise, your firm's private sector work in the County primarily concerns projects to be built within existing zoning, such as convenience stores, fast food restaurants, and hardware stores, which do not have to go before the County Commission but which go before the development review committee. Also, you advise that such projects involving your firm have never been turned down by the committee, that none of the members of the committee is a direct employee of the County Commission (rather, they are under the supervision of the County Administrator), and that the County Charter contains a provision prohibiting members of the County Commission from interfering with the performance of the duties of employees under the supervision of the County Administrator.

The second part of Section 112.313(7)(a), which prohibits a public officer from holding employment or a contractual relationship which would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or which would impede the full and faithful discharge of his public duties, is at issue regarding this question. In CEO 84-1, we determined that no prohibited conflict was present under the second part of the statute where a county commissioner was president of an engineering and surveying firm doing work regarding rezoning applications and subdivision plats, even though the applications and plats had to be approved by the board of county commissioners and even though county employees over whom the county commission had authority participated in the county's subdivision process. We reasoned that there was no prohibited conflict for the commissioner/engineer, in spite of the county commission and county commission employee involvement as to plats and subdivisions, because the commissioner's private firm's subdivision work within the county did not amount to a substantial percentage of its income or work. In applying the statute to your situation, we likewise find that your firm's continuation (should you become a Commissioner) of private sector work within the County such as is described in this question will not create a prohibited conflict under the statute. In your situation, you relate that your firm rarely has been involved with subdivisions (currently, none), a type of project which must go before the County Commission, but, rather, that your firm is involved with projects going through the development review committee.

Accordingly, we find that your private sector engineering work within the County as described [6] will not create a prohibited conflict for you should you become a Commissioner.

ORDEREDby the State of Florida Commission on Ethics meeting in public session on April 18, 2008 and **RENDERED** this 23rd day of April, 2008.

Albert P. Massey, III, Chairman

[1] Neither statute applies to candidates who also are not incumbent officeholders.

[2] See CE Form 3A (viewable on the Commission on Ethics' website: www.ethics.state.fl.us) regarding the exemption for business via sealed, competitive bidding to the lowest or best bidder; but note that this exemption has been found not to include business under the Consultant's Competitive Negotiation Act (CEO 01-15) or business via requests for proposals (CEO 89-48).

[3] Absent applicability of an exemption under Section 112.313(12) as discussed above.

[4] Note that this conflict will be present if your company's work for the other company handled under your licensure relates to the other company's projects inside or outside Florida, provided that at the time of your company's relationship with the other company, the other company is doing some business with the County.

[5] Absent applicability of an exemption as mentioned above. However, note that a requirement of the competitive bidding exemption in such a situation would be your filing of CE Form 3A prior to or at the time the other company submitted its bid to the County.

[6] Nevertheless, should subdivision work within the County look to become a substantial part of your firm's business, you should contact us for further advice. Of course, we find that a prohibited conflict of interest for you would be created under the second part of Section 112.313(7)(a) were you, or another member of your firm, to represent a client before the County Commission (as to any kind of work or matter), should you become a member of the Commission (see, for example, CEO 77-126 and CEO 88-40); but we do not find that a prohibited conflict would be created were you or members of your firm to appear before the County Commission to explain, or further delivery of, services to the County provided by a company contracting with the County, where your firm subcontracts with the other company (see CEO 07-2).

CEO 09-1 – January 28, 2009

CONFLICT OF INTEREST; GIFTS
EXPENDITURES BY CITIZENS INSURANCE BOARD MEMBER

To: Name withheld at person's request (Tallahassee)

SUMMARY:

No prohibited conflict of interest is created under Section 112.313(3) or (7)(a), Florida Statutes, where the Chairman of the Board of Governors of Citizens Property Insurance Corporation also serves on the board of directors of and holds stock in a company doing business with Citizens, as the "grandfather" provision of Section 112.313(3) applies to negate the conflict under that statute, and through application of Section 112.316, Florida Statutes, insulates him from the literal language of Section 112.313(7)(a), as well. CEO 87-41, CEO 08-8, CEO 02-19, and CEO 03-17 are referenced. The Chairman would not be required to abstain from voting on matters pertaining to his company or its parent, but would be required to disclose his voting conflict and file a CE Form 8A prior to voting on or participating in a measure which would inure to the corporation's special private gain or loss.
Compensation received by the Chairman for his service on those boards would constitute neither a prohibited "gift" under Sections 112.3148(4) or 627.351(6)(d)4, Florida Statutes, nor a prohibited "expenditure," under Section 627.351(6)(d)4, Florida Statutes. CEO 01-13, CEO 95-21, and CEO 06-7 are referenced.

QUESTION 1:

Does a conflict of interest exist where the Chairman of the Board of Governors of Citizens Property Insurance Corporation also serves on the board of directors of a company doing business with Citizens?

Under the circumstances herein, your question is answered in the negative.

In your letter of inquiry, and additional correspondence and conversations with our staff, you advise that you represent ..., who was appointed effective August 8, 2008 as Chairman of the Board of Governors of Citizens Property Insurance Corporation ("Citizens"). You write that the Chairman is also a compensated member of the board of directors of Regions Financial Corporation ("Regions Financial") and Regions Bank, its wholly-owned subsidiary. In addition, you advise that the Chairman and his spouse own 49,601 shares in Regions Financial,[1] "one of the nation's largest full-service providers of consumer and commercial banking, trust, securities brokerage, mortgage and insurance products and services." On January 25, 2007, you write, Regions Bank was selected by Citizens pursuant to a Request for Proposal to serve as Successor Indenture Trustee and to provide trust administration services for Citizens for a term of three years, for which it will earn approximately $162,000 per year. On May 27, 2007, Citizens selected Regions Bank to act as an Indenture Trustee for the 2007 PLA/CLA bond proceeds. The term of this agreement is 15 years, or the date of maturity, whichever comes first, and Regions Bank will receive approximately $37,500 for its services. On July 1, 2007, Regions Bank became the Master Trustee under the 2008 Personal Lines Account/Commercial Lines Account (PLA/CLA) 364 Day Revolving Line of Credit Agreement indenture, and is also a lender for this line of credit.[2] You write that Regions Bank will be paid nothing for its services as Master Trustee, unless Citizens actually draws on this line of credit.

Pursuant to Section 627.351(6)(d)3, Florida Statutes, members of Citizens' Board of Governors are subject to the Code of Ethics for Public Officers and Employees, and you inquire whether the member has a conflict of interest pursuant to either Section 112.313(3) or (7), Florida Statutes.

Section 112.313(3), Florida Statutes, provides:

> DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment. [Section 112.313(3), Florida Statutes.]

The first part of this section prohibits a public officer from acting in his public capacity to buy or rent goods, services, or realty from a business entity in which he is an officer or director; the second part prohibits a public officer from acting in his private capacity to sell, rent, or lease any goods, services, or realty to his public agency. We have previously indicated that a public officer is deemed to act in a private capacity when a business for which he serves as a director acts. See, CEO 87-41. Accordingly, absent some exception, a prohibited conflict is presented by the Chairman's simultaneous service as a member of Regions Bank's board of directors and on Citizens' Board of Governors.

Such an exemption is found in the "grandfathering" provision expressly stated in Section 112.313(3). This provision expressly exempts contracts entered into prior to the official's appointment to public office. As you have represented that both the Chairman's relationship with Regions Bank and all of Citizens' contractual relationships with Regions Bank predated the Chairman's appointment to Citizens' Board, this exemption applies to negate the conflict. CEO 08-8. Therefore, no prohibited conflict is created under Section 112.313(3), Florida Statutes, by the Chairman's service on the boards of directors of Regions Financial and Regions Bank.

Section 112.313(7), Florida Statutes, provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.-—(a) 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 Section 112.313(7)(a) prohibits a public officer or employee from having a contractual relationship with any business entity doing business with his agency. As the Chairman has a contractual relationship with Regions Bank by virtue of his compensated service on its board and Regions Bank is unquestionably "doing business with" Citizens, a prohibited conflict would exist under this statute as well.[3] However, in prior cases we have said that the grandfathering provision of Section 112.313(3) applies, through the operation of Section 112.316, Florida Statutes, in the context of conflicts under the first part of Section 112.313(7). See, CEO 86-71, CEO 02-19, and CEO 03-17. For that reason we find that no prohibited conflict of interest would be created under the first part of Section 112.313(7), Florida Statutes, by the Chairman's service on the boards of directors of Regions Financial and Regions Bank.

However, the grandfathering provision does not exempt conflicts arising under the second part of Section 112.313(7), which prohibits a public officer or employee from having any contractual relationship which would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties, or that would impede the full and faithful discharge of the officer's public duties. This provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. Commission on Ethics, 409 So.2d 57 (Fla. 4th DCA 1982).

You have indicated that the Chairman is not an officer or employee of either Regions Financial or Regions Bank, and played no part in the sale of services to Citizens. In addition, according to your correspondence, the combined value of the contracts for Indenture Trustee services is approximately $199,500 per year, while in the last year Regions Bank had total revenues of more than $10.75 billion. While certainly not an insignificant sum, the amount of business transacted between Citizens and Regions Bank does not appear to us to rise to a level that would tempt the Chairman to dishonor his responsibilities to Citizens in favor of his private interests. Compare, CEO 03-17 (conflict under Section 112.313(7) could not be negated by "grandfathering," where potential member of Port Authority chaired a company which carried approximately 40 percent of all refined petroleum products moved into the port).

We note that although the existing contracts are "grandfathered," renewal or amendment of the contracts may result in the loss of the grandfather exemption, unless the renewal is for a time certain provided for in the original lease and the terms of the renewal remain the same as those of the original contract. CEO 03-17.

Accordingly, we find that no prohibited conflict exists under either 112.313(3) or (7), as a result of the existing contracts between Citizens and Regions Bank. We point out that although the Chairman, as a state officer, is not required to abstain, he must disclose his interest before participating or voting and file a memorandum of voting conflict (CE Form 8A) within 15 days after any vote occurs which will inure to the special private gain or loss of Regions Financial or any of its subsidiaries.

QUESTION 2:

Does the compensation paid by Regions to the Chairman for his service on its board of directors violate the prohibitions on receipt of gifts or expenditures found in Sections 112.3148, 112.3215, or 627.351(6)(d)4, Florida Statutes?

You inquire whether the Chairman's receipt of compensation for his service as a member of the boards of Regions Financial and Regions Bank constitutes a prohibited gift or expenditure.

Section 112.3148(4), Florida Statutes, provides:

> A reporting individual or procurement employee or any other person on his or her behalf is prohibited from knowingly accepting, directly or indirectly, a gift from a political committee or committee of continuous existence, as defined in s.

> 106.011, or from a lobbyist who lobbies the reporting individual's or procurement employee's agency, or directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he or she knows or reasonably believes that the gift has a value in excess of $100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

This provision applies to the Chairman, because pursuant to Section 627.351(6)(d)3, Florida Statutes, he is required to file financial disclosure and is thus a "reporting individual" subject to the proscriptions of Section 112.3148. However, pursuant to Section 112.312(12)(a), Florida Statutes, a "gift" is that "for which equal or greater consideration is not given within 90 days." We observed in CEO 01-13 that the statutory definition of "gift" includes the concept of "quid pro quo," and in several opinions involving the gift law, we have concluded that the recipient had provided equal or greater consideration such that they had not received a gift. In CEO 95-21, an opinion factually similar to the situation here, we opined that the stipend a state senator received for serving on the board of directors of an insurance company was not a "gift" since the other directors received the same remuneration. It was, instead, "equal or greater consideration" for his service on the board. Similarly, through the Chairman's service as a board member, he provides equal or greater consideration; therefore, his compensation would not constitute a "gift" under the statutory definition. In addition, Section 112.312(21) specifically excludes from the definition of "gift" expenses associated primarily with the donee's service as an officer or director of a corporation. Accordingly, we find that Section 112.3148 does not prohibit the Chairman from receiving compensation from Regions Financial and Regions Bank for his service on their boards of directors.

We next turn to the question of whether he is prohibited from receiving such compensation by Section 112.3215(6), Florida Statutes, which states:

> Notwithstanding s. 112.3148, s. 112.3149, or any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure.

This section applies only to officers or employees of executive branch agencies as defined in Section 112.3215(1), Florida Statutes. However, it is not necessary for us to decide here whether Citizens is an executive branch agency, because of the existence of a similar prohibition in Citizens' enabling legislation.

In 2006, the Legislature enacted Chapter Law 2006-12, Laws of Florida, containing Section 627.351(6)(d)4, which states:

> Notwithstanding s. 112.3148 or s. 112.3149, or any other provision of law, an employee or board member may not knowingly accept, directly or indirectly, any gift or expenditure from a person or entity, or an employee or representative of such person or entity, that has a contractual relationship with the corporation or who is under consideration for a contract. An employee or board member who fails to comply with subparagraph 3. or this subparagraph is subject to penalties provided under ss. 112.317 and 112.3173.

This section prohibits both "gifts" and "expenditures" received from those having contracts with Citizens, a criterion that Regions Bank clearly meets. The statute does not define the terms "gift" or "expenditure," but as it was enacted after both Section 112.3148 and 112.3215(6),[4] the Legislature apparently intended to adopt the definitions supplied by those statutes.

We already have spoken to the issue of whether the compensation met the definition of "gift,"[5] and now focus on the issue of whether it constitutes an "expenditure." The term "expenditure" is defined in Section 112.3215(1)(d), Florida Statutes, to mean

> a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying. The term "expenditure" does not include contributions or expenditures reported pursuant to chapter 106 or federal election law, campaign-related personal services provided without compensation by individuals volunteering their time, any other contribution or expenditure made by or to a political party, or any other contribution or expenditure made by an organization that is exempt from taxation under 26 U.S.C. s. 527 or s. 501(c)(4).

In CEO 06-4 we said that by contemporaneously giving equal or greater consideration in the form of the purchase of an admission ticket, executive branch agency officials and employees did not receive a lobbying expenditure when they attended an event hosted by the principal of an executive branch lobbyist. The same rationale applies here: as you have provided equal or greater consideration in return for the compensation you have received, it does not appear to us that you have received an "expenditure."

In addition, in CEO 06-7, Question 5, we dealt with a question from the Commissioner of Agriculture, who was a member of the board of directors of the Florida Cattlemen's Association, the principal of an executive branch agency lobbyist. In his capacity as a member of that board, the Commissioner consumed food and beverages provided by the Association to the board members as part of their attendance at the board meeting. We said this would not constitute a prohibited "expenditure," as it was not given for the purpose of lobbying. In doing so, we also noted that the Interim Lobbying Guidelines for the House and Senate issued on January 20, 2006, consider employment-related compensation and benefits to be an exception to the expenditure prohibition imposed on members and staff of the Legislature under Ch. 2006-12, and that there is a similar exclusion from the definition of "gift" in Section 112.312(12)(b)1, Florida Statutes. For these reasons it appears that the compensation paid by Regions Financial and Regions Bank for the Chairman's service on their boards of directors is not a prohibited expenditure, as long as it is given in an amount commensurate with other similarly situated board members.

Accordingly, under the circumstances presented here, we find that the Chairman's receipt of compensation for his service as a member of the boards of directors of Regions Financial and Regions Bank[6] is neither a prohibited "gift" under Sections 112.3148(4) or 627.351(6)(d)4, Florida Statutes, nor a prohibited "expenditure," under Section 627.351(6)(d)4, Florida Statutes.

ORDERED by the State of Florida Commission on Ethics meeting in public session on January 23, 2009 and **RENDERED** this 28th day of January, 2009.

Cheryl Forchilli, Chair

[1] You relate that the Chairman owns 4,636 shares and 39,583 options and his wife owns 5,382 shares, and that their total interests amount to approximately .007% of Regions Financial's 693,601,138 outstanding shares.

[2] You advise that the line of credit was obtained on May 16, 2008.

[3] There is no indication that Citizens "regulates" Regions Bank.

[4] Enacted in Chapter 2005-359, Laws of Florida.

[5]We note that under Section 112.3148(4), a reporting individual is prohibited from accepting a gift valued in excess of $100 from one of the enumerated donors. In contrast, Section 627.351(6)(d)4 has no value threshold, prohibiting the acceptance of a gift of any amount. It is clear to us that the Legislature intended to apply differing standards depending upon the position held. For example, the proscriptions of Section 112.3148 apply only to reporting individuals and procurement employees, while the prohibitions on unauthorized compensation apply to all public officers and employees (and, by operation of Section 627.351(6)3, to senior managers and members of the board of governors of Citizens) and Section 350.04(2)(d),Florida Statutes, applicable to members of the Public Service Commission, prohibits taking anything from a party in a currently pending proceeding.

[6]We do not speak to any items the Chairman may receive from parties other than Regions Financial or Regions Bank which may be tangential to or in some manner connected with his service on the boards.

CEO 10-4 - March 3, 2010

CONFLICT OF INTEREST

COUNTY COMMISSIONER'S HUSBAND SELLING REAL PROPERTY ADJACENT TO COUNTY PARK

To: Mark Herron, Esq. (Tallahassee)

SUMMARY:

No prohibited conflict of interest would be created under Section 112.313(3), Florida Statutes, were the County to purchase a parcel of real property that is owned by a County Commissioner's husband and is situated adjacent to a County Park.

QUESTION:

Would a prohibited conflict be created under Section 112.313(3), Florida Statutes, were the County to purchase a parcel of real property that is owned by a County Commissioner's husband and is situated adjacent to a County Park?

Under the circumstances presented herein, your question is answered in the negative.

You advise that you make this inquiry on behalf of..... ("Commissioner") who is a member of the Wakulla County Board of County Commissioners. By your letter of inquiry and a subsequent telephone conversation, you advise that the Commissioner was elected to the Board of County Commissioners in November 2008. Prior to her election, the Commissioner's husband purchased a lot adjacent to Crab Apple Park. You advise that on December 10, 2007, the Commissioner's husband acquired the property in his individual capacity.[1] You advise that the purchase was made "with the view that someday the County would obtain grant funding to purchase all 13 lots adjacent to the park." On August 4, 2009, the Board of County Commissioners considered including Crab Apple Park ("Park") as one of three projects for a Florida Recreational Assistance Program grant. The Park was ranked second. You advise that the Commissioner recused herself from the vote and the Park was ranked second.

You advise that there is a steep drop from a nearby road down to a sinkhole located in the Park. You advise that the purchase of the parcels identified as lots 9, 10, and 11, would most effectively mitigate pollution to the sinkhole. You also advise that acquisition of Parcel 11 would facilitate access to the park from the Senior Citizens Center. You state, "Each of the properties is unique in relationship to the park." In light of the foregoing, you inquire whether Section 112.313(3), Florida Statutes, prohibits the County from purchasing the parcel owned by the Commissioner's husband.[2]

The only provision of the Code of Ethics implicated by your inquiry is Section 112.313(3), Florida Statutes, which provides:

> DOING BUSINESS WITH ONE'S AGENCY.--
> No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting

> in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.

Because your inquiry concerns the County purchasing the parcel from the Commissioner's husband, only the prohibition contained in the first sentence of Section 112.313(3) is applicable. That clause prohibits a County Commissioner acting in her official capacity from directly or indirectly purchasing any realty from a business entity of which the officer's spouse is an officer, partner, director, or proprietor or in which the County Commissioner's spouse has a material interest. A public officer "acts in her official capacity" for purposes of this prohibition when her board acts collegially to purchase, rent, or lease, regardless of whether the public officer abstains from voting on the matter. See, CEO 90-24.

"Business entity" is defined in Section 112.312(5), Florida Statutes, as:

> [A]ny corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

"Material interest" is defined in Section 112.312(15), Florida Statutes, as:

> [D]irect or indirect ownership of more than 5 percent of the total assets or capital stock of any business entity. For the purposes of this act, indirect ownership does not include ownership by a spouse or minor child.

We first turn to the question of whether the purchase would be "from a business entity." Under appropriate circumstances, we could conclude that a purchase of real property from an individual in their personal capacity would not be "from a business entity." In light of the representation that the Commissioner's husband "purchased the property with a view that someday the County would obtain

grant funding to purchase all 13 lots adjacent to the park," it could be concluded that the Commissioner's husband may have acquired the land as part of a business venture and was therefore doing business in this state as a proprietorship. Because there is an applicable exemption, we decline to decide this narrow question and assume for purposes of this opinion that he purchased the property as a business venture and, therefore, acted as a "business entity" for purposes of Section 112.313(3), Florida Statutes.

The applicable exemption is contained in Section 112.313(12)(e), Florida Statutes, and provides:

> The requirements of subsections (3) and (7) as they pertain to persons serving on advisory boards may be waived in a particular instance by the body which appointed the person to the advisory board, upon a full disclosure of the transaction or relationship to the appointing body prior to the waiver and an affirmative vote in favor of waiver by two-thirds vote of that body. In instances in which appointment to the advisory board is made by an individual, waiver may be effected, after public hearing, by a determination by the appointing person and full disclosure of the transaction or relationship by the appointee to the appointing person. In addition, no person shall be held in violation of subsection (3) or subsection (7) if:
>
> ...
>
> (e) The business entity involved is the only source of supply within the political subdivision of the officer or employee and there is full disclosure by the officer or employee of his or her interest in the business entity to the governing body of the political subdivision prior to the purchase, rental, sale, leasing, or other business being transacted.

This provision negates a conflict of interest under Section 112.313(3) where the "business entity" involved is the only source of supply within the political subdivision of the County Commissioner and there is full disclosure by the County Commissioner of his or her interest in the business entity to the governing body prior to the transaction. We have interpreted this provision to apply to the sale of real property. Once a political subdivision has determined that there is a need for the specific property to be acquired, we have opined that purchases of land from the necessary landowners would be permissible under the sole source exemption in Section 112.313(12)(e). See, CEO 91-31 and its progeny.

In this case, the County has determined that acquisition of the property will benefit the Park by preventing pollution from entering the Park's sinkhole and that the Senior Citizen's Center will benefit by facilitating access to the Park. Therefore, the identified need for the parcel owned by the Commissioner's husband brings this transaction within the sole source exemption. It would not be appropriate for us to second-guess the County's determination. It is not our province to interfere with or micromanage local political decisions.

Therefore, we conclude that there is no prohibited conflict of interest for the County to purchase the parcel owned by the Commissioner's husband because of the applicability of the sole source exemption in Section 112.313(12)(e), Florida Statutes. The Commissioner is advised that if the transaction occurs, she is required to file a CE Form 4A prior to the purchase being transacted. This obligation is in addition to the disclosure and abstention requirements contained in Section 112.3143(3)(a), Florida Statutes.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on February 26, 2010 and **RENDERED** this 3rd day of March, 2010.

_____

Roy Rogers, *Vice Chair*

[1] The lot purchased by the Commissioner's husband is identified as Parcel 11.

[2] Because you have advised that the Commissioner would not vote on the matter, Section 112.3143(3)(a), Florida Statutes, is not implicated.

CEO 14-21 - July 30, 2014

CONFLICT OF INTEREST; VOTING CONFLICT

SCHOOL BOARD MEMBER
EMPLOYED BY NON-PROFIT LITERACY FOUNDATION

To: Name withheld at person's request (Fort Lauderdale)

SUMMARY:

A prohibited conflict of interest would not be created under Section 112.313(7)(a), Florida Statutes, by a school board member's employment with a literacy foundation where the foundation has no contract with her board/district and the board member performs no duties related to recruitment of teachers in her district for compensated positions with the foundation. However, the board member would be required, under Section 112.3143(3)(a), Florida Statutes, to abstain from voting on measures related to a board/district contract with the literacy foundation. CEO 10-3 and CEO 10-16 are referenced.

QUESTION 1:

Would the Code of Ethics prohibit a school board member's operation of a reading mentors program, as part of her employment with a literacy foundation, where the reading mentors program includes recruitment of teachers for contractual positions with the foundation?

Question 1 is answered in the negative, as long as the board member does not operate the reading mentors program within the school district where she is a board member.

By your letter of inquiry and telephone communications with our staff, you relate that this opinion is sought on behalf of a member of a school board ("Board Member") who was recently appointed by the Governor to fill a vacancy on the board and was sworn into office on March 11, 2014. You inquire about the Board Member's current private capacity employment situation and whether it creates a prohibited conflict of interest and also whether a voting conflict would exist if she were to vote on a measure related to a prospective contract between her Board/District and her private employer. We have combined your several questions about her employment situation into Questions 1, 2, and 3, which we will address first.

You relate that the Board Member is presently employed by a literacy foundation ("Foundation"), a non-profit, tax-exempt corporation, where the Board Member serves as Regional Program Manager. You ask whether a prohibited conflict of interest would exist if the Board Member were to continue in her present duties with the Foundation, which include making presentations concerning a reading mentors program to teachers who serve as faculty advisors to Future Educators of America ("FEA") chapters within school districts in several counties, including the district where she serves as a Board Member. In this Foundation-sponsored reading mentors program, district students who are members of FEA serve as reading mentors for other students. You state that the Board Member's presentation includes offering to FEA faculty advisors an opportunity to become Program Advisors under contracts with the Foundation. You relate that, under these contracts, the Foundation directly pays Program Advisors a stipend of $1000 per school year, with no Foundation funds passing through a school district to the Program Advisors. You state that the Board Member also has duties with the Foundation related to a family literacy program, which provides grants to entities other than Florida school districts. You explain that there is presently no contract between the Foundation and the Board Member's Board/District and that the Board Member's compensation in her position with the Foundation comes entirely from sources other than her Board/District. You also relate that the Foundation is considering altering these circumstances to require school districts participating in the reading mentors program to contract with the Foundation and to make payments directly to their participating Program Advisors.

This question implicates Section 112.313(7)(a), Florida Statutes,[1] which 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 . . .; 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 Section 112.313(7)(a) prohibits a school board member from having an employment or contractual relationship with a business entity or agency that is doing business with or regulated by her agency. The second clause of Section 112.313(7)(a) prohibits employment or contractual relationships which would create continuing or frequently recurring conflicts between private interests and the performance of public duties, or which impede the full and faithful discharge of public duties.

There is no indication that the Board/District, which is the Board Member's agency,[2] presently regulates the Foundation or does business with Foundation. Therefore, the first part of Section 112.313(7)(a), Florida Statutes, would not apply to the situation presented in Question 1. Thus, the question is whether the Board Member's work with the Foundation's reading mentors program, including teacher recruitment for Foundation contracts, would create a continuing or frequently recurring conflict between her private interests and the performance of her public (Board/District) duties or would impede the full and faithful discharge of her public duties. You state that the Board Member's duties with the Foundation include recruiting teachers employed by the Board/District to work for the Foundation as independent contractors receiving stipends from the Foundation. If the Board Member were to engage in teacher recruitment within the District where she is a Board Member, we find that a prohibited conflict would exist under the second part of Section 112.313(7)(a) between her private interest as to the Foundation position and her public capacity position as a member of the Board. In such a situation, she could be tempted to act less than objectively toward teachers in her District depending on whether or not they worked for the Foundation. However, if the Board Member were to operate the reading mentors program, including teacher recruitment, in districts other than her District, the scenario would create no inherent conflict. Therefore, we find that the Board Member's employment duties as to teacher recruitment for the reading mentors program would create no prohibited conflict under Section 112.313(7)(a), as long she performs such duties outside the District where she is a Board Member.

Question 1 is answered accordingly.

QUESTION 2:

> Would the Code of Ethics prohibit the Board Member's operation of a reading mentors program, as part of her employment with a literacy foundation, where the program includes recruitment of Board/District teachers for positions as Program Advisors with the foundation, if the Board/District were to enter into a contract with the Foundation for participation in the Program?

Question 2 is answered in the negative, as long as the Board Member does not operate the reading mentors program within the School District where she is a Board Member.

You state that a prospective contract contemplated by the Foundation would require the Board Member's Board/District to provide access, facility space, and training to Foundation participants; appoint district personnel to be responsible for data collection and reporting to the Foundation; perform specified deliverables to the Foundation; distribute the Foundation's monetary stipends to participating District personnel; and provide indemnity and insurance coverage for the Foundation. If the Board/District were to enter into such contract with the Foundation, the Board/District would be doing business with the Foundation. Under the first part of Section 112.313(7)(a), as explained above in Question 1, any contract between the Foundation and the Board/District would create a prohibited conflict for the Board Member under Section 112.313(7)(a) unless an exemption is

applicable. Because the contract is not contemplated to be awarded under a system of sealed, competitive bids, the exemption under Section 112.313(12)(b) would not apply. Another potential exemption is in Section 112.313(15), Florida Statutes, which provides:

> ADDITIONAL EXEMPTION.--No elected public officer shall be held in violation of subsection (7) if the officer maintains an employment relationship with an entity which is currently a tax-exempt organization under s. 501(c) of the Internal Revenue Code and which contracts with or otherwise enters into a business relationship with the officer's agency and:
>
> (a) The officer's employment is not directly or indirectly compensated as a result of such contract or business relationship;
> (b) The officer has in no way participated in the agency's decision to contract or to enter into the business relationship with his or her employer, whether by participating in discussion at the meeting, by communicating with officers or employees of the agency, or otherwise; and
> (c) The officer abstains from voting on any matter which may come before the agency involving the officer's employer, publicly states to the assembly the nature of the officer's interest in the matter from which he or she is abstaining, and files a written memorandum as provided in s. 112.3143.

The Foundation is a non-profit, tax-exempt, section 501(c) organization, as required to meet the exemption and, further, you state that the Board Member's employment would not be directly or indirectly compensated as a result of the prospective contract and that the Board Member has not participated or voted and will not participate or vote regarding a Board/District decision to contract with the Foundation. Thus, there would be no apparent conflict under the first part of Section 112.313(7)(a) because we find that the Board Member's situation, if the prospective contract were in place and the Board/District were doing business with the Foundation, would meet the exemption in Section 112.313(15), which expressly exempts a public officer from the first part of Section 112.313(7)(a) insofar as the officer's private capacity employment entity contracts with or otherwise engages in a business relationship with the officer's agency. CEO 10-16.

However, because the first part of Section 112.313(7)(a) concerns only the "regulation of" and "doing business with" aspects of an employment or contractual relationship, we still must consider whether the Board Member's employment with the Foundation would create a prohibited conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes, i.e., a continuing or frequently recurring conflict or an impediment to the full and faithful discharge of her duties as a member of the Board, if the prospective contract were in place. In CEO 10-3, we analyzed a school board candidate's employment situation and found that, even if all the requirements for exemption under Section 112.313(15) were met, the candidate still would have a conflict under the second part of Section 112.313(7)(a), if she were to be elected to a school board position, because as a program director she directed the work of a non-profit business and education alliance on behalf of her employer and the duties of her private capacity position would create a prohibited overlap with her public position. Similarly, we find here, as we did in Question 1 above, that the Board Member's recruitment of teachers employed by her Board/District for compensated positions with the Foundation would create a prohibited overlap with her public duties as a member of the School Board and thus would be a conflict of interest under the second part of Section 112.313(7)(a).

As to the Board Member's employment as Regional Program Manager for the reading mentors program with the Foundation in school districts other than the one in which she serves as a Board Member, the same analysis would apply. The Board Member would be exempt from the first part of Section 112.313(7)(a) by operation of the exemption in Section 112.313(15), as stated above. However, the second part of Section 112.313(7)(a) would not apply in that scenario because the Board Member would not recruit teachers to receive Foundation compensation who also were employed by her Board/District. Therefore, we find that no conflict of interest would exist if the Board Member were to be employed by the Foundation as Regional Program Manager for the reading mentors program in school districts other than her District.

Question 2 is answered accordingly.

QUESTION 3:

Would the Code of Ethics prohibit the Board Member's operation of a family literacy program as part of her employment with the Foundation?

Question 3 is answered in the negative.

You state that the Foundation conducts a family literacy program through Foundation grants to support adult education and early childhood literacy programs conducted by community-based organizations. You relate that the Board Member's role in the family literacy program is to provide technical assistance for grant recipients and to collect data from grantees. You state that none of the Foundation's current or anticipated family literacy grants involve the Board Member's Board/District or any Florida school board or district.

There is no indication that the Board Member's Board/District presently regulates the Foundation or does business with Foundation. Therefore, the first part of Section 112.313(7)(a), Florida Statutes, would not apply to the scenario presented in Question 3, absent a contract between the Board/District and the Foundation. If the Foundation and the Board/District were to enter into a contract, the exemption in Section 112.313(15), as analyzed above in Question 2, would apply to exempt the Board Member from a conflict under the first part of Section 112.313(7)(a). As long as none of the family literacy grants or activities occur within the Board Member's District, we find that no conflict would be created under the second part of Section 112.313(7)(a) concerning the Board Member's work with the Foundation as to the family literacy program, whether or not the Board/District enters into a contract with the Foundation.

Question 3 is answered accordingly.

QUESTION 4:

Would the voting conflicts law prohibit the Board Member from voting on measures before the Board related to a potential contract between the Board/District and the Foundation?

Question 4 is answered in the affirmative.

The statutory provision implicated here is Section 112.3143(3)(a), Florida Statutes, which provides:

> VOTING CONFLICTS.--No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

The voting conflicts law, applicable to local, elective public officers, comes into play in a situation in which the vote/measure would cause special private gain or loss to the voting officer personally, the officer's principal (e.g., the officer's employer, client of the officer's firm), the officer's business associate, the officer's relative (e.g., spouse), or certain other persons or entities listed in the statute.

Under the facts you have presented, a vote on a measure to approve a contract between the Board/District and the Foundation would create a special private gain for the Foundation, which is the Board Member's principal (employer). Therefore, we find that the Board Member would be required to abstain from the vote(s).

Further, the Board Member would be required to publicly state to the Board the nature of her interest in any measure(s) concerning the Foundation, and, within 15 days after the relevant vote(s), to file a memorandum (CE Form 8B) disclosing the nature of her interest in the relevant vote(s)/measure(s).

Question 4 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 25, 2014, and **RENDERED** this 30th day of July, 2014.

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Linda McKee Robison, Chair

[1]Section 112.313(3), Florida Statutes (Doing Business With One's Agency), does not apply to the Board Member's situation because, under the facts you have presented, the Board Member is not an officer, partner, director, or proprietor of the Foundation and otherwise is not acting in her private capacity with the Foundation to sell Foundation services to the Board/District.

[2]The Code of Ethics in Section 112.312, Florida Statutes, defines "agency" as "any state, regional, county, local, or municipal government entity of this state."

CEO 14-27 – December 17, 2014

CONFLICT OF INTEREST

SCHOOL BOARD MEMBER'S COMPANY CONTRACTING TO PROVIDE PRIVATE TUTORING AND EXTRACURRICULAR TRAINING TO STUDENTS

To: Name withheld at person's request (Stuart)

SUMMARY:

A district school board member will have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if her company engages teachers from her own school district to provide tutoring services, or if the services are provided to students of her own district; and the board member will have a prohibited conflict of interest under Section 112.313(7)(a) if her company provides science, technology, engineering, and math (STEM) training, using teachers from her own district or to students of her own district. Referenced are CEO 14-21, CEO 14-2, CEO 13-21, CEO 13-19, CEO 09-3, CEO 08-7, CEO 07-2, CEO 97-17, CEO 94-37, CEO 88-43, and CEO 81-47.

QUESTION 1:

Will a prohibited conflict of interest be created under Section 112.313(7)(a), Florida Statutes, if a company owned by a school board member hires school district teachers to provide private tutoring services to district students, or provides tutoring services to school district students?

Question 1 is answered in the affirmative.

Through your letter of inquiry and correspondence with our staff, you state that you recently were elected to the District School Board of Martin County. You relate that you are the sole owner of an S-corporation. You state this corporation is a private education company which provides private tutoring to students in several counties, including Martin County. In particular, you state your company hires public school teachers—some of whom teach within the Martin County School District—on an independent contractor basis to provide private tutoring.

You relate that none of the tutoring is offered on school campuses, but rather at your company's office. You write that students call the company's office to request tutoring and that the office assigns each student to a particular tutor. You state that the students pay a fee prior to the start of each tutoring session.

You write that the School District has no involvement in these private tutoring activities. You state District policy does not prohibit teachers from accepting secondary employment as private tutors, although it does restrict them from tutoring students within their own classes.[1] Furthermore, you relate that while the District offers in-house tutoring on the same subjects for which your company provides private tutoring, this in-house tutoring is restricted to those students who qualify for free tutoring. You state your company does not provide tutoring to students who qualify for free in-house tutoring at the District.

Given this context, you inquire whether a prohibited conflict of interest will exist under the Code of Ethics if your company continues to offer private tutoring to District students—using District teachers—while you serve on the School Board. The provision relevant to your inquiry is Section 112.313(7)(a), Florida Statutes,[2] which provides:

> 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 . . .; 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 interest 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 (e.g., a school board member) from being employed by, or having a contractual relationship with, a business entity which is being regulated by, or which is doing business with, her public agency. In your situation, the entire District would be your agency. See CEO 14-21. This first part of the statute is not applicable to your situation, as the tutoring arrangement that you describe does not place your company in a contractual relationship with the District or indicate that your company otherwise is doing business with the District. You indicate the District is not involved in, and does not regulate, your company's tutoring arrangement; your company simply hires teachers to perform tutoring services on an independent contractor basis.

The second part of the statute prohibits a public officer from having any employment or contractual relationship that will create a continuing or frequently recurring conflict between her private interests and the performance of her public duties or will impede the full and faithful discharge of her public duties. In CEO 14-21, we addressed a situation somewhat analogous to your own. The opinion concerned a school board member who was employed by a private corporation—a literacy foundation—seeking to recruit teachers from within the board member's school district to serve as reading mentors. In that situation, we found there would be a prohibited conflict of interest under the second part of Section 112.313(7)(a) because, if the board member engaged in teacher recruitment within the district, she "could be tempted to act less than objectively toward teachers in her [d]istrict depending on whether or not they worked for the [f]oundation." We reasoned this possibility could create a conflict between the board member's public position and her private interests, and, therefore, we concluded the board member should only recruit teachers from outside of her district.

Considering our reasoning in CEO 14-21, the question here is whether there is a reality that your private company's tutoring activities could hinder or compromise your public capacity duties as a member of the School Board. This question hinges upon whether your company's interaction with teachers within the District could affect your role as a School Board member. From what you indicate, we find that your role as a School Board member is susceptible to compromise.

While, unlike the school board member in CEO 14-21, it does not appear that your company would recruit new personnel from teachers within your District, you indicate your company recruited its current tutors from within your District. And although this recruitment occurred prior to your election to the Board, those recruited prior, as well as any new workers of your company from among District teachers contracting on their own initiative with your company, will, nevertheless, be teachers of your School District. Notwithstanding that you represent that your role as a School Board member does not require you to review how District teachers are performing, it is inescapable that the School Board, of which you are a member, has authority or responsibility regarding District teachers. For example, were you asked as a Board member to evaluate the effectiveness of District teachers, it is apparent that you could be favorably disposed towards those who perform private tutoring for your company. See 09-3, finding a conflict of interest when a public officer's private interests could affect his public duty to objectively evaluate, recommend, and supervise employees in his public capacity. This is so even though other District officials, such as the Superintendent, might have a more likely or more significant role regarding District teachers. An example of this is your role as a School Board member in disciplinary proceedings against teachers, which could be compromised by the private tutoring arrangement. You indicate that the School Board is required to review disciplinary recommendations made by the District Superintendent and staff against particular teachers. Were you to be asked as a Board member to evaluate a recommendation against a teacher also involved in your company's tutoring program, questions could be raised regarding your objectivity, even though you state that such disciplinary proceedings requiring Board review are "fairly rare" and that you would refrain from voting if a proceeding addresses a teacher involved with your company.[3]

In sum, under the situation you present, we find that a prohibited conflict of interest under Section 112.313(7)(a) would exist if your company continues to offer private tutoring to students within your District or to engage District teachers to provide tutoring.[4]

Question 1 is answered accordingly.

QUESTION 2:

Will a prohibited conflict of interest be created under Section 112.313(7)(a), Florida Statutes, if a company owned by a school board member provides STEM training to students within her district, either through a contract with the PTA or through financial arrangements with individual students?

Question 2 is answered in the affirmative.

You next ask whether you will have any conflicts of interest if your company provides science, technology, engineering, and math (STEM) training to students within your District. You state that your company has a full-time employee who offers such training, and that your company occasionally hires certified teachers to provide it as well. You relate that there are two ways in which your company offers STEM training.

You state the first way is through the District's parent-teacher association (PTA). You relate the PTA occasionally requests your company to provide robotics and other STEM programs in District classrooms, and then pays your company for any training provided. You state the PTA has a long-standing arrangement with the District allowing it to bring entities onto school grounds to offer such specialized training. You emphasize that there is no competition for space at District facilities, and that other non-profit groups can obtain access to District grounds if they meet certain criteria.

You state the second way that your company provides STEM training occurs when students pay for the training themselves. You indicate students from both within and outside the District register for STEM training on your company's website. You state your company then provides the training at its office.

The first part of the statute applies if you are employed by or in contract with an entity doing business with the District. If you were in contractual privity with the PTA, you would trigger this part of the statute as you would be in contract with an entity (the PTA) doing business with (via its facility-use arrangement) your agency (the District). However, you state that the PTA pays your company—not you personally—for any STEM training provided. We have found in the past that a public officer does not hold employment or a contractual relationship with an entity doing business with her agency when she is employed by or in contract with another business entity (including an entity for which she is the sole owner) which is, in turn, doing business with the entity contracting with her public agency. See CEO 13-19, CEO 07-2, CEO 97-17, CEO 94-37, CEO 88-43, and CEO 81-47, among many others. Accordingly, here, although your company is in a contractual relationship with an entity doing business with the School District, you are not.[5] And there is no indication in the situation presented that the PTA is seeking your personal services and merely paying you through your company, such that we could disregard your company as a legal entity separate from you personally. See CEO 14-2 (Question 2). Therefore, the first portion of Section 112.313(7)(a) does not apply.[6]

However, the second part of Section 112.313(7)(a) prohibits you from having any employment or contractual relationship that would create a continuing or frequently recurring conflict with your public duties or which would impede the full and faithful discharge of your public duties. We find this portion of the statute will be violated due to your company providing the STEM training, if it involves District teachers or District students. A District teacher/District student dynamic similar to that present in Question 1, above, will be present; and such could undermine your objectivity as a Board member regarding teacher or student matters.

Question 2 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 12, 2014, and **RENDERED** this 17th day of December, 2014.

Linda McKee Robison, Chair

[1]You indicate your company honors this policy, restricting teachers from privately tutoring students who are enrolled in their School District classes.

[2]Section 112.313(3), Florida Statutes, is not applicable to your inquiry since there is no indication that your company is renting, leasing, or selling any realty, goods, or services to the District.

[3]We also find that a similar conflicting dynamic is present regarding District students, in that they, too, could have matters ultimately coming before the Board and regarding which your objective performance as a Board member could be called into question depending on whether or not a given student was or was not a customer of your company. See CEO 13-21, and our decisions cited therein, finding a similar conflict if school district teachers, coaches, or others were involved with tutoring of students in their public school classes or charge.

[4]We by no means find that you actually would misuse your public position regarding teachers or students associated with you private business. However, Section 112.313(7)(a), unlike Section 112.313(6), Florida Statutes, requires only a "temptation to dishonor." Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982); and see Section 112.312(8), Florida Statutes, defining, with emphasis supplied, "conflict" or "conflict of interest" to mean: "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest."

[5]Supporting this reasoning is the concept that S-corporations—such as your company—are treated as separate legal entities from their owners, except in regard to assessing income tax. See Section 605.1103(3), Florida Statutes (2014). Additional statutes shield corporate shareholders and directors from being held personally liable for actions committed by their corporations. See Sections 607.0732(6) and 607.083(1), Florida Statutes.

[6]Also, this analysis would change were you performing the STEM training for your company via professional licensure. If an individual performs services for her employer pursuant to a professional license, she is deemed to hold a contractual relationship with any client who receives such services. See CEO 08-7. However, you indicate that you do not perform any STEM training for your company. Rather such training is performed by company employees other than you, or by outside contractors.

CEO 16-09 — June 8, 2016

CONFLICT OF INTEREST; MISUSE OF POSITION; VOTING CONFLICTS

COUNTY HUMAN SERVICES ADVISORY BOARD MEMBER REPRESENTING A CLIENT IN LITIGATION AGAINST ENTITIES FUNDED BY THE COUNTY

To: Name withheld at person's request (Key West)

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7), Florida Statutes, were a member of a County Human Services Advisory Board to represent a plaintiff in a lawsuit against two nonprofit entities whose funding request must come before the Board. This conflict of interest could be negated by a waiver under Section 112.313(12), Florida Statutes. The member is advised to keep separate his private interests from his public responsibilities, thereby avoiding allegations of misuse of position or disclosure or use of certain information. Further, the member must abstain from voting and comply with the other requirements of Sections 112.3143(3) and 112.3143(4), Florida Statutes, regarding Board measures that will affect the two nonprofit organizations that are defendants to the lawsuit in which the member is serving as counsel. Referenced are CEOs 16-2, 14-3, 12-1, 09-8, 06-24, 05-10, 03-7, 99-2, 98-11, 96-1, 94-5, 92-11, 90-10, 88-8, 86-37, 81-66.[1]

QUESTION 1:

Would a prohibited conflict of interest be created were a member of a County Human Services Advisory Board to represent a client in litigation against two nonprofit organizations funded by the County pursuant to recommendations made by the Board?

This question is answered in the affirmative.

In your letter of inquiry and subsequent conversations with our staff you advise that you are requesting an opinion on behalf of a member of the County's Human Services Advisory Board (HSAB). You state that the HSAB was created by the Board of County Commissioners (BOCC) in 1991 to make funding recommendations for community-based nonprofit entities which provide health and social services for the citizens of the County. The HSAB is an advisory board consisting of five members, with each County Commissioner designating one HSAB member. Each year the BOCC sets the total amount that it will fund for the upcoming fiscal year for all entities that have filed applications for funding. The HSAB reviews funding requests for the qualifying nonprofit entities, and recommends specific funding allocations for each entity it deems worthy of funding. The BOCC makes the final decision for funding for each entity.

You further state that a current member of the HSAB is an attorney in private practice representing the plaintiff in a pending lawsuit filed against multiple defendants, including two nonprofit entities. You state that in prior years both of these entities were funded by the County through the HSAB process and both have submitted applications to the HSAB for funding in the upcoming fiscal year. You further relate that while HSAB funding must be used to fund substantive programs of the respective nonprofit entity, the appropriation or non-appropriation of HSAB funding could affect the organization's overall budget, and thereby impact the entity's ability to devote resources to defense costs or satisfy any adverse judgments. Finally, you state that, because he serves on the HSAB, the member will be in a position to question representatives of the defendant nonprofit entities on matters that could benefit his private client's case and thus indirectly benefit him.

Pertinent to your inquiry is Section 112.313(7)(a), Florida Statutes, which provides:

> 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 . . .; 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 this statute prohibits a public officer from being employed by or having a contractual relationship with a business entity which is subject to the regulation of his agency or is doing business with his agency. We have long held that the "agency" of a member of an advisory board includes both the board as well as the governing body. See CEO 16-2, CEO 06-24, and CEO 05-10. As the HSAB advises the BOCC, the "agency" of HSAB board members includes the BOCC.

As an attorney and senior partner of his firm, the HSAB member has a contractual relationship with his client and every other client of his firm. See, among others, CEO 03-7, CEO 96-1 (Question 2), CEO 94-5, CEO 92-11, CEO 86-37, and CEO 81-66. However, nothing in your materials suggests that the member's client is doing business with, or regulated by, the County. Therefore, this part of the statute does not apply.

The second part of the statute concerns whether the member's contractual relationship with his client—given the pending lawsuit against two entities seeking funding via the HSAB process—would create a continuing or frequently recurring conflict between his private interests and the performance of his duties as an HSAB member or would impede the full and faithful discharge of these duties. The District Court of Appeal in Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982) stated that this prohibition:

> establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate, and distinct or whether they coincide to create a situation which 'tempts dishonor.'

Section 112.312(8), Florida Statutes, defines "conflict" or "conflict of interest" as "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." Applying Zerweck, in conjunction with the definition of "conflict" cited above, we must examine the nature of the HSAB member's public duties along with the obligations of his private relationship as an attorney with his client, to determine if the two are compatible.

The HSAB was created with the express purpose of analyzing, deliberating, and making recommendations to the BOCC regarding the funding applications of nonprofit entities which provide health and social services to citizens in the County. The two defendant nonprofit entities receive their funding based upon the recommendations of the HSAB, and currently have funding applications pending for consideration by the HSAB. Thus, in this matter the member's HSAB duties would involve determining whether the defendant nonprofit entities deserve funding—and if so, in what amount—in a fair and impartial manner.

As an attorney, the member has both an interest in a successful outcome to the litigation for his client and an obligation to act in his client's best interests. His client is suing two of the entities seeking funding through his board and his board's decisions with respect to the appropriation or non-appropriation of funding ultimately will affect the defendant nonprofit entities' overall budget; potentially impacting their ability to devote resources to litigation defense costs or satisfy an adverse judgment. The member will also have an opportunity to question the defendant entities' representatives—and the answers to those questions may be useful to his private client in the litigation.

These circumstances create an impermissible conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes. The representation of a plaintiff in litigation against the respective nonprofit entities would impede the HSAB member's duty to impartially evaluate the funding applications of the defendant entities and to make objective determinations regarding whether funding the respective nonprofit entity is in the best interests of the County.[2] This conflict of interest would not be ameliorated were another attorney in the member's firm to take over representation of the plaintiff in the litigation, as an attorney has a contractual

relationship with every partner and each client of his or her law firm, and because the firm, with which the member is inextricably intertwined, would remain on the case.[3] See, for example, CEO 03-7 and CEO 88-8.

Section 112.313(12), Florida Statutes, provides for a waiver of conflicts of interest under Section 112.313(7)(a), Florida Statutes. Section 112.313(12), Florida Statutes, provides in pertinent part:

> The requirements of subsections (3) and (7) as they pertain to persons serving on advisory boards may be waived in a particular instance by the body which appointed the person to the advisory board, upon a full disclosure of the transaction or relationship to the appointing body prior to the waiver and an affirmative vote in favor of waiver by two-thirds of that body. In instances in which appointment to the advisory board is made by an individual, waiver may be effected, after public hearing, by a determination by the appointing person and full disclosure of the transaction or relationship by the appointee to the appointing person.

The conflict of interest involved herein may be ameliorated were the BOCC to vote to waive the particular conflict of interest upon full disclosure by the HSAB member of the conflicting relationship on CE Form 4A prior to the waiver and an affirmative two-thirds vote of the BOCC, as the appointing body, waiving the conflict. See CEO 99-2. Absent such a waiver, a prohibited conflict would exist under the second part of Section 112.313(7)(a), under the circumstances you present.

QUESTION 2:

> Would Section 112.313(6), Florida Statutes, be violated were the member to engage in the several actions discussed below?

Your question is answered as set forth below.

Assuming that the HSAB member were to successfully obtain a waiver of the above-referenced conflict of interest pursuant to Section 112.313(12), the member may continue to serve on the HSAB and participate in the deliberations regarding the funding applications of the applicant nonprofit organizations. However, such a scenario raises additional issues—which you raise in your inquiry—concerning the extent to which the member may ask questions of the defendant entities' representatives during the HSAB's deliberations and discussions of the entities' funding applications, the answer to which may glean information which could benefit his private client.

As a caveat, we direct your attention to the following provisions of the Code of Ethics:

> MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly 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. [Section 112.313(6), Florida Statutes]

> DISCLOSURE OR USE OF CERTAIN INFORMATION.—No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), Florida Statutes]

These provisions prohibit the member from using his official position to gain access to information which would not be available to the general public, and from otherwise using his official position in a manner inconsistent with the proper performance of his public duties for the benefit of any of his private clients. We do not know in advance what specific actions the member might take, and cannot prospectively rule on whether

they may violate these provisions, particularly since Section 112.313(6) has a corrupt intent element and is not susceptible to analysis in the context of an advisory opinion. However, as we did in CEO 09-08 and CEO 90-10, we advise that in order to avoid even the appearance of impropriety, the member should scrupulously separate his public role from his private pursuits in his interactions with entities that are subject to the determinations or input of the HSAB.

QUESTION 3:

Would the member be presented with a voting conflict under Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, concerning measures regarding the funding applications of nonprofit entities in the County?

Guidance is provided below.

Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, provide:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. [Section 112.3143(3)(a), Florida Statutes]

> No appointed public officer shall participate in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter. [Section 112.3143(4), Florida Statutes]

In addition, Section 112.3143(4)(c), Florida Statutes, defines the term "participate" to mean "any attempt to influence the decision by oral or written communication, whether made by the officer or at the officerâ€™s direction."

The voting conflicts statutes require that if a measure before a member's board would inure to his special private gain or loss, to that of his firm, or to that of a principal by whom he is retained, the officer would be required to comply with Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, by abstaining from voting and following the instructions for appointed officers on CE Form 8B. See e.g., CEO 03-07, CEO 94-05, and CEO 98-11.

Each year the BOCC sets the total amount of funding for the upcoming fiscal year for all of the entities applying for assistance. The HSAB then meets to review the funding requests from the qualifying nonprofit entities and ask questions of the applicant representatives regarding the particularities of their respective funding request. Pursuant to these deliberations specific funding levels are ascribed to each entity which affect the availability of funding for the remaining applicants. Once a funding consensus regarding the applicant funding

levels of each entity has been determined by the board, it votes to approve the recommended funding levels via a single vote.

Initially, we recognize that the HSAB's appropriation or non-appropriation of funding to the two defendant entities will affect their overall budget and may impact their ability to devote resources to their defense costs or to satisfy a judgment—to the advantage or disadvantage of the member's client. Therefore, measures before the HSAB concerning the funding applications of the two nonprofit entities that are defendants in the pending litigation will present a voting/participation conflict. In addition, however, our analysis of the HSAB's deliberative process used to derive the ultimate funding levels for each applicant indicates that its determination with respect to the level of funding for one applicant affects the availability of funding for all remaining applicants, including the two defendant entities. Due to the interrelatedness and interconnected nature of the allocation of a limited fund amongst many applicants, we cannot say that the two defendant applicants are only affected by the deliberation and determination on their specific applications. For this reason, we find that so long as the member maintains a contractual relationship with his client, the plaintiff to pending litigation against two of the nonprofit entity applicants, or he or his firm has a fee interest in the outcome of the case, he should abstain from voting on all measures involving the funding applications of the nonprofit entities, including those of the two defendant entities, and comply with the additional requirements of Section 112.3143(3)(a) (i.e., declare the conflict and timely file a CE Form 8B memorandum of voting conflict).[4]

With respect to the member's ability to participate in the discussion of such measures, Section 112.3143(4), Florida Statutes, prohibits such participation, unless the member first complies with the disclosures and actions required therein (see the instructions on Form 8B for appointed officers).

Your questions are answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 3, 2016, and **RENDERED** this 8th day of June, 2016.

Stanley M. Weston, *Chair*

[1]Prior opinions of the Commission on Ethics can be viewed at www.ethics.state.fl.us.

[2]In making our finding of a prohibited conflict, we do not impugn the character or personal integrity of the member. As the Zerweck court noted, the statute is purely preventative in nature, and requires no intentional or wrongful transgression on the part of the member such as would be required for a corrupt use of position under Section 112.313(6), Florida Statutes. We find no such transgression here; our opinion addresses only the incompatibility of serving on a board affecting the two entities' funding and simultaneously representing clients in a lawsuit against the entities.

[3]Similarly, we find that the referral of the case to another firm, with the member or his firm retaining a fee-sharing stake in the outcome, would not cure the conflict.

[4]Compliance with the voting conflicts laws (Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes) does not negate a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes. See CEO 03-7 and CEO 94-5.

CEO 19-7—April 17, 2019

CONFLICT OF INTEREST; DOING BUSINESS WITH ONE'S AGENCY

WATER MANAGEMENT DISTRICT GOVERNING BOARD MEMBER'S COMPANIES DOING BUSINESS WITH DISTRICT

To: Name withheld at person's request (Fort Lauderdale)

SUMMARY:

Advice is provided to a potential appointee to the governing board of a water management district concerning contracts between his companies and the district. CEOs 16-7, 11-2, 06-28, 02-14, 95-895-8, 90-39, and 81-28 are referenced.[1]

QUESTION 1:

Do contracts between companies of a member of the governing board of a Water Management District and the District, entered into prior to the member's appointment to the governing board, create a prohibited conflict of interest for the member?

Question 1 is answered as set forth below.

In your letter of inquiry and additional information provided to our staff, you relate that you make inquiry in behalf of an individual who anticipates being appointed to the governing board of the South Florida Water Management District (WMD) and who has interests in several companies or enterprises, some of which are doing business with the WMD under contracts or agreements already in existence. More particularly, you state that there is an active agreement (executed or entered into in 2015) between a corporation, of which the individual is the founder and the majority shareholder, and the WMD, for time and materials regarding a stormwater treatment area; that there is a second agreement, between a wholly-owned subsidiary of the corporation and the WMD, for debris-hauling services, executed or entered into in 2017, which has a term of five years (expires 2022), but which has yet to be activated (has yet to begin delivery of services); and that there is a third contract, for reservoir stormwater treatment, entered into in February 2019.[2]

Relevant prohibitions in the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes) provide:

> DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
>
> (b) Qualification for elective office.

(c) Appointment to public office.
(d) Beginning public employment.
[Section 112.313(3), Florida Statutes.]

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 . . .; 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. [Section 112.313(7)(a), Florida Statutes.]

We find that the contracts mentioned above do not create a prohibited conflict of interest under either Section 112.313(3) or Section 112.313(7)(a), Florida Statutes. As to Section 112.313(3), it expressly provides that its prohibitions do not apply to contracts entered into prior to appointment to public office, the contracts were entered into in 2015, 2017, and February 2019, and the individual has yet to be appointed to the WMD governing board. Concerning Section 112.313(7)(a), while it does not contain an express exemption or "grandfather clause," as does Section 112.313(3), the Commission on Ethics has applied Section 112.316, Florida Statutes, to exempt or "grandfather" such contracts from Section 112.313(7)(a), reasoning that there is no conflict regarding business entered into between one's private company and his public agency when he held no public position and thus had no public duties which he could have been tempted to dishonor.[3] See, among others, CEO 95-8 (school board member's corporations doing business with school district) and CEO 90-39 (water management district board applicant employed with laboratory receiving funds from the district).[4]

QUESTION 2:

Would contracts between the individual's companies and the WMD, entered into after he is appointed to the governing board, create a prohibited conflict under Section 112.313(3) or Section 112.313(7)(a)?

Question 2 is answered in the affirmative, unless an exemption (e.g., sealed competitive bidding)[5] under Section 112.313(12), Florida Statutes, applies.

Continuing, you relate that after appointment to the governing board the individual's companies will not enter into additional contracts with the WMD, unless the contracts are awarded under sealed competitive bidding; and that the individual will not be involved, directly or indirectly, concerning the development of the scope of work of any such contract, that he will not be involved in any discussion or decision of the award of such a contract, and that the individual will file the appropriate disclosure form (CE Form 3A, Interest in Competitive Bid for Public Business) prior to or at the time of his company's submission of a bid.[6]

QUESTION 3:

Would the WMD's purchase or lease of a parcel of real property owned by an entity in which the individual is a partner create a prohibited conflict under Section 112.313(3) or Section 112.313(7)(a), if the property is a "sole source?"

Question 3 is answered in the negative, provided that Section 112.313(12)(e), Florida Statutes, is complied with.[7] Section 112.313(12)(e) provides:

> . . . no person shall be held in violation of subsection (3) or subsection (7) if:
>
> (e) The business entity involved is the only source of supply within the political subdivision of the officer or employee and there is full disclosure by the officer or employee of his or her interest in the business entity to the governing body of the political subdivision prior to the purchase, rental, sale, leasing, or other business being transacted.

You state that as part of the restoration of Biscayne Bay, the WMD is studying and considering the purchase or lease of a parcel which is owned by an entity in which the individual is a minority partner. As part of its analysis, the WMD will determine the necessity of the purchase of the parcel and the parcel's specifics or uniqueness for the WMD's purpose (efforts toward restoration of the Bay).

Important to whether the property is a sole source will be objective determinations by WMD staff in this regard, coupled with the individual refraining from discussing the property's desirability for the project with WMD staff or any fellow governing board member and his refraining from voting and participating as a governing board member regarding project matters. See CEO 11-2 (water management district governing board member employee of landowner party to water project agreement with district), CEO 16-7 (water management district basin board member owner of company providing growth modeling to district), and CEO 06-28 (assistant principal selling real property to school district).

Your questions are answered accordingly.[8]

ORDERED by the State of Florida Commission on Ethics meeting in public session on April 12, 2019, and **RENDERED** this 17th day of April, 2019.

Guy W. Norris, *Chair*

[1]Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2]As to the February 2019 contract, you state that it was originally bid in August 2014, in a sealed competitive process; that a company that is not a company of the individual was the low bidder and was awarded the contract, but that the individual's corporation was the second lowest bidder, by less than one half of one percent; and that in December 2018 the individual's corporation was contacted by staff of the WMD and informed that the lowest bidder company had been removed from the project (which allegedly was behind schedule). The individual's corporation, as the original second lowest bidder, was already familiar with the project, and the WMD moved quickly to ensure that the project would progress as soon as possible in order for the WMD to have use of the stormwater treatment area, prior to full project completion. After several meetings and reviews, the WMD and the individual's corporation entered into the contract, which authorized a payment amount up to the amount that remained on the original contract with the original lowest bidder company. You relate that this contracting process between the WMD and the individual's corporation began well before any announcement of the individual's potential appointment to the governing board.

[3]Renewals or extensions of a grandfathered contract, occurring after a public officer's appointment, will not be grandfathered, unless the renewal or extension is expressly provided for (with a term or time period of the extension certain) in the original contract, and unless the renewal or extension occasions no change in the contract. See CEO 02-14, among others.

[4]Section 112.316, Florida Statutes, provides:

> CONSTRUCTION.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

[5]The exemption requires sealed, competitive bidding; invitations to negotiate (ITNs), requests for proposals (RFPs), or similar procurement mechanisms sometimes referred to as "bidding" do not satisfy the exemption. See, among others, CEO 81-28.

[6]The competitive bidding exemption, found in Section 112.313(12)(b), Florida Statutes, states:

> . . . no person shall be held in violation of subsection (3) or subsection (7) if:
>
> (b) The business is awarded under a system of sealed, competitive bidding to the lowest or best bidder and:
>
> 1. The official or the official's spouse or child has in no way participated in the determination of the bid specifications or the determination of the lowest or best bidder;
>
> 2. The official or the official's spouse or child has in no way used or attempted to use the official's influence to persuade the agency or any personnel thereof to enter such a contract other than by the mere submission of the bid; and
>
> 3. The official, prior to or at the time of the submission of the bid, has filed a statement with the Commission on Ethics, if the official is a state officer or employee, or with the supervisor of elections of the county in which the agency has its principal office, if the official is an officer or employee of a political subdivision, disclosing the official's interest, or the interest of the official's spouse or child, and the nature of the intended business.

[7]CE Form 4A/Part B (Disclosure of Business Transaction, Relationship or Interest/Disclosure of Interest in Sole Source of Supply) is the form to be used for the disclosure required by Section 112.313(12)(e).

[8]In addition to the individual refraining from involvement as required to come within the exemptions of Section 112.313(12)(b) and Section 112.313(12)(e), he also must comply with Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, the voting/participation conflicts law, regarding any votes/matters of the governing board which would inure to his special private gain or loss, to that of his companies, or to that of any other person or entity as listed in these statutes. CE Form 8B (Memorandum of Voting Conflict for County, Municipal, and other Local Public Officers) should be used in conjunction with these statutes.

CEO 20-4—March 11, 2020

CONFLICT OF INTEREST

COMMISSIONER OF THE OFFICE OF FINANCIAL REGULATION SELLING LAW FIRM

To: Name withheld at person's request (Coral Gables)

SUMMARY:

Under the circumstances presented, a conflict of interest would not be created were the sale of ownership in a law firm by an incoming Commissioner of the Office of Financial Regulation to include seller financing. CEO 03-7, CEO 14-5, and CEO 16-9 are referenced.

QUESTION:

Would a prohibited conflict of interest be created were the Commissioner of the Office of Financial Regulation to sell his law firm using seller financing?

Under the particular circumstances presented, this question is answered in the negative.

According to your inquiry, you were appointed to become Commissioner of the Office of Financial Regulation (OFR) on December 2, 2019, and expect to assume office imminently. Currently, you are the sole owner, officer, and director of a law firm. In telephone conversations with Commission staff, you explained that your law firm represents clients with securities matters and many of those clients are concurrently regulated by federal and state agencies, including OFR. In the past, you have represented some clients before OFR.

Since the announcement of your appointment to public office, you have been preparing for a transition from private enterprise to public officeholding. Your inquiry indicates that you are in the process of selling your entire ownership stake in your law firm without an option to repurchase it later. You inform us that you have concluded all client relationships, except one with an entity that is not regulated by OFR and whose representation nonetheless will be transferred as part of the eventual sale of the firm.

You state that you have found someone (the buyer) to purchase your entire ownership stake in the law firm. The buyer is not regulated by OFR and does not do business with OFR. As part of the purchase agreement, the buyer will take over all client matters of the firm, which will include receiving active client files, and will purchase the rights to collect all unpaid accounts receivable, including fees for work you performed for clients on behalf of the firm and costs you advanced to clients, to the extent they are collectible.

Further insulating yourself from the firm and its clients, you indicate that the purchase agreement will include terms that the buyer is prohibited from remunerating you for anything other than the purchase price, that you will not have access to client information after the sale, and that you will be entitled to a money judgment, rather than reversion, if the buyer defaults. In your letter, you also state that you will be instituting a procedure at OFR for screening matters involving your former clientele from your participation.

You state the buyer requires financing to complete the purchase of the firm and has requested seller financing. Under the terms of the purchase agreement, the buyer would execute a promissory note in your favor for the purchase price plus interest to be paid in 24 monthly installments with no prepayment penalty. With this factual background, you ask whether the sale would create a prohibited conflict of interest for you.

Relevant to your inquiry, Section 112.313(7)(a), Florida Statutes, provides:

> 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 . . . ; 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 clause of this statute would prohibit a public officer from having any contractual relationship with an entity that does business with or is regulated by his or her agency. We previously have opined that an attorney of a law firm has a contractual relationship with every client of the firm, regardless of who among the attorneys provides the actual representation or supervision of the representation. See, e.g., CEO 16-9, CEO 03-7. Assuming the firm will continue to represent clients that are regulated by OFR, you will no longer have a contractual relationship with those clients once you sell the firm. You will, however, have a contractual relationship with the firm's future owner, the buyer, in the form of the proposed purchase agreement with the seller financing term, but the buyer is not regulated by OFR and does not do business with OFR.[1] Thus, a prohibited conflict of interest is not created under the first clause of Section 112.313(7)(a).

The second clause of this statute would prohibit a public officer from having a contractual relationship that would create a continuing or frequently recurring conflict of interest or would create an impediment to the full and faithful discharge of his or her public duties. In this instance, there is no indication that the proposed purchase agreement with the seller financing term would create such a prohibited conflict, given that the buyer is prohibited from remunerating you for anything other than the purchase price, that you will not be able to access client information after the closing, that ownership of the firm will not revert to you by the terms of the agreement, even if the buyer defaults on the installment payments, and that you will be instituting a conflicts screening procedure at OFR to prevent you from participating in or being presented with matters involving your former clients.

For the foregoing reasons, we find that a prohibited conflict of interest would not be created under Section 112.313(7)(a) if you sell your firm.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 6, 2020, and **RENDERED** this 11th day of March, 2020.

Kimberly B. Rezanka, *Chair*

[1]Cf. CEO 14-5 (finding no conflict of interest under the first clause of Section 112.313(7)(a), Florida Statutes, where OFR had no regulatory oversight over or business relationship with a law school the requestor sought to contract).

CEO 20-11—October 23, 2020

VOTING CONFLICT OF INTEREST

COUNTY COMMISSIONER/RAIL COMMISSION MEMBER EMPLOYED BY ENTERTAINMENT COMPANY VOTING REGARDING MEMORANDUM OF UNDERSTANDING OR RESOLUTION OF SUPPORT CONCERNING RAIL SYSTEM EXPANSION

To: Paul H. Chipok, Deputy County Attorney (Seminole County)

SUMMARY:

A member of a rail commission is presented with a voting conflict regarding a measure requesting a memorandum of understanding between the commission, the State's department of transportation, and a rail company regarding expansion of rail service, or regarding a resolution of support for expansion between the commission and the company.

QUESTION:

Is a member of a rail commission presented with a voting conflict regarding a measure requesting a memorandum of understanding between the commission, the State's department of transportation, and a rail company regarding expansion of rail service, including expansion of service in the area in which the commissioner's employer (an entertainment company) is located? [1]

Under the circumstances presented, Question 1 is answered in the affirmative.

Via email communications with our staff and accompanying documents, you relate that a member of the Central Florida Commuter Rail Commission (CFCRC),[2] who sits on the CFCRC as Seminole County's representative (member),[3] is employed by the Disney corporation (Disney). You state that Brightline Trains Florida LLC (Brightline), a rail company, has approached the CFCRC requesting an agreement, a memorandum of understanding (MOU),[4] and that the request possibly could be considered by the CFCRC on October 29.[5] The parties to the MOU would be the Florida Department of Transportation (FDOT), Brightline, and the CFCRC. Brightline's system, which is operational between Miami, Fort Lauderdale, and West Palm Beach, currently is under construction to expand the system to Orlando International Airport; and Brightline is planning to extend its intercity passenger train service from the Airport to Tampa, with a planned stop in the Walt Disney World Resort area and with other potential stops. The MOU would commit its parties to outreach, project development, and grant-seeking, regarding the extension from the Airport to Tampa (including the Disney World stop and other potential stops).

You relate that the MOU is not a final authorizing document; rather, it is an exploratory document to enable its parties' staffs to research the types of documents and agreements that will need to be created and authorized to implement the project. In addition, you state that any final actions on the types of permit applications and subsequent agreements that will be developed as an outgrowth of the MOU will need to be vetted and separately approved by the CFCRC.

Applicable law[6] provides:

> VOTING CONFLICTS.—No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the

parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officerâ€™s interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. [Section 112.3143(3)(a), Florida Statutes.]

"Special private gain or loss" means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered. [Section 112.3143(1)(d), Florida Statutes.]

We find that the member will be presented with a voting conflict under Section 112.3143(3)(a), Florida Statutes,[7] as to the measure to enter into the MOU. This is because the principal by whom the member is retained (Disney) would be tangibly affected by the MOU; the circumstances show that the effect of the MOU on Disney would not be remote or speculative.

Question 1 is answered accordingly.

QUESTION 2:

Is the member presented with a voting conflict regarding a measure requesting a resolution of support between the rail commission and the rail company regarding the expansion?

Under the circumstances presented, Question 2 is answered in the affirmative.

Subsequent to your earlier contact with our staff regarding Question 1, you provided a draft Resolution of Support (ROS) for the expansion, which likely will be considered by the CFCRC on October 29. The ROS would be entered into by the CFCRC and Brightline. The ROS's contents are very similar to those of the MOU in Question 1.

For the reasons we found a voting and a participation conflict for the member as to the MOU, we also find such conflicts for him as to the ROS,[8] as the circumstances show that the member's principal (Disney) would be tangibly affected by the ROS and that the effect would not be remote or speculative.

Question 2 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 23, 2020, and **RENDERED** this 28th day of October, 2020.

Daniel Brady, *Chair*

[1]In addition, you also asked whether the member (as a County Commissioner) would be presented with a voting conflict (on September 22) as to a measure requesting the County Commission's endorsement of (support for) the MOU. Due to the date of the County Commission measure in relation to our meeting schedule (October 23 meeting), you relate that the member abstained from the September 22 vote.

[2]The CFCRC is a legal entity and public body and a unit of local government, in accord with Section 163.01, Florida Statutes (INTERGOVERNMENTAL PROGRAMS); and "agency" is defined in Section 112.312(2), Florida Statutes, to mean

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university.

[3]The member was appointed to the CFCRC by the Seminole County Board of County Commissioners..

[4]You write that the member has had no prior involvement with Brightline or with the subject of the MOU.

[5]It is possible, but not likely, that the MOU may be considered. However, it is more likely that the Resolution of Support (ROS), see Question 2 of this opinion, will be considered instead.

[6]"Principal by whom retained" includes one's client, employer, or the parent, subsidiary, or sibling organization of one's client or employer. Section 112.3143(1)(a), Florida Statutes.

[7]And with a "participation" conflict under Section 112.3143(4), Florida Statutes. This statute applies to appointive officers; and the member is such in his status on the CFCRC.

[8]We hold to our finding of a voting and participation conflict for the member as to the ROS regardless of whether the draft version of the ROS (presented to us in writing), or a changed, amended, or different version of the ROS, were to come before the member's public body.

CEO 20-12—December 4, 2020

CONFLICT OF INTEREST; VOTING CONFLICT

CITY COUNCIL MEMBER VOTING ON MEASURES AFFECTING LAW FIRM EMPLOYING HER HUSBAND

To: Scott Rudacille, City Attorney (Bradenton)

SUMMARY:

No prohibited conflict of interest is created for a City Council member under Section 112.313(3), Florida Statutes, occasioned by her husband's employment in a law firm providing legal services to the City, as the "grandfather" provision of Section 112.313(3)(c) applies to negate the conflict under that statute. No "unauthorized compensation" is present under Section 112.313(4), Florida Statutes; Section 112.313(7)(a), Florida Statutes, does not apply to the employment or contractual relationships of a member's spouse; and the spouse is not being hired or appointed to a position in the City, under Section 112.3135, Florida Statutes, the anti-nepotism law. Further, the City Council member is not presented with a voting conflict under Section 112.3143(3)(a), Florida Statutes, regarding votes/measures of the City Council involving the regular operation of the firm pursuant to its engagement with the City, where the husband receives no compensation from any firm fee derived from the firm's work on matters involving the City. CEO 85-40, CEO 87-14, CEO 02-14, CEO 03-17, CEO 07-5, CEO 08-8, CEO 09-1, CEO 11-4, CEO 12-2, CEO 14-23, and CEO 15-11 are referenced.[1]

QUESTION 1:

Would a prohibited conflict of interest be created where a law firm, of which a City Council member's husband is an employee, provides legal services to the City?

Under the unique circumstances presented, this question is answered in the negative.

In your letter of inquiry and supplemental information provided to our staff, you state that you are requesting this opinion on behalf of a member of a City Council. You advise that on October 31, 2019, the City executed an engagement letter (agreement) with a law firm to provide City Attorney services and serve as general counsel to the City. You relate that the engagement letter contemplates that you will serve as the City Attorney, a backup attorney has been identified, and that other members of the firm will provide services to the City on an as-needed basis, if a particular area of expertise is required for a matter. You state that the engagement letter provides that all of these services will be rendered on an hourly basis at the rates described in the agreement, except for third-party opinion letters, for which the fee is to be negotiated based upon the nature and amount of the issue. There is no stated term for the engagement, as the firm serves at the pleasure of the City Council.

You state that on July 8, 2020, the member was appointed to serve on the City Council for Ward 2 following the resignation of a Council member. You relate that the member had previously served for 15 years on the Council. You state that the member's husband currently is an attorney and equity shareholder in the law firm. However, you state that the member does not have any ownership in the firm and that she does not have any employment or contractual relationship with the firm or any of the firm's clients.

You state that because the firm serves as general counsel to the City and in order to address any conflicts of interest and/or voting conflicts issues that may arise as a result of his equity shareholder status within the firm, the member's husband has proposed forgoing his equity interest in the firm. You relate that once the member's husband has relinquished his equity shareholder status in the firm he will be a salaried employee of the firm who does not possess any ownership interest in the firm, he will not be an officer, partner, director, or shareholder in the firm and he will receive no direct bonuses,[2] compensation, or originating fee related to the firm's work on

behalf of the City. However, you state that he will receive working credit for work he personally performs on City matters. Further, you relate that it is his intention to avoid performing work on any matter which has been directed to the firm by a vote of the City Council.[3] With this factual background, you inquire as to whether conflicts of interest and/or voting conflicts may arise under the Code of Ethics for Public Officers and Employees (Code of Ethics) from the member's continued public service on the City Council and her husband's private employment as a non-equity employee in a law firm providing legal services to the City.

The provisions of the Code of Ethics that address conflicts of interest arising out of the interests or actions of relatives are contained in Section 112.313(3), 112.313(4), and 112.3135, Florida Statutes.[4] Section 112.313(3), Florida Statutes, provides:

> DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.

Section 112.313(3), Florida Statutes, prohibits the member from acting in her official capacity to purchase, rent or lease any goods, realty, or services for her agency, the City Council, from a business entity of which she or her spouse or child is an officer, partner, director, or proprietor, or in which she or her spouse or child owns more than a five percent interest, and it prohibits her from selling any services, goods, or realty to the City Council or to any agency of the City in her private capacity. However, Section 112.313(3)(c) contains a "grandfather" clause which exempts from its prohibitions contracts entered into prior to a public officer's " [a]ppointment to public office." See CEO 85-40, CEO 08-8, CEO 09-1, and CEO 14-23. As you have represented that the City's engagement letter/agreement with the firm predates the member's appointment to public office (by nine months), this exemption applies to negate the conflict of interest.[5]

Section 112.313(4), Florida Statutes, provides:

> UNAUTHORIZED COMPENSATION.—No public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity.

Section 112.313(4) prohibits the member, her spouse, or her child from accepting anything of value when she knows, or with the exercise of reasonable care should know, that the thing of value was given to influence a

vote or other action in which she was expected to participate in her official capacity. In CEO 15-11, which addressed a water management district's executive director's spouse being employed as an attorney in a law firm representing clients in district matters, the Commission opined that while the "thing of value" within the meaning of Section 112.313(4) could, under certain circumstances, encompass something of a non-gratuitous nature, such as legal client business (pay for legal services) provided to a law firm employing the spouse of a public officer, it also found that the statute was inapplicable because there was no indication that the clients of the law firm were directing their business to the spouse's firm in order to influence the executive director's conduct regarding their interests. Similarly, in the instant matter there are no facts present which indicate that any legal business provided to the firm pursuant to the engagement letter with the City will be provided with the intent of influencing the official decision-making of the member. On the contrary, the letter of engagement itself, which was executed by the City with the firm months before the member's appointment to public office, indicates the City's desire to acquire legal services from a firm that is accomplished and experienced in matters relevant to the City's interests.[6]

Further, Section 112.3135, Florida Statutes, is Florida's anti-nepotism law. Section 112.3135(2)(a), Florida Statutes, provides:

> A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement, in or to a position in the agency in which the official is serving or over which the official exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of the individual is a member. However, this subsection shall not apply to appointments to boards other than those with land-planning or zoning responsibilities in those municipalities with less than 35,000 population. This subsection does not apply to persons serving in a volunteer capacity who provide emergency medical, firefighting, or police services. Such persons may receive, without losing their volunteer status, reimbursements for the costs of any training they get relating to the provision of volunteer emergency medical, firefighting, or police services and payment for any incidental expenses relating to those services that they provide.

For the purposes of this statute, Section 112.3135(1)(d), defines "relative" to include one's "husband." However, the statute applies only to situations where a relative is being considered for appointment, employment, promotion, or advancement "in or to a position in the agency" in which the official serves or over which the official exercises jurisdiction or control. As the husband's employment position is in a private law firm and not in a governmental agency, this provision also would not be applicable here.

Accordingly, we find that based on these specific circumstances no prohibited conflict exists under either Sections 112.313(3) or (4), or 112.3135, Florida Statutes, as a result of the existing engagement letter between the City and a firm which employs the spouse of a City Council member.

QUESTION 2:

> Would a voting conflict of interest be present for the City Council member were the Council to consider matters affecting the City and resulting in legal services provided by the law firm (a firm wherein her husband is a non-equity attorney)?

Under the unique circumstances presented, this question is answered in the negative.

Section 112.3143(3)(a), Florida Statutes,[7] is the portion of the voting conflicts law contained within the Code of Ethics which is applicable to local, elective, public officers, such as city council members; it provides:

> VOTING CONFLICTS—No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officerâ€™s interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

Section 112.3143(3)(a), Florida Statutes, requires the member to declare her interest in the measure, abstain from voting, and file a memorandum of voting conflict (CE Form 8B) as to any vote/measure of the City Council which would inure to her special private gain or loss, to that of her relative,[8] to that of a principal by whom she is retained, or to that of her business associate. We observed in CEO 11-4 that

> because the statute does not speak directly in terms of gain or loss to a client or employer of the official's relative, in order to determine whether it applies to a situation where the measure would impact a relative's client or employer, we are required to evaluateâ€"not whether the measure impacts the relative's client or employerâ€"but whether the measure would inure to the special private gain or loss of the relative.

In that opinion, the Commission considered whether a county commissioner would be faced with a voting conflict regarding land use matters affecting clients of a law firm wherein her son-in-law (relative) was a non-equity shareholder. The Commission found that no voting conflict would arise under Section 112.3143(3)(a) for the commissioner because, as a non-equity employee of the firm, the commissioner's relative did not possess an ownership interest in the firm, nor was he a director or officer of the firm, and he did not stand to receive any direct bonuses, compensation, or originating fee related to the firm's work before the county commission. Under those circumstances, we said, it could not be concluded that the Commissioner's relative would derive a "special private gain" from a land use measure in which the firm was representing the property owner before the county commission. Similarly, in CEO 07-5 we found that a county commissioner was not prohibited by Section 112.3143 from voting on measures affecting clients of a lobbying firm employing her husband, where the husband received no compensation from any firm fee derived from the firm's work on behalf of a client on a matter involving the county.

In the instant matter we are faced with facts, such as have not previously been addressed by the Commission on Ethics, wherein the law firm which employs the spouse of a City Council member has been retained pursuant to an engagement letter, executed prior to her appointment to public office, wherein the firm serves at the pleasure of the City Council. Currently the member's spouse is an equity shareholder in the law firm. However, in recognition of his firm's role as counsel to the City and in an effort to mitigate any voting conflicts affecting the member's public service, her spouse has proposed de-equitizing his interest in the firm.[9] Once he has relinquished his equity interest in the firm he will be a salaried employee of the firm wherein he will no longer possess any ownership in the firm, nor will he be an officer, director, partner, or shareholder of the firm and he will not receive any direct bonuses, compensation, or originating fee related to the firm's work on behalf of the City. However, you relate that he will receive working credit for work he personally performs on City matters; nevertheless, it is his intention to avoid performing work on any matter which has been directed to the firm by a vote of the City Council. As a salaried employee of the firm, the member's spouse's compensation

will be based upon factors applicable to all non-equity employees of the firm and will not be predicated upon a percentage of the overall increase or decrease in firm business resulting from any matter before the City.

Due to the firm's position as counsel to the City, every action or inaction by the City Council conceivably could generate legal work in some form for the firm. For example, the City Council's decision to legislate in a certain area could result in work necessary to prepare ordinances by the firm. The City Council's decision on a land-use matters could result in a legal challenge and potential legal work in defense of the City. Even a decision to schedule a meeting of the Council would ostensibly result in some additional participation by the firm.

However, we find that the actions of the spouse of the Council member to voluntarily forego his equity interest in the firm, thereby placing himself in a position wherein he is a salaried employee of the firm, provides sufficient safeguards such that he will not be in position to receive a "special private gain or loss" from votes/measures of the City Council which result in legal work to the firm. Although the City Council votes/measures concerning matters affecting the City could generate additional legal business to the firm, and thus, result in a special private gain or loss to the firm, the firm is neither the member's "relative" nor is it a "principal" that has retained the member herself.

Accordingly, we find that based on the specific circumstances unique to this matter, once the Council member's husband/relative has relinquished his equity shareholder status in the firm, the Council member will not be faced with voting conflicts regarding votes/measures affecting City business and which result in legal work to the firm, given that the relative will be a salaried employee not susceptible to receiving direct bonuses, compensation, or originating fees related to the firm's work on behalf of the City.[10]

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 4, 2020, and **RENDERED** this 9th day of December, 2020.

_____

Daniel Brady, *Chair*

[1]Prior opinions of the Commission on Ethics can be viewed at www.ethics.state.fl.us.

[2]You state that as a non-equity principal, he will be a salaried employee with bonuses to be determined by a compensation committee (of which he would not be a member) based upon criteria applied to all non-equity employees of the firm.

[3]You further relate that in accordance with Section 112.313(16)(c), Florida Statutes, during the pendency of the engagement with the City, the firm will not represent any individual or entity (e.g., firm clients) in matters before the City. Section 112.313(16)(c), Florida Statutes, provides:

> (c) No local government attorney or law firm in which the local government attorney is a member, partner, or employee shall represent a private individual or entity before the unit of local government to which the local government attorney provides legal services. A local government attorney whose contract with the unit of local government does not include provisions that authorize or mandate the use of the law firm of the local government attorney to complete legal services for the unit of local government shall not recommend or otherwise refer legal work to that attorneyâ€™s law firm to be completed for the unit of local government. .

[4]We note that the standard governing conflicting employment or contractual relationships contained in Section 112.313(7)(a), Florida Statutes, is inapplicable in the instant matter as it applies only to employment or contractual relationships of the public officer or employee and not to those of their spouse. See CEO 12-2 and CEO 15-11. As you have indicated that the member does not have any employment or contractual relationship with the firm or any of the firm's clients, Section 112.313(7)(a), Florida Statutes, is not applicable in the instant matter.

[5]We note that we have advised that the "grandfathering" exemption applicable to existing contracts may be vitiated by renewal or amendment of the contracts, unless the renewal is for a time certain provided for in the original agreement and the terms of the renewal remain the same as those of the original contract. See e.g., CEO 03-17 and CEO 09-1. However, were the member's spouse to relinquish his equity interest in the firm, you relate that he will no longer be an officer, partner, shareholder, or director of the firm, nor will he possess any ownership interest therein. As such, following the de-equitazation of his interest in the firm, the member's spouse will no

longer possess any of the status requirements implicative of the first clause of Section 112.313(3), Florida Statutes; that is, his situation will no longer support the statutory elements required for the prohibition to apply, even if the agreement were renewed or amended beyond its original provisions.

[6]Nevertheless, and without in any way intending to suggest doubt as to the member's personal integrity, we bring to your attention to the requirements of Sections 112.313(6) and 112.313(8), Florida Statutes, which prohibit the member from corruptly using her position or the resources thereof, or using "inside information," for the purpose of benefitting herself or any other person or business entity. Further, the member must be cognizant of the requirements of a newly-enacted constitutional amendment which will become effective on December 31, 2020, contained in Article II, Section 8(h)(2) of the Florida Constitution, which prohibits the member from abusing her public position to obtain a disproportionate benefit for herself, a family member, or a business with which she is affiliated. See, also, Rule 34-18.001(2)(a), Florida Administrative Code.

[7]Notwithstanding the member's appointment to the City Council, we note that she is subject to the voting conflicts provisions of Section 112.3143(3)(a), and not also to those contained in Section 112.3143(4), because the position she holds on the City Council is not an appointive position; rather, it is a position which is regularly filled by election. See CEO 87-14 and CEO 02-14.

[8]"Relative" is defined in Section 112.3143(1)(c) to mean "father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law."

[9]During the Commission's consideration of this matter, the Commission expressed a willingness to explore alternative pathways wherein the conflicts of interest and voting conflicts issues facing the member could be mitigated while still enabling the member's husband to remain an equity shareholder in the law firm serving as general counsel to the City. However, following careful consideration of the matter the requestor stated that although it may be feasible to craft a financial arrangement which would allow the member's husband to remain a shareholder with the firm and address the potential voting conflicts issues, the instant facts provided the member, the law firm, and the City with a greater level of certainty and best preserve the public trust in the actions of the City.

[10]We emphasize that our finding herein is limited to the specific circumstances unique to this matter. Further, our decision herein is not intended to preclude our consideration of other similar questions in the future being susceptible to their own unique analyses.

CEO 22-5—December 7, 2022

CONFLICT OF INTEREST

CONTRACT BETWEEN COUNTY COMMISSIONER'S AGENCY AND EMPLOYER REINSTATED PURSUANT TO LITIGATION SETTLEMENT AGREEMENT

To: Robert B. Shillinger, County Attorney (Monroe County)

SUMMARY:

A member of the Monroe County Board of County Commissioners will not have a prohibited conflict of interest if a contract between her Board and her private employer that was executed prior to her appointment to office is reinstated through a litigation settlement agreement and if options written into that contract are then exercised to extend the contract. Analysis is also provided regarding whether the Commissioner will have a prohibited conflict of interest if amendments are made to the terms of the contract, and guidance is provided concerning potential voting conflicts. Referenced are CEO 76-118, CEO 77-14, CEO 77-126, CEO 78-86, CEO 81-2, CEO 82-10, CEO 84-107, CEO 90-24, CEO 96-31, CEO 96-32, CEO 97-11, CEO 02-14, CEO 02-19, CEO 03-17, CEO 08-4, CEO 09-1, CEO 12-13, CEO 17-4, CEO 19-7, CEO 20-8, and CEO 20-10.

QUESTION 1:

Will a prohibited conflict of interest be created for a member of the Monroe County Board of County Commissioners if a terminated contract between the County and the member's employer that was originally executed before the member's appointment to the Board is reinstated to settle litigation between the employer and the County?

This question is answered in the negative.

You write your letter of inquiry on behalf of Holly Merrill Raschein,[1] a current member of the Board of County Commissioners of Monroe County (Board). In your letter, you explain a sequence of events concerning the County's vendor agreement with AshBritt, Inc. (Ashbritt), a provider of emergency management and disaster relief services. On June 21, 2017, the County contracted with AshBritt for disaster relief services. The term of the contract was five years (expiration date of June 20, 2022), but the contract also contained options for the County to renew the agreement in one-year increments for up to five additional years (latest possible expiration date of June 20, 2027), with all other terms remaining the same. On October 25, 2017, however, AshBritt sued the County and, on August 18, 2018, the County terminated the contract with AshBritt. On December 1, 2020, AshBritt hired Ms. Raschein as its new director of government relations. In that role, she is not an owner, officer, or corporate director of AshBritt. On September 24, 2021, Governor DeSantis appointed Ms. Raschein to a vacant seat on the Board. On June 20, 2022, the expiration date passed for the original five-year term of the contract between the County and Ashbritt. On July 25, 2022, AshBritt made an offer to settle its litigation against the County. On August 23, 2022, Commissioner Raschein won the open primary for the special election to fill the remaining two years of the unexpired term to which she had originally been appointed. On August 31, 2022, AshBritt amended its settlement offer.

Under the terms of the July 25, 2022 settlement offer, Ashbritt would dismiss all claims with prejudice and waive payments for additional fees, including attorney's fees, and, in exchange, the County would reinstate the June 21, 2017 contract and exercise its option to extend the term of the contract for one additional year. The terms of the August 31, 2022 amended settlement offer are identical, except it stipulates the County will agree to exercise all five of its options to extend the term of the contract by one year, for a total of five years. Under the terms of the amended settlement agreement, once the options to extend the agreement are exercised, the contract would be set to expire on June 20, 2027. In subsequent communications with Commission staff, you indicate it

remains unclear whether the settlement agreement will be rendered as part of a judicial order, though you expect that AshBritt would prefer this and you expect the County will have no objection to it.

It is expected that on November 15, 2022, Commissioner Raschein will begin serving a two-year term (after which the seat will return to its normal election cycle). In mid-December 2022, you expect the Board to consider AshBritt's settlement offer in a closed, attorney-client session. You and Commissioner Raschein have exchanged correspondence and participated in video conferences with Commission staff about her ethical obligations and you have informed Commission staff that Commissioner Raschein will not be participating in the closed attorney-client session, and will follow the procedures for a voting conflict under Section 112.3143, Florida Statutes, relating to any votes pertaining to AshBritt or the litigation (more on that below).

With this background, you ask whether a conflict of interest will be created for Commissioner Raschein if the County accepts the original settlement agreement or the amended settlement agreement.

Relevant to this inquiry, Section 112.313(7)(a), Florida Statutes, states:

> 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 . . . ; 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 clause of this statute prohibits a public officer or employee from having any employment or contractual relationship with a business entity or an agency that is regulated by or is doing business with his or her agency. The second clause of Section 112.313(7)(a) prohibits a public officer or employee from having employment or a contractual relationship that would create a continuing or frequently recurring conflict of interest or would create an impediment to the full and faithful discharge of his or her public duties.

We first review Commissioner Raschein's employment with AshBritt under the first clause of Section 112.313(7)(a). In your request for an ethics opinion, you detail two separate contractual agreements requiring analysis: (1) the settlement agreement extinguishing the lawsuit AshBritt brought against the County; and (2) the 2017 contract between the County and AshBritt for disaster relief services that will be reinstated under the terms of the proposed settlement agreement.

We address the settlement agreement first. We have not previously had the opportunity to address whether a settlement agreement could create a conflict of interest for a public officer or employee under the first clause of Section 112.313(7)(a). We have said in the past that an agency and business entity are not "doing business" when they commence or participate in a lawsuit against each other. See CEO 17-4 (citing CEO 77-14). In practical terms, a settlement of an active lawsuit before the courts is a necessary part of the lawsuit—its end—and represents resolution of the conflict. Because a settlement agreement is part of a lawsuit, and a lawsuit does not constitute "doing business," we find that an agreement to settle a lawsuit that has been filed in the courts also does not constitute "doing business." Therefore, the settlement agreement between the County and AshBritt does not create a prohibited conflict of interest under the first clause of Section 112.313(7)(a) for Commissioner Raschein.

We next address the 2017 contract for disaster relief services. It is clear that if this contract is reinstated, Commissioner Raschein will have employment with a business entity (AshBritt) that is doing business with her agency (the County). There may, however, be an exception available to negate the conflict.

In certain situations when a conflict of interest under the first clause of Section 112.313(7)(a) is present, the conflict can be negated by an application of Section 112.316, Florida Statutes,[2] if the public officer's or public employee's private employment or contractual relationship and the "doing business" relationship between the business entity and the agency both predate the public officer's office holding or the public employee's public employment. CEO 82-10; CEO 96-31; CEO 96-32; CEO 02-14; CEO 02-19; CEO 81-4, footnote 6; and CEO 09-1. In our numerous opinions on this topic, we have referred to this negation of the conflict of interest as "grandfathering." For example, in CEO 19-7, a preexisting business relationship between a water management district and a corporation was found not to be a prohibited conflict of interest under Section 112.313(7)(a) for a shareholder of the corporation who was later appointed to the governing board of the water management district.

Even when preexisting contracts are "grandfathered," renewals and amendments to those contracts are considered new contracts no longer benefiting from the application of "grandfathering," unless "the renewal is for a time certain provided for in the original [contract] and the terms of the renewal remain the same as those of the original contract." CEO 09-1 (citing CEO 03-17).

We find that grandfathering is available to negate the prohibited conflict of interest under the first clause of Section 112.313(7)(a). The contract was originally executed on June 21, 2017, and Commissioner Raschein's employment with AshBritt began on December 1, 2020; both events predate her appointment to the Board on September 24, 2021. Although the contract for disaster relief services was not continuously in effect, having been terminated in 2018, we find that the contract represents a meeting of the minds between the County and AshBritt that occurred in a conflict-free environment for Commissioner Raschein, long before she was appointed to the Board. Thus, the termination and subsequent reinstatement of the contract does not affect the availability of "grandfathering" to negate the conflict.

The exercise of the options to extend the reinstated contract also do not vitiate the availability of "grandfathering." The options were included in the terms of the original contract and merely extend the term of the deal for a time certain, while leaving all other terms unchanged. We allowed similar extension options to be exercised in CEO 03-17 and CEO 09-1 without vitiating the availability of "grandfathering"; we allow it here for the same reasons.

For these reasons, the prohibited conflict of interest created under the first clause of Section 112.313(7)(a) by the reinstatement of the 2017 contract is negated by "grandfathering."

Lastly, we must analyze Commissioner Raschein's employment with AshBritt under the second clause of Section 112.313(7)(a). We see no indication that the second clause of Section 112.313(7)(a) poses a prohibited conflict of interest for her, given that there is nothing obvious about her private role that would tempt her to dishonor her public responsibilities. Previous contacts with Commission staff indicate that she does not represent AshBritt's interests before the County Commission or County staff. As Commission staff wrote to you in a March 8, 2022 letter, such communications made on behalf of AshBritt would violate the second clause of Section 112.313(7)(a) by creating a continuing and frequently recurring conflict between her public duties and her private employment; potentially tempting her to dishonor her public responsibilities. See Zerweck v. Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982); see also CEO 77-126, CEO 78-86, and CEO 20-8, Question 1.[3]

We understand that you and Commissioner Raschein have been in regular contact with Commission staff to clarify her ethical obligations in light of her ongoing employment with AshBritt. In those communications, Commission staff have provided guidance for complying with the voting conflict law, specifically when votes on the litigation between AshBritt and the County are presented to the Board. You did not specifically ask about voting conflicts in the instant ethics inquiry, but we take this opportunity to endorse what has already been communicated to you about voting conflicts[4] because you indicate votes about the settlement agreement will be presented to the Board in mid-December 2022.

QUESTION 2:

> Will a prohibited conflict of interest be created for a member of the Monroe County Board of County Commissioners if a terminated contract between the County and the member's employer that was originally executed before the member's appointment to the Board is reinstated to settle litigation between the employer and the County, but with many contract provisions amended to include new terms, some mandated by state law and others required by the Federal government to make the contract eligible for Federal reimbursement?

This question is answered as follows.

In communications subsequent to your initial request for a formal advisory opinion, you have indicated that the County is considering a scenario whereby it settles the matter as described in Question 1, above, but, additionally, as part of the settlement of the lawsuit, the parties agree to amend certain provisions of the 2017 contract.

As you have explained in written and telephonic communications with Commission staff, the Federal Emergency Management Agency (FEMA) has authority to reimburse certain eligible contracts for disaster relief

services between disaster relief service providers and state or local governments when those contracts contain particular terms. FEMA provides suggested language for these contract provisions, but the suggested language need not be used word-for-word to effectuate eligibility for the reimbursement. According to you and your staff, because the wording of the suggested language is somewhat fungible, the phrasing of the amendments is technically negotiable, though, historically, the disaster relief companies that have contracted with the County have never attempted to negotiate the wording when the County has proposed amendments to remain eligible for FEMA reimbursement.

You explain that FEMA now requires more terms in disaster relief contracts to be eligible for reimbursement than it did when the 2017 contract was executed and, because of that, there is a compelling reason to amend the 2017 contract to include the additional terms suggested by FEMA—so the County will be eligible for the reimbursement of costs by FEMA. If the County and AshBritt reinstate the 2017 contract without amending it to comport to the FEMA requirements, the contract will be enforceable, but the County will not be eligible for Federal reimbursement for the disaster relief services provided by AshBritt. According to you and your staff, reinstating the 2017 contract without the amendments means forgoing reimbursements from FEMA, which, in turn, means the County could potentially incur tens of millions of dollars in otherwise-reimbursable costs.

Compliance with the FEMA requirements for reimbursement would require amending the 2017 contract to add terms spanning many topics: those requiring adherence to the standards of certain Federal laws, including the Contract Work Hours and Safety Standards Act, the Clean Air Act, the Byrd Anti-Lobbying Amendment, the Resource Conservation and Recovery Act, and the Energy Policy and Conservation Act; those requiring compliance with certain standards prohibiting contractors from purchasing communication devices produced by Huawei Technologies Company or ZTE Corporation; and those allowing the Department of Homeland Security to access and inspect records and the vendor's staff.

According to you, if the 2017 contract is reinstated, the County also will be required by state laws implemented since 2017 to include additional terms that must be incorporated into certain vending contracts. These additions are separate and apart from the changes necessary to achieve FEMA reimbursement. These nondiscretionary terms, which are required by state law and set out in Section 287.135, Florida Statutes, include County options for early termination of the contract if AshBritt is placed on the "Scrutinized Companies that Boycott Israel List," the "Scrutinized Companies with Activities in Sudan List," or the "Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List," or if AshBritt has been engaged in business operations in Cuba or Syria.

With this background, you ask whether the reinstatement of the 2017 contract will still benefit from the "grandfathering" described in the discussion of Question 1 if the contract is amended to comport to the FEMA requirements for reimbursement or the separate requirements set forth in state law.

We have consistently opined that "[t]he essential purpose of s. 112.313(7) is to prevent a public officer from using [his or her] official position to secure business for [his or her] private employer." CEO 76-118. We have kept this in mind whenever we have applied "grandfathering" to negate a conflict of interest resulting from the mechanical application of Section 112.313(7)(a) to a contract executed by a public agency before the public officer or employee assumed their public position. We have even applied grandfathering to allow contracts negotiated before one's assumption of public office or employment to be renewed after one's assumption of public office or employment. Prior to 2002, we allowed these contracts to be renewed without vitiating their grandfathered status when the terms of the contract remained "substantially identical" to the original contract. See, e.g., CEO 76-118 (allowing the extension of a loan between the City and a bank to benefit from grandfathering "so long as the annual renegotiation of terms remains substantially the same as those in the original contract"); CEO 96-31 (allowing the assignment of a leasehold of city-owned property from one corporation to another owned by a member of the City council to benefit from grandfathering "as long as the terms of the lease agreement remain substantially identical to the terms of the lease agreement that was originally signed by the City"); and CEO 97-11 (allowing the renewal of a contract between the County and a County commissioner's law firm with an upward adjustment in the fees paid to benefit from grandfathering "as long as the terms of the contract remain substantially the same" [emphasis added]).

In 2002, we departed from that reasoning, instead requiring the terms of a contract to remain exactly "the same" to maintain grandfathering through a renewal occurring after the public officer or employee's assumption of their public position. See CEO 02-14 (allowing the extension of a school district's contract with an investment banking firm that marketed district bonds to benefit from grandfathering "provided the terms of the contract

remain the same as those of the original") [emphasis added]. We have, since then, reiterated our view that the terms of a contract must remain precisely "the same" to maintain grandfathering. See CEO 03-17, footnote 6 ("We recognize that it might be difficult for the terms of a renewal to remain the same in your situation due to the original lease's providing for a renegotiation of rental rates regarding a renewal. However, since the issuance of CEO 96-31, we have clearly and recently stated our view that the terms of a renewal must remain the same." [emphasis in original]); see also CEO 08-4, footnote 6 and CEO 09-1.

In the scenario presented here, the terms to be added to the 2017 contract to achieve eligibility for FEMA reimbursement will create numerous, new obligations for the parties, particularly for AshBritt, and create new rights for early termination by the County. Furthermore, those addition of the terms will have the effect of creating a stronger business opportunity for the Commissioner's private employer, AshBritt, by ensuring the effective availability of a surety that will guarantee the reimbursement of tens of millions of dollars coming from the Federal government. Because the amended contract will not be the same as when it was executed in 2017, we find the inclusion of the terms to achieve eligibility for FEMA reimbursement would create a prohibited conflict of interest for the Commissioner under the first part of Section 112.313(7)(a) that cannot be negated by an application of grandfathering.

We contrast the inclusion of the FEMA terms, which is discretionary and potentially subject to negotiation, with the inclusion of the terms required by state law. Because you indicate the state law terms are required by law to be included in the contract, and given that their inclusion would confer no benefit on the private interests of the Commissioner's employer, we find that their inclusion would not vitiate grandfathering. Therefore, the addition of the state law terms will not create a prohibited conflict of interest for the Commissioner under the first part of Section 112.313(7)(a), provided that the rest of the contract remains the same.

Your questions are answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 2, 2022, and **RENDERED** this 7th day of December, 2022.

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John Grant, *Chair*

[1]When summarizing the chronology of events, we refer to her as Ms. Raschein when referencing events occurring before her appointment to the Board of County Commissioners and as Commissioner Raschein when referencing events occurring after her appointment.

[2]Section 112.316 provides:

> Construction.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

[3]We briefly note that the prohibition in Section 112.313(3), Florida Statutes, is inapplicable to the scenario because (1) Commissioner Raschein is not acting in an official capacity (i.e., through her board, as in CEO 90-24) to buy, rent, or lease any realty, goods, or services from a company in which she, her spouse, or her child are an officer, partner, director, or proprietor and (2) she is not acting in a private capacity (i.e., personally, as in CEO 12-13, or through a company in which is an officer, director, or owner of more than a 5 percent interest, as in CEO 81-2 and CEO 09-1) to sell, rent or lease any realty, goods, or services to the County or any agency of her political subdivision.

[4]In a letter to you concerning Commissioner Raschein dated March 8, 2022, Commission staff addressed these topics, writing

> Lastly, you asked about the applicability of the voting conflicts statute, Section 112.3143(3)(a), Florida Statutes . . . .

Section 112.3143(3)(a) prohibits a local public officer from voting on any matter that will inure to his or her special private gain or loss or that he or she knows would inure to the special private gain or loss of a principal by whom he or she is retained, a relative, or business associate. One is only retained by a principal when, as the definition requires, the principal directs one's conduct in exchange for compensation or other consideration. See, e.g., CEO 20-10 and CEO 84-107. . . .

In Commissioner Raschein's case, Ashbritt is a principal by whom she is retained, given that the company is her employer. Therefore, any vote that would inure to Ashbritt's special private gain or loss will pose a voting conflict for her. You asked specifically about certain votes that may be scheduled for the Board of County Commissioners in the future. Any vote concerning the payment of legal fees or the settlement of the litigation would inure to Ashbritt's special private gain or loss because those matters directly affect the County's ability to pursue the litigation, which will necessarily affect the size of Ashbritt's recovery or liability in the lawsuit. . . .

Pursuant to Section 112.3143(3)(a), Florida Statutes, when Commissioner Raschein is presented with a voting conflict, she is required to publicly state to the assembly the nature of her interest in the matter, abstain from voting, and file a CE Form 8B, "Memorandum of Voting Conflict for County, Municipal and other Local Public Officers," with the person responsible for taking the minutes of the meetings of the Board of County Commissioners.

[Emphasis added. Internal footnotes omitted.]

CEO 23-4—April 26, 2023

CONFLICT OF INTEREST

EMPLOYEES OF SCHOOL DISTRICT WHO ARE MEMBERS AND DIRECTORS OF A NONPROFIT CORPORATION

To: Name withheld at person's request (Brevard County Public Schools)

SUMMARY:

Guidance is provided regarding School District personnel at all levels of the District as to whether they have conflicts of interest under Sections 112.313(3) and (7)(a), and, if so, whether they have the benefit of an exemption under either Section 112.313(12)(f), Florida Statutes, or Section 112.316, Florida Statutes. CEO 81-2, CEO 93-31, CEO 97-21, CEO 99-7, CEO 04-17, CEO 09-1, CEO 10-2, CEO 10-15, CEO 14-12, CEO 14-21, CEO 14-27, CEO 14-28, CEO 16-12, CEO 18-4, CEO 18-5, CEO 19-1, CEO 19-9, CEO 19-14, and CEO 23-2 are referenced.

QUESTION:

Will certain School District personnel have a prohibited conflict of interest if the Superintendent, on behalf of the School District, purchases an institutional membership with a nonprofit corporation?

This question is answered as follows.

You are the general counsel for the Brevard County School District (School District) and you write on behalf of the School District and certain individuals in its employ. You explain that the Superintendent is considering a purchase for the School District of an institutional membership with a nonprofit corporation called the Brevard Alliance of Black School Educators (Brevard ABSE). The mission of this entity is "to enhance and facilitate the education and social development of all students in Brevard County, with a particular focus on African-American students." Brevard ABSE accomplishes this mission in a variety of ways. According to the president of the organization, who is also the School District's Director of Elementary Leading and Learning, the organization forms partnerships to financially support recruitment events to attract minority teachers and to supply food for teachers who provide service to the school and its students in after-school hours. Brevard ABSE partnered with a Head Start program by donating needed items to the school. Brevard ABSE also provides a scholarship for a student to attend a historically black college or university.

Brevard ABSE offers individual memberships and numerous teachers, administrators, and department directors of the School District hold individual memberships. Additionally, Brevard ABSE offers institutional memberships at a cost of $250 per year, which is available for purchase by any institution offering instruction from kindergarten through higher ed. With an institutional membership, the School District will receive a Certification of Institutional Membership, the opportunity to network with fellow educators, two (2) complimentary individual memberships, a link on Brevard ASBE's webpage to the School District's webpage, and a 20 percent discount on the organization's paid events.

At present, Brevard ABSE's board of directors consists of teachers, administrators, and department directors within the School District, all of whom are individual members of Brevard ABSE. The members of the board of directors of Brevard ABSE are not compensated for their service.

With that background, you ask whether a conflict of interest will be created for any of the School District personnel associated with Brevard ABSE if the Superintendent purchases an institutional membership for the School District.

Relevant to your inquiry is Section 112.313(3), Florida Statutes, which states:

> DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision . . . . This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.

The first prohibition of this provision operates to prevent a public employee from acting in his or her public capacity as a purchasing agent, or a public officer acting in his or her official capacity, from purchasing, renting, or leasing any realty, goods, or services for his or her agency from any business entity in which he or she (or his or her spouse or child) is an officer or director or in which the employee or officer (or his or her spouse or child) owns more than a five-percent ownership interest. The second prohibition of this subsection prevents a public employee or officer from acting in his or her private capacity to rent, lease, or sell any realty, goods, or services to his or her public agency or to any agency of his or her political subdivision. "Acting in a private capacity" includes situations where one is an officer, director, or owner of more than a 5 percent interest of a business entity that is selling, renting, or leasing to the agency or political subdivision. See CEO 81-2 and CEO 09-1.

The term "agency" is defined in Section 112.312(2), Florida Statutes, as:

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; any public school, community college, or state university; or any special district as defined in s. 189.012.

We have opined in the past, when interpreting this definition, that the agency of a public officer or public employee is the lowest unit of government to which one's influence could be said to extend. See CEO 93-31 and CEO 99-7. For a teacher or administrator whose position is within a school, we have found that their agency is the school where they work. See CEO 04-17, CEO 10-15, CEO 16-12. However, the agency of an employee of a school district's central office was found to be the department where he or she worked. See CEO 14-28. For school board members, though, we have found their agency to be the entire school district. See CEO 14-21 and CEO 14-27. The agency of the superintendent of a school board is the school district. See, generally, CEO 97-21.

Unless an exemption applies to negate the conflict, a prohibited conflict of interest under Section 112.313(3) will be created for those School District personnel who also serve on Brevard ABSE's board of directors when the Superintendent, on behalf of the School District, purchases an institutional membership. In that instance, those individuals will be acting in a private capacity either to sell an institutional membership to their agency or an agency of their political subdivision, depending where their public positions are within the School District.

Also, if the Superintendent is a member of the Board of Directors of Brevard ABSE, then he will be acting in an official capacity to purchase from a business entity of which he is a director. That would present a conflict for the Superintendent under Section 112.313(3) in the absence of an applicable exemption.

To provide a complete analysis of the possible conflicts of interest arising from the scenario you present, a second statute, Section 112.313(7)(a), Florida Statutes, must be applied. Section 112.313(7)(a) states:

> 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 . . . ; 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 clause of this statute prohibits a public officer from having any contractual relationship with a business entity or an agency that is regulated by or is doing business with his or her agency. The second clause prohibits a public officer from having a contractual relationship that would create a continuing or frequently recurring conflict of interest or would create an impediment to the full and faithful discharge of his or her public duties. In determining whether a contractual relationship exists, we have often said that membership in a nonprofit corporation creates a contractual relationship between a public officer or public employee and that nonprofit corporation. See, e.g., CEO 19-1, CEO 14-12, and CEO 10-2.

Without the benefit of an exemption, if the Superintendent or any staff of the Superintendent's Office[1] holds an individual membership while the School District is contemporaneously doing business with Brevard ABSE (through the purchase of an institutional membership or by other means), they will have a conflicting contractual relationship under the first clause of Section 112.313(7)(a). They will hold contractual relationships (through their individual memberships) with Brevard ABSE, which will be a business entity doing business with their agency.

If the Superintendent or personnel of the School District who have a role in the approval process for the purchase of the institutional membership are also both (1) individual members of Brevard ABSE and (2) members of its board of directors, then they will have a conflict of interest under the second clause of Section 112.313(7)(a). They will have, on the public side of the transaction, an operational role in their agency's treatment of the business entity while at the same time having a representational role on behalf of the same business entity. As we recently opined, such a relationship can tempt a public officer or public employee to dishonor their public responsibilities as they relate to decisions about business entity. See, e.g., CEO 23-2 and the opinions therein cited.

All other School District personnel, even those who have individual memberships with Brevard ABSE or sit on the organization's board of directors, will not have a conflicting contractual relationship under Section 112.313(7)(a). They will merely hold contractual relationships (individual memberships) with a business entity (Brevard ABSE) that is doing business with the Superintendent's Office, which is an agency other than their own. Such a relationship does not create a prohibited conflict of interest under the first clause of Section 112.313(7)(a). Also, there is nothing in the fact pattern to suggest that their memberships in Brevard ABSE will tempt these individuals to dishonor their public responsibilities. See Zerweck v. State Commission on Ethics, 409 So.2d 57, at 61 (Fla. 4th DCA 1982).

For those individuals who have a conflict of interest under Sections 112.313(3) and/or (7)(a), as described above, there appears to be an exemption available that will operate to negate the conflicts. According to Section 112.313(12)(f), Florida Statutes, a conflict of interest under Sections 112.313(3) or (7)(a) will be exempted if "[t]he total amount of the transactions in the aggregate between the business entity and the agency does not exceed $500 per calendar year." If the School District only buys the institutional membership each calendar year, the total amount of the transactions in the aggregate between the School District and Brevard ABSE will be $250 in each calendar year, and the exemption will apply to negate the conflicts for everyone who would otherwise have a conflict. Of course, if the School District transacts additional business with Brevard ABSE—for example, if the School District makes use of its 20 percent discount on the organization's paid events by purchasing admissions to those events—the individuals with conflicts will lose the benefit of the exemption when the total aggregated business transacted between the School District and Brevard ABSE exceeds $500. In that event, a second exemption will be needed.

There is, though, a second exemption available, through an application of Section 112.316, Florida Statutes. Section 112.316 states:

> Construction.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

Section 112.316 only operates to negate certain conflicts arising under Section 112.313(3) and the first clause of Section 112.313(7)(a). Because Section 112.316, by its plain meaning, precludes its application to any pursuit that interferes with the full and faithful discharge of a public officer's or employee's duties, as is precisely defined to be a conflict under the second clause of Section 112.313(7)(a), those individuals with conflicts under the second clause of Section 112.313(7)(a), as described above, will not benefit from this exemption and, therefore, will have a prohibited conflict.

We have interpreted Section 112.316 to negate conflicts derived from Section 112.313(3) and the first clause of Section 112.313(7)(a) when the public officers and employees who might otherwise have a conflict played no public role in their agency's dealings with or oversight of the business entity. See, e.g., CEO 18-4, CEO 78-7418-5, CEO 19-9, CEO 19-14. The conflicts of School District personnel who are not involved in the process of approving the School District's purchasing of the institutional membership from Brevard ABSE will be negated by an operation of Section 112.316. For those personnel who are involved in the process—not just the Superintendent, who provides the final approval of the purchase, but anyone else who offers legal, financial, or other preliminary approvals prior to the Superintendent's final approval and exercise of his or her purchasing authority—a negation of their conflicts through an application of Section 112.316 is not available.

In conclusion, so long as the total amount of the transactions in the aggregate between the School District and Brevard ABSE does not exceed $500 in any calendar year, all school district personnel described above who might otherwise have a conflict of interest will benefit from the exemption in Section 112.313(12)(f) and their conflicts will be negated. If, however, the total amount of the transactions in the aggregate between the School District and Brevard ABSE does exceed $500 in any calendar year, then a prohibited conflict of interest will be created for those individuals who (1) are individual members of Brevard ABSE and/or are members of the board of directors of Brevard ABSE and (2) are involved in the School District's approval process for transactions with Brevard ABSE. However, Section 112.316 will operate to negate the conflict of interest for those who are individual members of Brevard ABSE and/or are members of the board of directors of Brevard ABSE, but are not involved in the School District's approval process for the purchase.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on April 21, 2023, and **RENDERED** this 26th day of April, 2023.

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Glenton "Glen" Gilzean, Jr., *Chair*

[1] An organizational chart on the Brevard Schools website shows that the Superintendent is the head of the Superintendent's Office, which is a School District department staffed by: district and school security, a staff attorney, a chief of staff, five assistant superintendents, a deputy superintendent, a chief financial officer, a chief of human resources, and a chief operating officer. We find that the agency of these positions is the entire School District, due to the scope of the influence of these high-level positions. The identity of the agency, for purposes of Section 112.313(7)(a), of specific support staff to those high-level positions will either be the School District or the Superintendent's Office, depending on the nature and duties of their individual positions; for specific guidance on how this opinion might affect those support staff, which will require a fact-dependent determination of their agency, please contact Commission staff.