CE0 08-20 – September 10, 2008

CONFLICT OF INTEREST

STATE SENATOR OFFERED PARTNERSHIP IN PRIVATE EQUITY FIRM

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

SUMMARY:

The Code of Ethics for Public Officers and Employees would not prohibit a State Senator from becoming a partner in a private equity firm. There is no indication that the firm or any of its partners are doing business with the Legislature, and to the extent they are regulated by that body through the enactment of laws, the exemption of Section 112.313(7)(a)2, Florida Statutes applies. Any voting conflicts of interest that may develop require disclosure, not abstention, and the Senator is prepared to comply with the requirements imposed by the voting conflict law, Section 112.3143(2), Florida Statutes. Identification of the Senator's public position as part of descriptive information regarding the firm's members would not violate Section 112.313(6), Florida Statutes.

QUESTION:

Does the Code of Ethics for Public Officers and Employees prohibit a State Senator from becoming a partner in a private equity firm?

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

You write on behalf of a member of the Florida Senate, and you advise, through correspondence and telephone conversations with our staff, that the Senator has been invited to join, as a limited partner, an international private equity firm with offices in the state of Florida. The firm creates investment funds[1] made up of individual, corporate, and institutional investors, and these individual funds are structured as limited partnerships, with the firm serving as the general partner.[2] The Senator's responsibilities with the firm will include analyzing proposed investment opportunities, many of which may be in the state, and making recommendations to

---

[1] Private equity funds are pooled investment vehicles managed by investment professionals that solicit investors directly, rather than through general advertising, a registered broker-dealer, or a public offering. The funds are generally organized as limited partnerships ("LP") or limited liability companies ("LLC"). A management company, which acts as an investment adviser, usually holds the general partnership interest of a LP or acts as a managing member of a LLC. Investors usually consist of high net-worth individuals and families, pension funds, endowments, banks, and insurance companies. See, Bevilacqua, Convergence and Divergence: Blurring the Lines Between Hedge Funds and Private Equity Funds, 54 Buffalo L. Rev. 251, 257 (May, 2006).

[2] The Senator will not be a partner in any of the individual funds.

the firm on whether to invest in these businesses. The Senator will also be tasked with contacting potential investors, both in and out-of-state, to determine whether they are interested in investing in a particular fund.

The Senator understands that he is precluded from representing the firm or any other entity for compensation before any State agency, and he would have no involvement in any activity which would seek to influence any agency or State pension fund. His compensation will come through a percentage of the money he raises, management fees, a bonus after a certain amount has been raised (the calculation for which will exclude any amount raised from any State agency), and a performance based fee to be paid at the close of the firm's activities. You relate that it is anticipated that the firm's website will make reference to the Senator's public position, "in the context of a resume which would mention that, among other experiences and qualifications, he is an elected official in the State of Florida," and that his position will also be referred to in "private placement memoranda" which describe the security offered for sale, terms and fees, and the background of the business and the management team.

You also advise that matters of interest to the firm may come before the Legislature, and firm members may lobby the Legislature or employ a lobbyist to do so. The Senator understands that he is precluded from having any involvement in any lobbying activities, including involvement in the firm's strategies concerning lobbying activities.

Section 112.313(7), 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 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 Senator's agency is the Florida Legislature (CEO 95-21) and as a member of a limited partnership, he would have a contractual relationship with the partnership itself as well as with each of the individual partners. See, CEO 98-3. Absent the applicability of an exception, the first part of Section 112.313(7) prohibits him from having a contractual or employment relationship with the partnership if it is regulated by or doing business with the Legislature.

Nothing in the materials you have provided suggests that the firm is "doing business" with the Legislature, and to the extent that it or its members may be regulated by the Legislature, Section 112.313(7)(a)2, Florida Statutes, would apply. It provides:

> When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual

> relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

We have often found this provision applicable to exempt situations in which the potentially conflicting relationship was based on the possible "regulation" of a business entity by the Legislature (a situation applicable to many "citizen-legislators") from the prohibition of Section 112.313(7)(a). See, CEO 03-3, footnote 5. Insofar as the Senator's firm can be said to be "regulated" by the Legislature through its enacting laws, the application of Section 112.313(7)(a)2 negates any conflict.

Although we have not applied this exemption to lobbying activities, "[w]e have concluded that Section 112.313(7)(a) does not prohibit a legislator from having any employment whatsoever with an organization that engages in lobbying the Legislature." CEO 91-1. In this regard, our previous opinions have indicated that "a legislator's employment should be completely separated from the lobbying activities of his employer." Id. In CEO 90-8, an opinion instructive here, we found that a State Representative was not prohibited from serving as president and CEO of a nonprofit corporation formed to promote private higher education, but that he would be prohibited "from engaging in lobbying activities personally and also in any activities related to lobbying." We stated:

> This would include not only actual contact with legislators through physical attendance at legislative meetings, submission of written materials, and personal contact with legislators in an effort to encourage the passage, defeat, or modification of any measure before the Legislature, as part of your employment responsibilities, but also directing the activities of those who will contact the Legislature, participating in setting the strategies of whom to contact and what to say, and assisting in preparing amendments to documents in support of the corporation's position. In other words, it is our view that your employment with the corporation should be completely separated from the lobbying activities of your employer.

As you have already recognized, the Senator would be similarly prohibited from engaging in lobbying activities. Under such circumstances, his proposed employment would not be prohibited by Section 112.313(7), Florida Statutes.

The second part of Section 112.313(7) prohibits a public officer 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 which would impede the full and faithful discharge of his public duties. In Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982), the District Court of Appeals said that 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 interests to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor."

You have not provided specific details regarding the entities the firm's funds will invest in, or who the investors are or will be, and to the extent that the firm's activities are prospective, you are unable to do so. Accordingly, general guidance is all we can afford you. In that regard, there is nothing inherent in the proposed employment which would create a prohibited conflict. It is conceivable that a particular set of circumstances could cause the Senator to be tempted to dishonor his public responsibilities. However, that possibility exists in any number of employment and professional opportunities, and given that Florida's constitution and laws presently preserve the notion of a "citizen" legislature, it is insufficient by itself to violate Section 112.313(7). In CEO 96-4, we advised a State Senator that his employment by a corporation focusing on market research and business development of various health care clients would not create a prohibited conflict under Section 112.313(7), but cautioned that he exercise care to "ensure that he keeps separate his private business endeavors from his public responsibilities" in order to protect against the appearance of impropriety. That counsel is also appropriate here.

With respect to voting, Section 112.3143(2), Florida Statutes applies here. It states, in relevant part:

> No state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer's 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 the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer shall, 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.

As a State officer, the Senator is never required to abstain from voting. Rather, he is required to make disclosure when voting on measures which would inure to his own "special private gain or loss" or which he knows would inure to the "special private gain or loss" of a relative, business associate, or principal. You have indicated that the Senator understands that he would be required to disclose a voting conflict in the event a measure would inure to the special private gain or loss of the firm.

He would also be required to make disclosure when voting on a measure that would inure to the special private gain or loss of his partners in the firm, as they would constitute "business associates" under the statute.[3] It is important to note that not every vote which may affect the

---

[3] Section 112.312(4), Florida Statutes, defines "business associate" as:

> 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.

firm or its members in some way will inure to their "special private gain or loss." If the size of the class of persons affected by the measure is sufficiently large, and there is no disproportionate impact on the Senator, the firm, or its members, the gain or loss will not be "special." See, CEO 93-28 ("assuming that a matter or measure affects you, your company, or its subsidiary, the gain from it would not be 'special' within the meaning of the voting conflicts law if the class affected by it were large.") and see, generally, CEO 90-10, and CEO 89-18.

Finally, as to references to the Senator's public position in firm memoranda and publications, Section 112.313(6), Florida Statutes, states in relevant part:

> 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. This section shall not be construed to conflict with s. 104.31.

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.

These provisions prohibit public officials from corruptly using or attempting to use their official positions or property or resources placed within their trust due to their status as public officials, and it prohibits them from corruptly performing their official duties, in order to secure a special privilege, benefit, or exemption for themselves or another.

In CEO 99-8, we spoke to the propriety of a Circuit Court Clerk identifying herself as such on letters of recommendation written on personal stationery. We referenced In re George Keller, Complaint No. 97-169, where we found that there was no probable cause to believe that Mr. Keller, a city council member, had violated Section 112.313(6) by identifying himself as a member of the City Council while testifying as a character witness on behalf of a constituent whom he knew only because she had contacted him to complain about her treatment by a particular police officer, In re Ilene Liebermann, Complaint No. 90-71, in which we found no probable cause to believe that Ms. Liebermann had corruptly misused her official position by using privately purchased stationery bearing, among other things, the seal of the city, her title, and her name, for writing city electors and recommending to them particular candidates, and In re John Curlee, Complaint No. 89-45, in which we found that a highway patrolman's wearing his uniform while appearing in a television commercial for a Florida Senate candidate did not violate Section 112.313(6). In view of these prior actions we stated:

> Where personal stationery is used and no public resources are expended in making the recommendation, your providing a

> letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with is no different from agreeing to be listed as a character reference. The person reviewing the application will learn, or already know, of your public position and will be given a favorable recommendation of the applicant. Such an action, although it involves the use of public position, would not be "inconsistent with the proper performance of public duties" or made with "wrongful intent."

Similarly, while in this case the Senator's identifying himself as an officeholder may be, in a strict sense, a "use of position," nothing in the context you have described suggests wrongful intent in such self-identification, or that it would be inconsistent with the proper performance of his public duties.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 5, 2008 and **RENDERED** this 10th day of September, 2008.

____

Cheryl Forchilli, *Chair*