COMMISSION ON ETHICS RULE WORKSHOP

July 26, 2019, 9:00 A.M.

Third Floor Courtroom
Florida First District Court of Appeal
2000 Drayton Drive
Tallahassee, FL

AGENDA

I. Introductory Comments by Chair

II. Procedural and Substantive Overview by Commission staff

III. Discussion regarding meaning of "disproportionate benefit" as used in Article II, Section 8(h)(2), Florida Constitution, and the requisite intent for finding a violation of that constitutional provision's prohibition against abuse of public position

IV. Adjournment
MEMORANDUM

TO: Members, Commission on Ethics
FROM: Chris Anderson
SUBJECT: Amendment 12 Rulemaking
DATE: July 10, 2019

At your last Commission meeting (June 7, 2019), you held a rule hearing to consider a new rule required by Amendment 12, which Amendment was proposed by the Constitution Revision Commission and adopted by the voters. The Amendment requires the Commission to do only two things by rule: One—define "disproportionate benefit," and Two—prescribe the requisite intent for finding a violation of the Amendment's prohibition on "abuse" of public position to obtain a disproportionate benefit. The Amendment does not give the Commission any other rulemaking authority.

On June 7, you considered draft rule language offered by your staff, heard from your staff orally, considered written comments and rule language proposed by others, and took oral comments from members of the public and persons representing various organizations. No rule language was approved by you on June 7; rather, the Commission directed that a workshop on language for the rule be held. The workshop was noticed in the Florida Administrative Register, to be held on July 26, 2019, at the Commission's meeting scheduled for that same date. A rule hearing was noticed in the Florida Administrative Register, to follow the workshop at the Commission's meeting on July 26, 2019.

This memorandum is offered to assist you in your discussion of the rule required by Amendment 12; in addition to the contents of this memorandum, you will have for your use and consideration, at the July 26, 2019, workshop and rule hearing, the following: the draft language from Commission staff which was before you on June 7, other written materials which were provided to you for the June 7 rule hearing, additional written materials, and oral comments made at the July 26, 2019, workshop and hearing. For your consideration, use, and ease of reference, contained below in this memorandum are the following: relevant portions of Amendment 12, draft rule language offered by your staff on June 7, other possible language for the rule, and observations from your staff. THE MATERIALS, POSSIBLE RULE LANGUAGE, AND DISCUSSION
CONTAINED IN THIS MEMORANDUM DO NOT LIMIT YOUR ABILITY TO CONSIDER OTHER MATERIALS, POSSIBLE RULE LANGUAGE, AND DISCUSSION WHICH IS OFFERED TO YOU EITHER IN WRITING OR ORALLY.

Amendment 12 prohibition, "Abuse of Public Position"

A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest. The Florida Commission on Ethics shall, by rule in accordance with the statutory procedures governing administrative rulemaking, define the term "disproportionate benefit" and prescribe the requisite intent for finding a violation of this prohibition for purposes of enforcing this paragraph. Appropriate penalties shall be prescribed by law.

Schedule

The Florida Commission on Ethics shall, by rule, define the term "disproportionate benefit" and prescribe the requisite intent for finding a violation of the prohibition against abuse of public position by October 1, 2019, as specified in Section 8(h) of Article II.

Again, it is important to note that the Amendment only gives the Commission two rule tasks: (1) to define "disproportionate benefit" and (2) to prescribe the requisite intent for abuse of public position in order to obtain a disproportionate benefit.

June 7, 2019, draft rule language

34-18.001 General.

(1) The purpose of this chapter is to provide notice and guidance to public officers or public employees, as well as to the general public, regarding the definition of the term "disproportionate benefit," as that term is used in Article II, Section 8(h)(2) of the Florida Constitution, as well as the requisite intent for finding a violation of the prohibition contained in Article II, Section 8(h)(2) of the Florida Constitution.

(2) For the purposes of Article II, Section 8(h)(2) of the Florida Constitution, "disproportionate benefit" means a benefit, privilege, exemption, or result not available to similarly situated persons.

(3) The Commission will consider the following factors in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit:"


(a) The size of the class who will experience the benefit, privilege, exemption, or result;

(b) The nature of the interests involved;

(c) The degree to which the interests of all members of the class are affected; and

(d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others in the class.

(4) The requisite intent for finding a violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is that the public officer or public employee acted, or refrained from acting, with knowledge that his or her action or failure to act would result in a disproportionate benefit.

Alternate possible draft rule language #1

34-18.001 General.

(1) The purpose of this chapter is to provide notice and guidance to public officers or public employees, as well as to the general public, regarding the definition of the term "disproportionate benefit," as that term is used in Article II, Section 8(h)(2) of the Florida Constitution, as well as the requisite intent for finding a violation of the prohibition contained in Article II, Section 8(h)(2) of the Florida Constitution.

(2) Definitions

(a) For the purposes of Article II, Section 8(h)(2) of the Florida Constitution, "disproportionate benefit" means a benefit, privilege, exemption, or result that is not available to similarly situated persons.

(b) As used in this chapter, "similarly situated persons" means those with a commonality or like characteristic to the public officer or public employee that is unrelated to the holding of public office or public employment.

(c) As used in this chapter, "class" means the persons who will either benefit or have the potential to benefit from a public officer or public employee's abuse of his or her public position.

(3) The Commission will consider the following in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit:"
(a) The size of the class who will experience the benefit, privilege, exemption, or result;

(b) The nature of the interests involved;

(c) The degree to which the interests of all members of the class are affected;

(d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others in the class; and

(e) The degree to which there is uncertainty at the time of the abuse of public position as to whether there would be any benefit, privilege, exemption, or result and, if so, the nature or degree of the benefit, privilege, exemption, or result must also be considered.

In addition, no public officer or public employee will be considered to have abused their public position to obtain a disproportionate benefit if he or she has complied with all of the other standards of conduct, and the disclosure requirements, of Article II, Section 8 of the State Constitution and Part III, Chapter 112 of the Florida Statutes regarding the conduct in question.

(4) The requisite intent for finding a violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is that the public officer or public employee acted or refrained from acting with a wrongful intent and for the purpose of obtaining any benefit, privilege, exemption, or result resulting from the act or omission which is inconsistent with the proper performance of his or her public duties.

Alternate possible draft rule language #2

(Note: this version differs from Alternate #1 only in that it removes references to "class")

34-18.001 General.

(1) The purpose of this chapter is to provide notice and guidance to public officers or public employees, as well as to the general public, regarding the definition of the term "disproportionate benefit," as that term is used in Article II, Section 8(h)(2) of the Florida Constitution, as well as the requisite intent for finding a violation of the prohibition contained in Article II, Section 8(h)(2) of the Florida Constitution.

(2) Definitions
(a) For the purposes of Article II, Section 8(h)(2) of the Florida Constitution, "disproportionate benefit" means a benefit, privilege, exemption, or result that is not available to similarly situated persons.

(b) As used in this chapter, "similarly situated persons" means those with a commonality or like characteristic to the public officer or public employee that is unrelated to the holding of public office or public employment.

(3) The Commission will consider the following in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit:"

(a) The number of persons, besides the public officer, who will experience the benefit, privilege, exemption, or result;

(b) The nature of the interests involved;

(c) The degree to which the interests of all those who will experience the benefit, privilege, exemption, or result are affected;

(d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others who will receive a benefit, privilege, exemption or result; and

(e) The degree to which there is uncertainty at the time of the abuse of public position as to whether there would be any benefit, privilege, exemption, or result and, if so, the nature or degree of the benefit, privilege, exemption, or result must also be considered.

In addition, no public officer or public employee will be considered to have abused their public position to obtain a disproportionate benefit if he or she has complied with all of the other standards of conduct, and disclosure requirements, of Article II, Section 8 of the State Constitution and Part III, Chapter 112 of the Florida Statutes regarding the conduct in question.

(4) The requisite intent for finding a violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is that the public officer or public employee acted or refrained from acting with a wrongful intent and for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties.
Observations from your General Counsel

It is indisputable that the guiding principle (polestar) for construction of the meaning of a provision of law is the intent of the framers. Further, intent is, first and foremost, to be gleaned from a reading of the language of the provision as adopted; such language is the intrinsic evidence of the intent of the framers. Extrinsic evidence of intent, such as oral comments by participants during deliberations or proceedings of a body enacting a provision as to the participant's view of the meaning of the provision, or possibly, comments or statements made by a framer subsequent to or outside of the body's adoption proceedings, is of secondary value in discerning the intent and must yield to the plain language adopted. The Commission's work, by rule, is to do two things: One—define the term "disproportionate benefit," and Two—prescribe the requisite intent for finding a violation of the prohibition. Both of these tasks are inextricably linked because abuse of position alone, not tied to a disproportionate benefit, will not violate the prohibition, and neither will a disproportionate benefit, not linked to abuse of public position, violate the prohibition.

"Disproportionate benefit" plainly is analogous to or synonymous with "special private gain," a term well known under the voting conflicts law of Section 112.3143, Florida Statutes, and defined in Section 112.3143(1)(d), Florida Statutes. Thus, it is logical and makes great sense for the Commission's rule to make use of factors from that definition; all of the versions of language in this memorandum make some use of this definition.

As to "abuse" of public position, this plainly is not synonymous with mere "use" of public position. The plain or dictionary definitions of "abuse" expressly incorporate or refer to terms such as "wrong," "improper," "deceit," or "misuse." In contrast, plain definitions of "use" are not linked to such terms. The plain terms associated with "abuse" readily copy or mirror those associated with Section 112.313(6), Florida Statutes ("misuse of public position" or "corrupt use of public position"). In this regard, it is important to remember that the Amendment's charge to this Commission regarding prescribing intent is to prescribe intent for finding a violation of the prohibition, and the prohibition plainly states abuse, not use. Thus, alternatives in this memorandum use language relating to Section 112.313(6).

Further, it can be argued that the focus of the Amendment is on "abuse," not on "disproportionate benefit," given that there are many instances in the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes) where less-than-equal, or disproportionate, benefits are allowed and recognized. In this regard, language alternatives, herein, provide safe harbor language for your possible approval.

However, I do not view the amendment as giving the Commission the authority to make a rule defining "public officer" or "public employee" for purposes of the prohibition, and, indeed, such a definition is not needed given the definition of "public officer" codified in the Code of Ethics and given the very many decisions of the Commission on Ethics construing the term "public employee." Also, it is my view that the Commission should not approve rule language restricting "disproportionate benefit" only to benefits economic in nature; and that it should not approve language restricting the meaning of abuse only to actions without also including omissions.

In sum, the choice of language for the rule is, of course, yours, not limited to the language alternatives in this memorandum. There are arguments which can be made for and against all of the language alternatives. I am happy to comment or answer any questions you may have.

EACH LANGUAGE CHOICE IN THIS MEMORANDUM ALSO IS PRINTED
SEPARATELY AND ATTACHED TO THIS MEMORANDUM.

(Note: Any materials received at the Commission offices after this memorandum and the other materials for the July 26 meeting are sent to you will be placed on the Commission website www.ethics.state.fl.us, if such materials are received in time to be placed on the website).
34-18.001 General.

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(2) For the purposes of Article II, Section 8(h)(2) of the Florida Constitution, "disproportionate benefit" means a benefit, privilege, exemption, or result not available to similarly situated persons.

(3) The Commission will consider the following factors in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit:"

(a) The size of the class who will experience the benefit, privilege, exemption, or result;

(b) The nature of the interests involved;

(c) The degree to which the interests of all members of the class are affected; and

(d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others in the class.

(4) The requisite intent for finding a violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is that the public officer or public employee acted, or refrained from acting, with knowledge that his or her action or failure to act would result in a disproportionate benefit.
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(b) As used in this chapter, "similarly situated persons" means those with a commonality or like characteristic to the public officer or public employee that is unrelated to the holding of public office or public employment.

(c) As used in this chapter, "class" means the persons who will either benefit or have the potential to benefit from a public officer or public employee's abuse of his or her public position.

(3) The Commission will consider the following in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit:"

(a) The size of the class who will experience the benefit, privilege, exemption, or result;

(b) The nature of the interests involved;

(c) The degree to which the interests of all members of the class are affected;

(d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others in the class; and

(e) The degree to which there is uncertainty at the time of the abuse of public position as to whether there would be any benefit, privilege, exemption, or result and, if so, the nature or degree of the benefit, privilege, exemption, or result must also be considered.

In addition, no public officer or public employee will be considered to have abused their public position to obtain a disproportionate benefit if he or she has complied with all of the other standards of conduct, and the disclosure requirements, of Article II, Section 8 of the State Constitution and Part III, Chapter 112 of the Florida Statutes regarding the conduct in question.
(4) The requisite intent for finding a violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is that the public officer or public employee acted or refrained from acting with a wrongful intent and for the purpose of obtaining any benefit, privilege, exemption, or result resulting from the act or omission which is inconsistent with the proper performance of his or her public duties.
Alternate possible draft rule language #2

(Note: this version differs from Alternate #1 only in that it removes references to "class")

34-18.001 General.

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(2) Definitions

(a) For the purposes of Article II, Section 8(h)(2) of the Florida Constitution, "disproportionate benefit" means a benefit, privilege, exemption, or result that is not available to similarly situated persons.

(b) As used in this chapter, "similarly situated persons" means those with a commonality or like characteristic to the public officer or public employee that is unrelated to the holding of public office or public employment.

(3) The Commission will consider the following in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit."

(a) The number of persons, besides the public officer, who will experience the benefit, privilege, exemption, or result;

(b) The nature of the interests involved;

(c) The degree to which the interests of all those who will experience the benefit, privilege, exemption, or result are affected;

(d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others who will receive a benefit, privilege, exemption or result; and

(e) The degree to which there is uncertainty at the time of the abuse of public position as to whether there would be any benefit, privilege, exemption, or result and, if so, the nature or degree of the benefit, privilege, exemption, or result must also be considered.

In addition, no public officer or public employee will be considered to have abused their public position to obtain a disproportionate benefit if he or she has complied with all of the other standards
of conduct, and disclosure requirements, of Article II, Section 8 of the State Constitution and Part III, Chapter 112 of the Florida Statutes regarding the conduct in question.

(4) The requisite intent for finding a violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is that the public officer or public employee acted or refrained from acting with a wrongful intent and for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties.
May 29, 2019

Mr. Grayden Schafer  
Senior Attorney  
Commission on Ethics  
P.O. Drawer 15709  
Tallahassee, FL 32317-5709

RE: Commission on Ethics  
Rule Number 34-18.001

Dear Mr. Schafer:

I have reviewed the above-referenced rule and offer the following comments for your consideration and response:

34-18.001: In order to be comprehensible and unambiguous, should the rule define the terms “similarly situated persons” and “class?”

If you have any questions, please do not hesitate to contact me. Otherwise, I look forward to your written response.

Sincerely,

Sharon Jones  
Senior Attorney
May 31, 2019

Ms. Sharon Jones
Senior Attorney
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 W. Madison Street
Tallahassee, FL 32399-1400

Re: Commission on Ethics
Rule 34-18.001

Dear Ms. Jones:

I have received your May 29, 2019, letter concerning proposed Rule Number 34-18.001. Thank you again for your careful review of the proposed rule. I met with members of the Commission's legal and administrative staff concerning your inquiry as to whether a definition of "similarly situated persons" or "class" should be incorporated into the proposed rule. After discussion and careful consideration, we concluded, at this point, that it would be unnecessary to define the terms further in the draft rule. However, I will apprise the Commission members of your inquiry when presenting the draft rule for their approval at the rule hearing on June 7, 2019, and inform you of any additions they may decide to make.

If you have any questions, please do not hesitate to contact me. Your efforts at reviewing the draft rule are greatly appreciated.

Sincerely,

Gray Schafer
Gray Schafer
Senior Attorney
Florida Commission on Ethics
(850)-488-7864
June 13, 2019

Mr. Grayden Schafer
Senior Attorney
Commission on Ethics
P.O. Drawer 15709
Tallahassee, FL 32317-5709

RE: Commission on Ethics
Rule 34-18.001

Dear Mr. Schafer:

Upon further review, it appears that section 112.322, F.S., was inadvertently not included in the citations for rulemaking authority and the law implemented for the proposed rule. These citations must be included as, "[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.” See §120.536, Fla. Stat. (2018). Please correct the citations as a technical change when you file the rule for adoption.

If you have any questions, please do not hesitate to contact me. Otherwise, I look forward to your written response.

Sincerely,

Sharon Jones
Senior Attorney
34-XX.100 Purpose

In general, the purpose of this rule is to define “disproportionate benefit” as that term is used in Art II, Section 8(h)(2), Florida Constitution as approved by the voters in November 2018. The rule also prescribes the requisite intent to find a violation by a person included within the scope of this rule.

34-XX.200 Definitions

For purposes of defining “disproportionate benefit” and determining the requisite intent for a violation:

(1) “public officer” includes any person elected or appointed to hold office in any agency, including any person serving on an advisory body.

(2) “agency” means 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; any public school, community college, or state university; or any special district as defined in s. 189.012.

(3) “public employee” includes....

34-XX.300 Applicability

No public officer or public employee shall corruptly use his or her official position to obtain an economic benefit for him or herself, his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest that is materially greater than any economic benefit accruing to other similarly situated persons.

(1) In determining whether there is a materially greater economic benefit, the following factors shall be taken into account:

a. The size of the class affected by the vote or action.

b. The nature of the interests involved.

c. The degree to which the interests of all members of the class are affected by the vote or action.

d. The degree to which the officer or employee, his or her spouse, children or employer; or any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest receives a greater economic benefit when compared to other members of the class.
e. The degree to which there is uncertainty at the time of the vote or action as to whether there would be any economic benefit to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit must also be considered.

(2) No public officer or employee shall be considered to have corruptly used his or her official position in violation of this section if s/he has complied with the Code of Ethics as it relates to the vote or action taken.

34-XX.400 Examples
Rule 34-18.001

Language Submission – Commission on Ethics

“Disproportionate Benefit” shall mean obtaining through official conduct the agreement or cooperation of state, local or governmental contracted entities any type of “special benefit” for a public officer, public employee, the employer of a public officer, their family members or any businesses in which they have an interest of more than 10%. A “special benefit” shall include no bid contracts, set aside agreements, memorandum of agreements or any other similar contractual or legal instruments that obligate or bind a state agency, local government or quasi governmental entity, special legislative appropriations not open to competitive bid as defined under FS 287.001 or documents not available to citizens of any type.

The requisite intent for finding a violation of the prohibition shall be that substantial and competent evidence that demonstrates that the public officer or public employee sought to seek a “disproportionate benefit” on behalf of him or herself or for a company in which they have a 10% or more ownership or their employer or any family member no matter the type of relationship. A probable cause investigation shall commence upon evidence that there was at least one attempt to plan or organize a “special benefit” in violation of this prohibition.
Rule Proposal

Disproportionate Benefit

Rule 34-18.001

"Disproportionate benefit" shall mean any conduct by a public officer, which shall include public employees of any type, the employer of the public officer, their family members or any businesses in which they may own more than 5%.

A disproportionate benefit shall be defined by the following criteria:

1. Did the public official or a member of their family, employer or a business in which they own 5% receive a special gain or benefit from any act or conduct to which the public officer owes a fair and reasonable duty?

2. Did the public official or public employee or their family member receive or seek a no bid contract of any type in the jurisdiction to which they owed a public duty of any kind?

A Disproportionate benefit shall NOT include any of the following acts:

1. A public official or public employee who responds to a public agency who has made an inquiry of any type.

2. A public official or public employee who seeks to compete for contracts in jurisdictions outside of the jurisdictions in which they are employed or have a public obligations and there is NO contracts.

A probable cause investigation shall commence upon the finding of the following facts:

1. A sworn complaint filed alleging a violation of this prohibition and stating a public official or public employee or their family members or businesses have received a disproportionate benefit as defined under this section.

2. There shall be at least once instance where the public official or the public employee made at least one attempt to create a special gain or benefit for themselves, a family member, an employer or a business in which they own 5%

The Commission on Ethics shall find a violation of this prohibition on Disproportionate benefit using substantial and competent evidentiary standard to decide whether the evidence supports a violation of this standard.
February 5, 2019

PROPOSED RULE – RULE 34 – Article II – H – 8 - 2

"Disproportionate Benefit" shall mean any deliberate act or omission by a public officer and public employees that result in a disproportionate benefit for the public officer, the public employee their spouse, children, or employers, any business in which they contract, serve as an officer, partner, director, proprietor or in which they own an interest that results in a special gain, benefit that would not otherwise be available absent their employment with a public entity or services as a public officer. A determination of whether a disproportionate benefit exists shall be made through an investigation of the facts that meet the following criteria:

The Commission on Ethics shall determine a violation of this rule by the following criteria:

1. Did the public officer or public employee receive a non-bid contract from a publicly funded board, commission or governmental agency where there were other entities that could have offered competitive bids?

2. Was the public officer or public employee the most qualified candidate or option available for the position sought if the position was a publicly funded position?

3. Did the public officer seek to circumvent the competitive bid statute in order to assist a vendor with whom the officer had a personal connection?

4. Did the public officer utilize his or her position to seek any legal opinion or advisory opinion to favor his or her use of public resources to create a special gain or benefit for a family member or an employer?

5. Did the public officer or public employee facilitate or provide assistance of any type to encourage the formation of third parties such as foundations, committees or other organizations that would then seek public funds and provide a benefit of any type to a family member to include step children, uncles, aunts, cousins, grandparents, step parents and any other type of family member that might be included as part of an extended family?

6. Did any public officer or employee fail to discharge their duties in a customary and reasonable fashion and such conduct resulted in a public officer, employee or employer of the public officer gaining a special disproportionate benefit that unfairly creates a benefit to one party at the expense of another.

7. Is there substantial and competent evidence of prior conduct that would demonstrate that the public officer or public employee has engaged in a pattern of conduct in the past that would demonstrate the use of their special powers and privileges to secure a disproportionate benefit for others?

8. Are there examples of conduct that support a deliberate act of any type or pattern of conduct that has resulted in an unfair and disproportionate benefit in favor of the public official or the public employee?
9. The Commission on Ethics shall review public officer’s e-mails, credit card statements, personal expense vouchers and use of travel assets to make an initial determination of whether evidence of a disproportionate benefit might exist.

10. The Commission on Ethics shall examine whether any contracts, agreements or business relationships subject of a complaint alleging a violation of this rule have resulted in an unfair advantage to the public officer or the public employee in any way.

11. A disproportionate benefit shall not be present if a public officer or public employee or their employer, spouse or family members are a party to any agreement or contract that is subject to FS 287.001.
March 14, 2019

PROPOSED RULE – 34 – ARTICLE II – H – 8 – 2

Disproportionate Benefit will mean any act or omission by a public official or public officer where they have a reasonable duty and obligation to act in the reasoned interest of the citizens to whom they owe a reasonable duty or obligation and the failure to act or the official act itself creates a unique gain for a company, family member, employer or partner that otherwise would not be available absent the act or omission of the public official or public employee. The public officer shall report any known conflicts of interest to the Commission on Ethics upon discovery.

The Commission on Ethics shall investigate each alleged violation on a case by case basis and shall determine whether each case meets the following criteria:

1. Did the public officer have a duty to the public or jurisdiction to which they were assigned to serve?

2. Did the public officer fail to act or act in a deliberate manner to create a special gain for any person described in this section?

3. Did the public officer fail to disclose or report any conflicts of interests to the appropriate parties?

It shall not be considered a disproportionate benefit if;

1. A public officer competes for contracts under a competitive bid arrangement with other companies equally qualified.

2. A public officer can respond to any public inquiry no matter the reason or issue.

3. A public officer has the freedom to ask for records, seek information and make such information available to members of the public via a website or social media that is accessible to all citizens.

4. A public officer may omit to act for reasons of health, sickness or family emergencies.

The Commission on Ethics shall adopt the substantial and competent evidentiary standard threshold as the standard for review as to whether to find whether a violation has been committed by a public officer.
Mr. Schafer

I apologize I misspelled your name and the e-mail got rejected.

Doug

From: Doug Adkins <dadkins777@bellsouth.net>
Sent: Monday, February 11, 2019 7:16 AM
To: shafer.grayden@leg.state.fl.us
Cc: anderson.chris@leg.state.fl.us
Subject: SUBMISSION OF ADDITIONAL TESTIMONY

Mr. Schafer

I would respectfully like to submit to the Commission the comments and debate from members of the constitutional revision commission on April 16, 2018 https://thefloridachannel.org/videos/4-16-18-constitution-revision-commission/ located at 5:01 and to 6:23 - associated with proposal 39 which became the amendment #12 revision to the constitution article II, section 8, article 5 section 13 and article 7, new section. I believe that these comments are meaningful and relevant to the intent of the CRC commissioners as to the need for a strict definition of clear meaning of “disproportionate benefit”.

Contrary to the testimony given at the last meeting (Feb 8, 2019) there was NOT broad discussion about the application of “case law” relative to how the Commission on Ethics might define this term. It appears to be well recognized based on the debate and discussion that the words “disproportionate intent” while mentioned in case law is intended to be addressed “de novo” by the Commission on Ethics otherwise there would be no need to place these words in the constitution. The 34-4 vote showed substantial support for the intent of the sponsor and the revision, which were drafted in part by experts in the field of legislative affairs, legal issues and had significant knowledge of these issues.

Thank you for allowing me to enter this testimony into the record for consideration. I look forward to seeing you at the next public rule hearing, I plan to submit another proposed rule at that time.

Douglas Adkins
Fernandina Beach
904-583-0134-cell
Mr. Anderson,

I believe that a great deal of public testimony was directed at the broad and lack of clear meaning that rendering the proposed draft vague. If a rule forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ to its application then the rule is considered vague in my opinion and should be considered invalid.

Further I believe that under Florida Statute 120 there is some requirements that suggest that when adopting rules the Commission should ensure that there are clearly annunciated principles, criteria and standards so that the regulated persons (public officers and public employees) can know with some degree of certainty how to comply. I believe that the proposed draft fails to meet this standard in that there does not appear to be any principles, criteria or standards clearly annunciated in the proposed rule that a person with common sense intelligence could read and understand.

If the role of the Commission on Ethics is to simply “define” the term “Disproportionate benefit” then it would be my opinion that perhaps this really means that the Commission should focus on drafting language that is truly a definition of the term rather than a regulation as seems to be the case as the hearings have unfolded. I would suggest that the statutory definition is intended to merely inform the reader not to create rights nor enforce duties. As I think about this challenge it appears to me that the logical conclusion is to focus on the mere definition and that would imply there are no rights created and no duties to enforce. Maybe this is just what is described in the amendment, a simple definition.

As I mentioned at the hearing I am concerned how this rule impacts the economic interests of all the good public servants and the public employees and public officers who also have small businesses or are engaged in other types of commerce outside their official duties. While the use of the public position or role inside the jurisdiction is particularly offensive and creates unfair trade advantages that are hard for others to compete against and to cover come generally speaking, it is egregious when the public sees no bid contracts awarded to companies where the company is owned in part by a public official and clearly there are other companies that could substantially perform the same work. This is especially offensive when the taxing board or commision is paying more under these agreements that what otherwise would be the case for the same service.

In my opinion whether it is a School Board and a Community College and how they handle dual enrollment or articulation agreements and whether those agreements create a special gain or benefit to the employer of a elected official who is also employed by either party and who is also involved in the negotiation of these agreements creates an appearance of impropriety and should be avoided. If the school board Chairman is also the Executive Director of the
community college and the school board pays the community college $70,000 a year and the articulation agreement between the school board and community college in effect restricts or limits which campuses the students in that school district can attend and that is not how similar articulation agreements are drafted between the same community college and a neighbor school district, does this example rise to a disproportionate benefit? Who is receiving the benefit? Should students not have equal rights to attend any campus under that articulation agreement?

In my opinion the fact that a school superintendent could ask for an advisory opinion and receive a favorable opinion clearing the path to allow the school district to contract with a step son of the superintendent creates an appearance of impropriety and erodes the public confidence. While seeking an opinion would not be a problem, acting on that opinion perhaps would then become a disproportionate benefit or result in a disproportionate benefit to a public official. The question then arises should the Commission on Ethics even facilitate these situations by answering these sorts of inquiries when it is clear what is being sought? Is the issuance of the advisory opinion itself creating a disproportionate benefit to a public official?

In my opinion you have other instances where school board lawyers make recommendations to the school board members and then based upon these recommendations both public officers and citizens make decisions in good faith they rely upon the competent decision making roles of the school board attorney’s and then when the school board lawyer decides to say I never know that person worked for the school board when I told you they could have a no bid contract, this compromises the public’s confidence. Despite the recommendations or faulty opinions of the school board lawyers, ignorance of the law is not a reasonable excuse and people have a fair and reasonable duty to glean an understanding of these facts themselves, through seeking an advisory opinion from the Commission on Ethics or the Attorney General. Does the school board attorney through their acts and omissions create a disproportionate benefit under this example?

If an investigator for the Commission on Ethics who is conducting a probable cause investigation and is given a list of people who are possible witnesses and by an act of omission fails to interview identified witnesses has that investigator created a disproportionate benefit to the person that is under investigation? Does this violate the equal protection clause and create a subsequent violation of due process through a defective review or investigative process? So while these are possible impacts to the Commission itself there are impacts to small businesses and I would urge the Commission to review the FS 120.54 provisions below;

(b) Special matters to be considered in rule adoption.—
1. Statement of estimated regulatory costs.—Before the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541. However, an agency must prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if:
a. The proposed rule will have an adverse impact on small business; or
b. The proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within 1 year after the implementation of the rule.
2. Small businesses, small counties, and small cities.—
a. Each agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address. An agency may define “small business” to include businesses employing more than 200 persons, may define “small county” to include those with populations of more than 75,000, and may define “small city” to include those with populations of more than 10,000, if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small businesses, small counties, and small cities, or any combination of these entities:
   (i) Establishing less stringent compliance or reporting requirements in the rule.
(II) Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements.
(III) Consolidating or simplifying the rule’s compliance or reporting requirements.
(IV) Establishing performance standards or best management practices to replace design or operational standards in the rule.
(V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

b.(I) If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the rules ombudsman in the Executive Office of the Governor at least 28 days before the intended action.

(II) Each agency shall adopt those regulatory alternatives offered by the rules ombudsman in the Executive Office of the Governor and provided to the agency no later than 21 days after the rules ombudsman’s receipt of the written notice of the rule which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. When regulatory alternatives are offered by the rules ombudsman in the Executive Office of the Governor, the 90-day period for filing the rule in subparagraph (e)2. is extended for a period of 21 days.

(III) If an agency does not adopt all alternatives offered pursuant to this sub-subparagraph, it shall, before rule adoption or amendment and pursuant to subparagraph (d)1., file a detailed written statement with the committee explaining the reasons for failure to adopt such alternatives. Within 3 working days after the filing of such notice, the agency shall send a copy of such notice to the rules ombudsman in the Executive Office of the Governor.

I believe that considering how this impacts the labor and economic interests of small businesses I would suggest there is a fiscally impact of more than $1 million statewide from the adoption of this rule. I believe that there are less expensive alternative rules available to the Commission to consider and would urge the Commission to consider the proposed alternative rules that were presented at the hearing or to consult with the rules ombudsman to examine other alternatives.

Based on the testimony and the importance of this rule and its impact on Floridians and how it will be used to improve public confidence in our public officials and government I respectfully request that the Commission grant additional hearings to continue the rule making process until a better draft rule can be prepared upon which there is greater reliance it will meet the requirements and include clear standards, criteria and principles and will have plain meaning so people can easily understand hw to comply and remain compliant.

Thank you for you work and continued service to Florida, It is appreciated what you do each day to help improve public confidence in our state and local government.

Regards

Douglas Adkins
Fernandina Beach, Florida
904-583-0134
Mr. Anderson

I was hoping to hear whether the Commission on Ethics had published a proposed rule yet and I have not heard anything further. I am very interested in the work the Commission is doing in this area and would like to be made aware of any proposed rules or additional workshops the Commission might hold and was hoping you could tell me how I can keep myself abreast of the developments around the proposed rule.

If you have already published a proposed rule, please send me a copy of what was published and I would like to be included on any e-mails regarding further discussion of the rule. Public corruption continues to be a major stumbling block for members of the public and restoring the necessary confidence and respect needed to take on the big challenges that lie ahead.

I look forward to hearing from.

Thank you for your service.

Doug Adkins
Fernandina Beach, Florida
904-583-0134-cell
From: carslay@aol.com <carslay@aol.com>
Sent: Tuesday, March 26, 2019 7:46 PM
To: Anderson, Chris <ANDERSON.CHRIS@leg.state.fl.us>
Subject: Letter
Mr. Shafer

I would like to communicate based on my review of the draft rule that I believe the rule is too vague and broad and does not outline principles, criteria or standards necessary to ensure the rule meets the requirements for plain meaning. I would like to request that the Commission consider holding additional workshops to address the criteria, principles and standards and to also permit greater input to the process. I am opposed to the current rule as was presented and would encourage the staff to create a draft with greater detail based on the alternative rules that were submitted as less expensive alternatives.

Thank you

Carlos Slay
Callahan, Florida
Virindia, I see the rule for the constitutional amendment is up. I wanted you to know that I have used the draft language in all my classes including the state tax collectors and state supervisors of election and have had no adverse comments. I believe the people of Fl. have spoken in support of a stricter standards. Norm Ostrau

Sent from my iPad
Dear Mr. Schafer,

I serve as Manager of the Spring Lake Improvement District, a 3,359-acre independent district in Highlands County created in 1971 by the Florida Legislature. The district is governed by a 5-member board of supervisors, three of which are elected by the landowners on a one-acre, one-vote basis. The other two seats are filled by popular election. I understand that the Florida Commission on Ethics is currently developing a rule to implement Amendment 12 that was passed by the voters in November 2018. I have reviewed the current draft rule and have some questions/concerns. Namely:

1. SLID is in a rural area. When contracting for goods or services, there are often not many vendors to select from. In such a small community, it would not be unusual for one of my five supervisors to have a personal connection to a local vendor, perhaps a family member employed by the vendor. If the district used a competitive bidding process and a particular vendor was the highest ranked proposer, what is a supervisor to do if they have a relationship to this vendor? Under current law, the supervisor could abstain citing the potential conflict. Under the current draft rule, that could be construed as “refraining from acting” which would violate the rule. What are they to do? Vote and be in violation? Abstain and be in violation?

2. The language of Amendment 12 says a public officer or employee shall not abuse his position to obtain a disproportionate benefit. However, the current draft rule provides a different standard. Rather than abuse of office, the intent required for a violation is mere “knowledge.” This has the potential to subject officers and employees to ethics challenges.

3. I am concerned about the economic impact of the draft rule on SLID. I believe the rule may result in increased insurance costs for public officers and director’s insurance due to the threat of increased ethics complaints. I also believe that it may result in decisions to contract with more expensive vendors, not located in our area, in order to avoid any potential “disproportionate benefit”.

4. Finally, with all the uncertainties surrounding the draft rule and its potential impacts, I fear it will have a chilling effect on residents running for office. In such a small community, it is already hard enough to find qualified candidates. This will make it that much more difficult.

I appreciate you taking the time to consider my concerns and respectfully request that the Commission on Ethics re-visit the draft rule to address some of these concerns.

Sincerely,

Joe DeCerbo, District Manager
I am the Mayor of the Town of Jupiter and the President of a private company called Special District Services, Inc. which manages over 100 special taxing districts in Florida. The proposed rule that attempts to define "disproportionate benefit" actually creates a lot of confusion and consternation on for board members of special districts like Ch. 190 Community Development Districts, Ch. 189 Improvement Districts, and Ch. 298 Water Control Districts. All of these types of districts have landowner/developer controlled boards who are elected to make improvements, such as infrastructure and drainage, to improve the land within the district. The proposed language of the proposed rule potentially prohibits the any board comprised of developer-representatives serving.

As an elected official myself, I encourage legislation that prohibits any quid pro-quo or "pay for play" type of politics. Conversely, vague definitions that are open for broad interpretation is not good policy and I would encourage this office to try and either better define the terminology or eliminate the language in question.

Thank you for the opportunity to be heard.
My company manages over 140 Community Development District's across the State of Florida, my employees are usually officers of each Community Development District. Am I, my company or employees benefitting disproportionately? We make decisions and non-decisions everyday that could be viewed as benefitting one way or the other....this proposed rule/definition seems vague and subjective. This rule should not be adopted as being presented at this time and my organization and personnel are strongly opposed to the adoption at this time.

Thanks for your consideration.

Darrin Mossing

Governmental Management Services

President
The current proposed open-ended definition of ‘disproportionate benefit’ is problematic for Boards of special districts throughout the State of Florida. I serve as District Manager for large stewardship districts such as the Babcock Ranch Community Independent Special District (17,600 acres) and East Nassau Stewardship District (24,000 acres) as well as community development districts throughout the State of Florida. These districts plan, finance, construct, operate & maintain public infrastructure, amenities, facilities, wetlands and conservation lands. The district Boards are initially elected by the majority landowner(s) which is initially the Land Developer. The Land Developer initially has all the risk and all the investment in the land being developed. In many instances, the districts will issue tax exempt bonds to fund the acquisition and/or construction of the public infrastructure, amenities, facilities, and mitigation to wetland and conservation lands. Ultimately, all landowners such as future residents and businesses located within the district will benefit from these public improvements and the district’s ability to effectively manage and maintain these assets. Without these infrastructure improvements and environmental stewardship, the emerging communities such as Babcock Ranch would never be possible. Accordingly, the definition of ‘disproportionate benefit’ being as it is currently crafted, there is great concern that as these districts fund public infrastructure that the argument could be made that the Land Developer is receiving disproportionate benefit to their private lands as a result of the construction of the public infrastructure. As with any new development, infrastructure such as roads, water, sewer, storm water management, wetland mitigation, environmental stewardship, parks, and etc are vital components to allowing a new community to ever be developed. Development orders/development agreements entered into between local governments/the State and Land Developers require the construction of this infrastructure to serve that new planned community as well as provide general benefit to the general public. Moreover, the State, cities, and counties aren’t burdened financially by these new developments coming on-line as these districts ensure that those that benefit directly from the growth (lands in the district) pay for that growth. So by the very nature of constructing infrastructure improvements within these districts, the properties within the district by legal definition receive special and peculiar benefit. So yes, the landowners in these special districts will receive this special and peculiar benefit. The Land Developer will initially receive this special and peculiar benefit and so will the future residents and business owners. The concern is that landowner elected representatives serving on special district Boards vote to issue bonds or take other actions to construct infrastructure and maintain that infrastructure at a high level that it can be argued that this improved the value of the private lands in the district and accordingly, the Land Developer and more specifically its elected district Board members have received ‘disproportionate benefit’ to the increased use and value of their private lands. Moreover, in many instances, special districts will acquire infrastructure improvements from Land Developers for the actual cost of construction or at a lesser value. The concern is if the district purchases infrastructure improvements from the Land Developer for the actual cost of construction, that the argument could be made that the Land Developer and more specifically the district Board member employed by or associated with the Land Developer would be deemed as receiving ‘disproportionate benefit’ as a result of the district’s acquisition of these infrastructure improvements. Special districts such as stewardship districts, community development districts, and water control districts rely heavily on the initial Land Developer to serve as the catalyst to bring the vision, expertise, and financial resources needed to build new communities such as the 17,600 acre Babcock Ranch project. The Land Developer in this case, Sid Kitson, and the Babcock Ranch Community Independent Special District are a prototypical example of a private-public partnership that is producing an environmentally conscious community which is being watched across the entire United
States. This is development done right and this proposed rule could potentially cause irreparable harm to the effective functioning of special districts that partner with Land Developers like Sid Kitson throughout the State.
I have questions on the proposes changes to Article II, Section 8(h)(2) regarding "Disproportionate Benefit".

1. Who has the burden to prove that a board member or official received a “Disproportionate Benefit” from a board action if a complaint is filed?

2. Is a board member who either recuses himself from a vote or votes “No” on an action that could be a potential conflict for him absolved of the conflict even if the rest of the board voted “Yes”?

3. What happens if the entire board votes in a way to avoid a potential conflict for one board member but that decision is not in the best interest of the community in which it serves?

4. Can a board member of a special district receive potential benefits from other special districts in which he is completely unrelated to and has no voting capacity in any way?

5. To what extent is a board member required to disclose all of his personal contracts and business relationships? Only if a potential situation comes to the board?

6. Will there be some form of a review committee that a board can present a situation to and obtain a ruling or opinion before the board takes action?
From: oldplantation@bellsouth.net
Sent: Thursday, June 06, 2019 2:54 PM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: FL COMMISSION ON ETHICS RULEMAKING AMENDMENT 12

Dear Mr. Schafer:

My name is Pat O’Quinn, the District Superintendent for the Old Plantation Water Control District. OPWCD is an independent special district, comprising about 10,000 acres within the City of Plantation in Broward County. The district was created by the Legislature in 1946 to provide surface water management improvements and services to support the development of this part of Broward County. OPWCD is governed by a 3-member board of supervisors, each elected by the landowners within the district.

It has been brought to my attention that the Ethics Commission is developing a rule to implement Amendment 12, approved by the voters in November. I have reviewed the draft rule and have some concerns, including:

1. The definition of “disproportionate benefit” in the rule is vague and will allow the Commission to make decisions on a case-by-case basis. Currently, there are decades worth of case law defining an abuse of office on which public officers and employees can rely.
2. There is no definition of “public officer” or “public employee”. Does that include part time employees? Independent contractors?
3. Under current law, if a potential conflict arises, a supervisor can abstain from voting. Under the draft rule, would that be considered “refraining from acting”, thereby subjecting them to a violation?
4. I think it’s likely that the uncertainty created by this rule will result in increased costs to OPWCD, in the form of litigation expenses over ethics complaints and higher officers and directors insurance.
5. I also think it will make it more difficult to find qualified candidates for office. With all of the potential pitfalls in this draft rule, I’m afraid people will not be willing to run for an office.

Thank you for taking the time to consider my comments.

H.C. (Pat) O’Quinn, Superintendent
Old Plantation Water Control District
8800 N. New River Canal Road
Mail: P.O. Box 15405
    Plantation, FL 33318
Office: (954) 472-5596
Fax: (954) 472-6950
June 6, 2019

State of Florida Commission on Ethics
Attention: Grayden Schafer, Senior Attorney
P.O. Drawer 15709
Tallahassee, FL 32317-5709

Re: Commission on Ethics Proposed Rule 34 – 18.001

Dear Mr. Schafer:

On behalf of the Florida Sheriffs Association, I wish to express our concerns with the proposed rule. I echo the comments of others that it appears to be vague and not sufficiently specific to give fair warning to public officials such as sheriffs regarding the prohibited conduct. Under the current proposal, it also appears that a gift to a public official which is currently lawful under the Code of Ethics for Public Officers and Employees, such as a hunting trip that has been properly reported by a sheriff, would be considered a disproportionate benefit if that same hunting trip was not made available to similarly situated public officials, such as the other county constitutional officers or sheriffs. The problem with proposed rule is that the focus is upon availability to similarly situated public officials, rather than the circumstances concerning the obtaining of the benefit.

We suggest that the test for disproportionality focus on whether the benefit, privilege or exemption was excessive or unreasonable based on the totality of the facts and circumstances. Certainly, whether the benefit was available to other similarly situated public officials should be a factor to be considered in determining whether the benefit is disproportionate. Another factor to be considered could include the relationship between the donor and the public official.

An additional factor to be considered could be whether or not the benefit was intended to influence any official action on the part of the public official. Also, the nature of the benefit and the degree in which it favorably affected the public official should be considered. Whether the public official has received similar benefits from others would also be a consideration.

This is not an exhaustive list, and the Commission can likely identify other factors that may be considered in determining whether the benefit is disproportionate within the meaning of Article II, section 8(h)(2), of the Florida Constitution. However, we emphasize that the factors should principally focus upon the provision of the benefit and not the availability to similarly situated public officials.
We also question the proposed rule with regard to the requisite intent for finding a violation. As presently worded, the proposed rule states that a violation occurs if the official knew that his or her action or inaction would result in a disproportionate benefit. This intent necessarily assumes that a public official knew what benefits his or her counterparts were receiving and that the benefit obtained was not available to the others. Practically, this seems to be an unlikely occurrence and raises the issue of whether officials should be inquiring as to what others receive before accepting a benefit.

There should be a willfulness element to establish an ethics violation that is consistent with other provisions of the Code of Ethics. Because Article II, section 8(h)(2) is similar to section 112.313(6), Florida Statutes, prohibiting misuse of public position, we suggest that the proposed rule require a showing that the public official corruptly used his or her official position to obtain a disproportionate benefit. The term “corruptly” is defined to mean “done with a wrongful intent and for the purpose of obtaining … 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.” §112.312(9), Fla. Stat.; see also Robinson v. Commission on Ethics, 242 So.3d 467, 471 (Fla. 1st DCA 2018) Because “disproportionate” may easily be subject to interpretation, requiring a showing that the official acted corruptly would fairly distinguish those cases in which an ethics violation occurred from those in which it simply appears that a benefit is excessive.

Based upon these concerns, we are requesting the Commission to reconsider the proposed rule in accordance with these issues raised. Thank you for your attention to this matter.

Sincerely,

Wayne Evans
General Counsel, Florida Sheriffs Association

cc Sheriff Mark Hunter
Steve Casey
Matt Dunagan
June 6, 2019

Honorable Chairman Guy W. Norris
c/o Ms. Virlindia Doss, Executive Director
doss.virlindia@leg.state.fl.us
Florida Commission on Ethics
P.O. Drawer 15709
Tallahassee, FL 32317-5709

Re: Deferral of Proposed Rule Implementing Amendment 12

Dear Chairman Norris:

On behalf of the Builders Association of South Florida (BASF), they respectfully request the Commission on Ethics delay tomorrow’s agenda item implementing Amendment 12. The proposed rule lacks certain definitions for critical terms, such as “Public Officer.” In addition, the proposed rule is not clear in its application to developers and builders who lawfully use Community Development Districts (“CDDs”) to finance necessary infrastructure for residential communities in South Florida. We believe implementing of the Amendment without clarification will lead to confusion as to the applicability of the rule and potential misapplication to entities that should not be included. To rectify these deficiencies, we respectfully ask that the Commission create a safe harbor provision for Florida businesses that use CDDs to finance necessary infrastructure for Florida residents.

It is our understanding that the intent of Amendment 12 was never to negatively affect the lawful use of CDDs to finance necessary infrastructure for Florida residential communities. Amendment 12 was designed to address the “revolving door” of public officials that misuse public office for personal benefit. This is not the case with CDDs. Using CDDs to finance necessary infrastructure for residential communities is not an abuse of public power, and if history repeats itself, it will not provide disproportionate benefits that Amendment 12 seeks to remedy.

We thank you for all your work to date and request you consider our plea to remove the proposed rule from tomorrow’s agenda and delay its implementation to address the above concerns. A new timeline will allow more dialogue to clarify the rule as outlined above, and provide a safe harbor provision for the lawful use CDDs to finance necessary infrastructure for Florida residential communities. As the deadline to finalize the rule is October 1, 2019, this judicious delay will not have impede timely implementation and will insure the clarity needed for appropriate application.

Thank you for your consideration of this request.

Sincerely,

[Signature]
Truly Burton
Executive Vice President
Grayden Schafer
Senior Attorney
Florida Commission on Ethics
P.O. Drawer 15709
Tallahassee, Florida 32317-5709

Re: Proposed Rule 34-18.001
Submitted VIA E-Mail and U.S. Mail

June 6, 2019

Dear Mr. Schafer:

The Florida Association of Counties ("FAC") and the Florida League of Cities ("FLC") appreciate the opportunity to provide these comments on the Commission on Ethics' Proposed Rule 34-18.001. Unfortunately, as presently drafted this Proposed Rule improperly expands the scope of Article II, Section 8(h)(2) of the Florida Constitution by creating a vague and arbitrary new standard for "disproportionate benefit" that is entirely unrelated to established law and precedent. It will create uncertainty for public officials and employees, disproportionately impact small cities and counties, and unreasonably impede qualified individuals from serving in public office and public employment. Accordingly, the FAC and FLC hereby adopt and incorporate by reference the following documents submitted to the Commission on Ethics on June 6, 2019 by the Association of Florida Community Developers and the Florida Association of Special Districts ("Associations"): (1) Lower Cost Regulatory Alternative and Request for Public Hearing and a Statement of Estimated Regulatory Costs; (2) Comments and Objections to Proposed Rule. In addition, the FAC and FLC offer the following comments and suggestions for consideration.

The Proposed Rule fails to consider the impact of the rule on small cities and counties, as required by Section 120.54(3)(b)2.a., Florida Statutes, and thus, provides no options to help offset the disproportionate impacts on small cities and counties. According to information provided by Florida’s Office of Economic and Demographic Research\(^1\), roughly 30 counties and over 250 cities would be considered “small” pursuant to Section 120.52, Florida Statutes.\(^2\) The operations of these governments will be disproportionately impacted by the Proposed Rule because the class of individuals and businesses

\(^1\)http://edr.state.fl.us/content/population-demographics/data/index-floridaproducts.cfm

\(^2\) Section 120.52(18), Florida Statutes, defines “small city” as any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census. Section 120.52(19), Florida Statutes defines small county as a county that has an unincarcerated population of 75,000 or less according to the most recent decennial census.
available to provide services in small cities and counties is naturally smaller and will result in more conflicts with the Proposed Rule.

As proposed, the Proposed Rule will increase the number of officials who face recurrent conflicts, disproportionately impacting public officials in small cities and counties. Section 112.3143(3)(a), Florida Statutes, prohibits a local public officer from voting on a matter that would inure to his or her special private gain or loss (or that of a principal, relative or business associate of the public officer). Section 112.3142(1)(d) defines “special private gain or loss” as:

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 principle, 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 the members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principle, 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 principle and, of so, the nature of degree of the economic harm must also be considered.

While the language used in the Proposed Rule is like this definition of “special private gain or loss”, there are key differences. The voting conflict statute addresses economic benefit or harm; the proposed rule encompasses non-economic benefit and harm as well as economic benefit and harm. The consequence is that a public official could have no voting conflict under Section 112.3143, Florida Statutes, but could be found to violate the Proposed Rule. For example, the vote taken could have resulted in a non-economic benefit to the public official, such as a vote that resulted in a sidewalk in the official’s neighborhood. Alternatively, there could have been uncertainty at the time the vote was taken about whether there would be any economic benefit to the officer that would absolve the officer of any violation of Section 112.3143 Florida Statutes, but this uncertainty at the time of the vote would not be a consideration for purposes of the Proposed Rule.

The likely consequence of the broadening of the Proposed Rule to encompass economic as well as non-economic benefit and harm, as well as its lack of clear guidelines and precedent for public officials, will be repeated and recurring voting abstentions. Public officials seeking to avoid getting tripped up in the quagmire of guessing whether a benefit is disproportionate may simply abstain from voting at all, which increases the likelihood the official may violate section 112.3143(7), Florida Statutes, which prohibits a
public official from having an employment or contractual relationship that will create a continuing or frequently recurring conflict. The impact of this will be magnified in small cities and counties as a function of class size.

Without additional clarification, the Proposed Rule’s vagueness will necessitate significant litigation as the Proposed Rule is applied to fact-specific scenarios by the Ethics Commission. This will burden both the Commission and government officials with unnecessary legal costs. The Proposed Rule should be revised to reduce its impact on local governments, and especially small counties and small cities by adopting changes that provide lower cost regulatory alternatives pursuant to s. 120.54(3)(b)2.(iii).

Recommended Alternative:

The Constitution directs the Commission on Ethics to “prescribe the requisite intent for finding a violation of this prohibition.” Article II, Section 8(h)(2) of the Florida Constitution prohibits a public officer or employee from abusing his or her public position in order to obtain a disproportionate benefit. The provision clearly requires both an abuse of office and that the abuse of office be undertaken with the intent to obtain a benefit. The Proposed Rule equates mere knowledge that a benefit would result with an abuse of office undertaken to secure the benefit. This is contrary to the plain language of the constitutional provision.

The Proposed Rule should be amended to clarify that to be a violation of Article II, Section 8(h)(2), the conduct be done with wrongful intent for the purpose of obtaining a disproportionate benefit inconsistent with the proper performance of his or her public duties. This would clarify that mere knowledge that a benefit would occur does not constitute an abuse of office and that actions taken in accordance with the officer or employee’s duties and which result in an incidental benefit are not violations of the provision.

The above alternative language would align the Proposed Rule with the constitutional provision. This significantly reduces that type of conduct that would give rise to challenges under the Proposed Rule and would, therefore, reduce the amount of litigation and associated costs of all parties concerned.

Additional Concerns:

- The Proposed Rule’s failure to define “public officer” or “public employee” will result in many individuals who are unaware of their obligation to comply with the Proposed Rule. In various contexts, these terms have been defined to include elected officials and certain employees, but also independent contractors, appointed officials, and community volunteers serving on advisory bodies, among other positions. If adopted, individuals will be forced to guess whether their office or position subjects them to potential liability under the Proposed Rule.
The definition of “disproportionate benefit” is difficult to apply in practice. The definition fails to define “similarly situated persons” or “class”, which is a necessary factor in determining whether a benefit is disproportionate. Additionally, the Proposed Rule implies that non-economic benefits may constitute disproportionate benefits but does not provide a mechanism to calculate non-economic benefits. The result is a rule that can only be applied on a case-by-case basis, making it impossible for a public official or employee to have fair notice of exactly what conduct is forbidden.

The Proposed Rule should endeavor to incorporate existing case law and Commission advisory opinion precedent regarding “abuse” of office under Chapter 112, Florida Statutes. This would be consistent with the expressed intent of the Constitutional Revision Commission framers and reduce uncertainty as to what conduct is forbidden. Ad hoc lawmaking by Commission staff is a poor way to implement the Florida Constitution and is an injustice to Florida’s public servants who harbor no wrongful intent but simply fail to predict the whims of a given decisionmaker on a given day.

The FAC and FLC respectfully request the Commission on Ethics continue its scheduled June 7 decision on the Proposed Rule, address the potential regulatory costs and impacts of the Proposed Rule as drafted on local governments, particularly small cities and counties. Further, the FAC and FLC request the Commission on Ethics consider and adopt the Lower Cost Regulatory Alternative and Alternative Rule submitted by the Associations.

Even if the Commission elects to proceed with the Proposed Rule, however, the FAC and FLC request the Commission continue its June 7 public hearing. This would allow adequate time for the Commission to review the Lower Cost Regulatory Alternative, prepare a Statement of Estimated Regulatory Costs as requested, and for the FAC and FLC and others to have adequate opportunity to protect their substantial interests.

The Florida Association of Counties and the Florida League of Cities appreciate your consideration of these comments.

Sincerely,

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FLORIDA COMMISSION ON ETHICS

In re:

PROPOSED RULE 34-18.001

__________________________ /

COMMENTS AND OBJECTIONS TO PROPOSED RULE ¹

The Commission on Ethics ("COE") should not adopt the proposed rule 34-18.001 ("Proposed Rule") as written because the Proposed Rule creates a new, vague and arbitrary ethical standard that is inconsistent with the language of Amendment 12, its legislative history and existing law. Contrary to the provisions of Chapter 120, Florida Statutes, the Proposed Rule (i) goes beyond the powers, functions and duties delegated to the COE under Article II, Section (8)(h)(2) of the Florida Constitution, (ii) contravenes the specific language of Section 8(h)(2), (iii) is vague, fails to establish adequate standards for COE decisions, and vests unbridled discretion in COE, (iv) is arbitrary and capricious, and (v) imposes excessive regulatory and other costs on public officers and employees, as well as private landowners and Florida taxpayers.

In implementing Section 8(h)(2), the COE should abandon the Proposed Rule and instead follow the plain language of that section, and the intent of the Constitutional Revision Commission ("CRC") and define “disproportionate benefit” based on existing statutory and COE precedent. In other words, the COE should prescribe the requisite intent by reference to “abuse” of one’s position, as stated in Amendment 12, rather than mere “knowledge,” and should bring in existing, long standing mechanisms for compliance under Chapter 112 and existing COE and case law opinions to provide certainty to public officers and employees on what behavior is prohibited and how to comply with the rule. As feared by both critics and proponents of Amendment 12, the Proposed Rule – as written and due to its vague and arbitrary nature – will create uncertainty for public officials and employees and result in a chilling effect, will cause unintended consequences, will substantially increase regulatory and legal costs to interpret and litigate the Proposed Rule and cases arising therefrom, and will cost Florida taxpayers millions of dollars in increased public infrastructure costs.

The undersigned, on behalf of AFCD and FASD, offer the following comments and objections in this regard:

¹ These comments and objections are being submitted on behalf of the Association of Florida Community Developers ("AFCD") and the Florida Association of Special Districts ("FASD"). AFCD is comprised of various Florida developers and other entities with a mission to provide a leadership role in the creation of quality community development and the formulation of a responsible approach to the planning and development of Florida’s future. AFCD’s members are directly affected by the Proposed Rule because of its potential affect on special districts that are used by AFCD members to deliver public infrastructure for community development throughout Florida. FASD’s membership is comprised of registered special districts in the State of Florida. FASD’s members are directly affected by the Proposed Rule because the Proposed Rule would impose regulatory requirements on their public officers and employees.
1. **Community Developers and Special Districts are substantially affected by the Proposed Rule, at a cost of millions of dollars per year to Floridians.**

An independent special district is a special purpose unit of local government, most often established at the request of a developer or landowner with governmental approval (at the local or state level or by special act of the legislature). Special districts help address Florida’s growing pains and offer a cost-effective means of providing for the financing and management of public infrastructure systems and services to support the development of land, including roads, bridges, water and sewer utilities, storm water facilities, and other improvements that cities and counties cannot afford to provide for new communities. Not only can special districts issue tax-exempt bonds to finance such infrastructure, but they also serve as excellent long-term maintenance entities. Most planned communities in Florida use one or more types of special districts to provide the infrastructure necessitated by growth.

Of the over 1,700 special districts in Florida, approximately 1,100 are independent. In 2018 alone, independent special districts issued approximately $850 million dollars in tax exempt bonds to finance infrastructure. The average interest rate on those bonds was approximately 5.25%. While it’s difficult to estimate precisely, the comparable cost of private equity — estimated very conservatively — for that period would have been at least 10%. Accordingly, it’s reasonable to assume that, without the use of special districts in 2018, the cost of interest on borrowing for public infrastructure would have almost doubled and increased the cost by many millions of dollars.

Special districts are units of government, subject to all of the same safeguards that apply to other units of government, including disclosure requirements, governmental accounting, public records, etc. Board members are considered local elected officials and must comply with Florida’s financial disclosure requirements, gift laws, Sunshine Laws, and various other laws governing local officials. Community development districts ("CDDs"), a common form of independent special district (there are almost 700 in Florida), generally turnover from landowner elected board members to resident elected board members at six years and 250 resident electors. This means that at least for the first six years, landowners, and their respective representatives, within the district are typically serving as members of the Board by design and thereafter residents are elected to the Board, who then make decisions impacting land, facilities and services within the boundaries of the district, including their own.\(^2\) Similarly, many special act districts, which are created by legislative act, govern and deliver public infrastructure to large tracts of land, and also initially have landowner-elected boards. Water control districts, established pursuant to Chapter 298, likewise have landowner-elected boards, as their primary function is to provide water management improvements to lands within their boundaries. Further, the municipal bond market relies on stability and predictability in the market and calling into question what actions (or inactions) by board members may violate this new standard may result in significant market instability.

Consistent with Florida’s Code of Ethics, Chapter 112, *Florida Statutes*, this Commission has long recognized the ability of members of special districts elected on a one-acre, one-vote basis to vote on matters that benefit the landowner by whom they are employed. Not only is this concept

\(^2\) In fact, special districts turn-over to resident control much more quickly than communities with just homeowner’s associations, which typically turnover at 90% build-out.
included in Section 112.3143(3)(b), *Florida Statutes*, but also, in CEO 87-66, this Commission stated:

“[C]ommissioners of community redevelopment agencies and special tax district officials elected on a one-acre, one-vote basis specifically are not prohibited from voting. Therefore, members of the Board of Supervisors of the Development District may vote on a matter inuring to the special gain of the developer by whom they are employed . . .”

The Proposed Rule fails to address whether these long-standing Florida Statutory provisions, and related case precedent, continue to apply. Accordingly, and because almost all special districts are created to specially benefit the property and landowners within the District, nearly all members of special districts, and community developers and landowners who may seek to establish such districts, are unclear on the rights of landowner representatives to continue to participate as Board Supervisors and vote on matters affecting their interests, and accordingly are substantially affected by the Proposed Rule. If in fact the Proposed Rule is interpreted to rewrite the Code of Ethics – we cannot tell because it is so vague and arbitrary - then special districts, community developers and landowners will all be substantially affected by the rule in the various ways described herein.

2. *The CRC was relying upon the COE to clearly define “disproportionate benefit” and give meaning to that admittedly vague language, based on existing legal standards and precedent. Regardless, with the Proposed Rule, the COE has abdicated its responsibility by creating new, vague and arbitrary standards without attempting to answer any of the resulting questions.*

While Amendment 12 appears intended to raise Florida’s ethical standards in certain areas such as lobbying, nothing in the language of Section 8(h)(2) or the CRC’s deliberative history indicates that the CRC intended to create a new ethical standard and in doing so overturn the provisions of Florida’s Code of Ethics or the COE’s past precedent as it relates to “misuse of public position.” Instead, the language and history suggest that the CRC intended for the “misuse of public office” concepts from existing law be placed into the Florida Constitution. Yet, the Proposed Rule is silent on this issue and, thus, in doing so calls the existing Code of Ethics into question, along with its related precedents.

Significantly, the concept of “disproportionate benefit” was introduced late in the CRC process (January 26, 2018), and in the over 3,500 pages of public hearing and meeting transcripts after that point, the CRC never once discussed overturning the Florida Code of Ethics in any way, including but not limited to, the portion of the Code of Ethics that relates to special district Board Supervisors who are elected on a one-acre, one-vote basis, the standard for “misuse” of a public position, etc. That issue is not identified in the transcripts of the CRC discussions, in the language of Amendment 12, or in the ballots that went to Florida’s voters relating to Amendment 12. If the CRC had wanted the COE to rewrite the Code of Ethics, they would have discussed that issue at length and given the COE much broader authority.
Importantly, the CRC Commissioners acknowledged that “disproportionate benefit” was a vague, ambiguous term that would be difficult to define in the Florida Constitution. They worried about the lack of a definition for “disproportionate benefit” (3/19/18 Transcript Vol. II at 261); “how difficult it's going to be to define what a disproportionate benefit is” (4/16/18 Transcript Vol. III at 318); the “chilling effect” that the proposal would have on public officials (3/19/18 Transcript Vol. II at 250-51) in navigating the vague language; and the “unintended consequences” of having Amendment 12 included within the Constitution (4/16/18 Transcript Vol. III at 331). Commissioner Gaetz, one of Amendment 12’s sponsors, recognized that Amendment 12 was intentionally vague, and remarked, “we tried really hard not to anticipate every scenario, but, rather, to provide constitutional language and then give implementing authority to the Commission on Ethics and the Legislature.” (4/16/18 Transcript Vol. II at 308.)

To cure the vague and arbitrary language in Section 8(h)(2), the CRC directed the Commission on Ethics to define “disproportionate benefit” and the requisite intent for violating Section 8(h)(2), Article II of the Florida Constitution. The CRC recognized that the concept of “disproportionate benefit” (or similar concepts such as “special gain or loss”) had been explored in prior COE opinions, and believed that the COE would be the best-positioned body to define it, given that context. Commissioner Carlton remarked:

... there is case law on disproportionate benefit and there are ethics cases that have sort of defined what that is.

(4/16/18 Transcript Vol. II at 301.) Commissioner Gaetz similarly stated:

Regardless of what my view of disproportionate gain is, it is not included in this proposal. At the strong suggestion of one of our co-sponsors, Commissioner Kruppenbacher, we leave that to the Commission on Ethics to make that definition and to do it through the usual rule promulgation process that allows for public input, public hearings.

(3/19/18 Transcript Vol. II at 261.) Commissioner Lee also recognized the need for the Commission to define the term, in order to provide flexibility for unforeseen circumstances:

... there are at times unintended consequences that take place, as Commissioner Diaz points out, he's not incorrect at all, and hopefully this will not have been written so tightly that the Ethics Commission and the Legislature, whether through statute or our -- or its rules, can make adjustments, and -- and if we stumble across those sorts of things.

(4/16/18 Transcript Vol. III at 330-31.)

In short, recognizing that “disproportionate benefit” was a vague term that should not be defined in the Constitution, the CRC directed the COE to prepare a rule addressing the definition of “disproportionate benefit” and the requisite intent based on an “abuse” of public position standard, as used in the context of the existing Code of Ethics. Nowhere did the CRC contemplate or direct the COE to dramatically rewrite Florida law and the Code of Ethics, sending all public
officers and employees, along with the municipal bond market, into a down spiral. Nevertheless, by failing to place the definition in its proper context – and incorporate the Code of Ethics (and the one-acre, one-vote provision, the prevailing standard for “misuse,” and other provisions of the Code) into the Proposed Rule, the Proposed Rule continues to perpetuate the vague, arbitrary standard that both critics and advocates of the proposal acknowledged could cause a “chilling effect” and the “unintended consequences” that the CRC specifically directed the COE to avoid.

3. **Contrary to the requirements of Chapter 120, Florida Statutes, the Proposed Rule goes beyond the delegation of authority granted to the COE, is contrary to the language of Amendment 12, and is unlawfully vague, arbitrary and capricious.**

Pursuant to Section 120.52(8), Florida Statutes, a proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Here, the Proposed Rule is an invalid exercise of delegated legislative authority under Section 120.52(8), Florida Statutes. The Proposed Rule exceeds the scope of the CRC’s rulemaking authority and contravenes the language set forth in Section 8(h)(2) because, as discussed below, the Proposed Rule creates a new ethical standard when defining “disproportionate benefit” and identifying “knowledge” as intent, and in doing so calls into question existing statutes, COE opinions and case law, contrary to the plain language of Section 8(h)(2). Further, the definition of “disproportionate benefit” is so vague that it frustrates the intent of an abuse of position standard such that the prohibition can apply to a wide variety of special district board members on a wide variety of issues such board members face on a routine basis. The proposed rule also fails to establish adequate standards for agency decisions and vests unbridled discretion in the agency. The agency itself has surmised it will make a decision on a case by case basis when asked about the application of the Proposed Rule. Further, the Proposed Rule is arbitrary and capricious because it is not supported by necessary facts as set forth herein. The rule is also capricious because
it is adopted without thought or reason and is irrational. It was not based on any public feedback at the rule workshops, consideration of the intent of Section 8(h)(2), or any precedent.

4. **The Proposed Rule fails to prescribe the requisite intent.**

The Proposed Rule creates a standard for “intent” that is contrary to the plain language of Section 8(h)(2). Section 8(h)(2) of Article II provides, with emphasis added, that “[a] public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit . . .” and then requires the COE to “prescribe the requisite intent” for finding a violation of this prohibition. The plain meaning of “abuse” is defined, with emphasis added, as “1. A corrupt practice or custom.” See Merriam-Webster Dictionary On-Line (last visited June 4, 2019 at https://www.merriam-webster.com/). This plain language definition is consistent with the existing standard for misuse of a public position set forth in Section 112.313(6), Florida Statutes, which states, with emphasis added:

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.

Nonetheless, the Proposed Rule abandons the plain meaning of “abuse” and instead simply refers to “knowledge” to prescribe intent. The plain meaning of “knowledge” is defined, with emphasis added, as “1. the fact or condition of knowing something with familiarity gained through experience or association.” See Merriam-Webster Dictionary On-Line (last visited June 4, 2019 at https://www.merriam-webster.com/). Based on the plain definitions, “knowledge” has nothing to do with “abuse” and the Proposed Rule effectively removes the intent requirement from the law. Further, the Proposed Rule dispenses with the directive by the CRC to prescribe the requisite intent. The plain meaning of “intent” is defined, with emphasis added, as “1. The act or fact of intending: purpose, especially the design or purpose to commit a wrongful or criminal act.” See Merriam-Webster Dictionary On-Line (last visited June 4, 2019 at https://www.merriam-webster.com/). In short, knowledge is NOT intent.

The implications of not having a meaningful intent standard are important and mean that the receipt of any special privilege or benefit could constitute an ethics violation. Here are a few specific examples:

- Assume that a special district has a pool where a swim team meets, and three of the five Board Supervisors for the special district have children who participate on the team. Assume further that certain of the costs of having the swim team are paid for from the District budget — e.g., the cost of operating and maintaining the pool, providing for swim lane equipment, etc. Can the Board Supervisors who have children on the swim team vote on the budget that authorizes such funding?
• Does an hourly contract maintenance employee of a local government violate the Proposed Rule by suggesting to the Board that more hours are needed to be authorized to complete the work required? Has the employee violated the Proposed Rule by knowingly asking for and obtaining a benefit for himself?
• Has a Board of Supervisors of a local government violated the Proposed Rule when they authorize a D&O insurance policy that protects them? What about if they adopt a resolution that obligates the local government to indemnify and/or defend the individual Board Supervisors in the event of individual lawsuits arising against them individually from their role with the District?
• Has a City Manager violated the Proposed Rule by preparing a draft budget that provides for the City Manager's compensation?
• Has a Board Supervisor of a special district violated the Proposed Rule by suggesting that there be an increase in the number of meetings of a special district thereby resulting in an increase in the overall budget and a payment of additional fees to the Board Supervisors who are paid on a per meeting basis?

5. **As evidence of the Proposed Rule's vague, arbitrary nature, the Proposed Rule fails to define who it even applies to.**

The Proposed Rule fails to define “public officer” or “public employee” and, accordingly, it could include a wide array of individuals, including city, county, and special district officers, members of the Legislature, advisory bodies, Commission on Ethics members, school boards, quasi-public bodies, part time employees, independent contractors, procurement officials, etc. It’s wholly unclear to whom the rule applies. Without any such definition, public officials and employees will be left to guess whether they are within the scope of the Proposed Rule. Analyzing this definition on a supposed case-by-case basis is a recipe for administrative disaster and fosters uncertainty in all public positions and is the definition of agency acting with unbridled discretion.

6. **The Proposed Rule would appear to create a new ethical standard contrary to CRC intent and dispensing with decades of COE opinions and precedent.**

As noted above, the Proposed Rule creates a “new ethical standard” even though Florida law already has a long-established ethics standard set forth in the Code of Ethics, Chapter 112, Florida Statutes. Accordingly, one could be in compliance with the Code of Ethics, and all the cases and the Commission’s own advisory precedent, but in violation of this purportedly new Constitutional standard. This was not what the Constitutional Review Commission intended. The intent was to elevate a portion of Chapter 112 in an effort to “keep special interests” out of ethics – not create a standard anew. When a constitutional provision is unclear, one should look to its history, including the intent of the framers who drafted it and the intent of the people when they adopted it, as evidenced by sources such as documents from the constitutional revision
commission, documents from the Florida legislature, and ballot summaries. See Gallant v. Stephens, 358 So. 2d 536, 540 (Fla. 1978).

The term “disproportionate benefit” in the rule is not clearly defined, but instead, lists factors that would be considered in deciding whether there is a disproportionate benefit. Though the term “disproportionate” is used, the benefit or privilege gained can be something other than economic, which raises question of how it would be measured (proportionate to what? And proportion to what “class” of people? What if there is no class?). The Proposed Rule is so vague that it frustrates the intent of an abuse of position standard, such that the prohibition may apply to most special district board members at one time or another and especially substantially affect landowner elected (one acre, one vote) officials.

7. The Proposed Rule also exceeds the COE’s authority, and creates further ambiguity and an arbitrary standard, by providing that a public officer or employee can “abuse” his power where he or she has “refrained from acting.”

The Proposed Rule provides that the required intent for finding a violation of Section 8(h)(2) can include situations when the public officer or public employee “refrained from acting” with knowledge that his or her action or failure to act would result in a disproportionate benefit. That language does not appear in Section 8(h)(2), and is absent from current ethical standards. It’s unclear what it means. Does an absence from a meeting constitute refraining from acting? Does a previously required abstention constitute refraining from acting? What happens if a public officer or public employee knows that it will violate this rule by an action it is asked to take? Can and/or should he or she abstain? Per the Proposed Rule, abstention may be a failure to act which would also run afoul of the Proposed Rule. The Proposed Rule fails to answer these questions and leaves affected parties with no clear options to comply.

8. The Proposed Rule also fails to explain how “disproportionate benefit” relates to the language, “business with whom he or she contracts.”

Amendment 12 includes the language “business with whom he or she contracts” but the Proposed Rule fails to take into account this language and explain how “disproportionate benefit” and “abuse” apply in that context. This language is included as part of one of the factors for deciding whether a disproportionate benefit has been provided – specifically, “[t]he degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts . . . receives a greater or more advantageous benefit . . .” What does this language mean? For example, if I am a city commissioner in a city whose utilities are provided by a power company such that I have a “contract” with them for utilities at my personal residence, and I vote (or fail to vote!) on an easement sought by the power company, have I violated this Proposed Rule?
9. **The Proposed Rule fails to address whether landowner representatives elected on a one-acre, one-vote basis can vote on matters affecting their property and interests.**

As noted, the Proposed Rule does not address whether, pursuant to Section 112.3143(3)(h), *Florida Statutes*, landowner representatives who are elected on a one-acre, one-vote basis can vote on matters affecting the landowner. Consequently, prior opinions of the Commission relying on such exceptions arguably would be in question. *See, e.g.*, CEO 87-66 ("[C]ommissioners of community redevelopment agencies and special tax district officials elected on a one-acre, one-vote basis specifically are not prohibited from voting. Therefore, members of the Board of Supervisors of the Development District may vote on a matter inuring to the special gain of the developer by whom they are employed . . . "). Thus, despite the fact that there was no discussion of this during the numerous CRC public hearings and CRC meetings, and the fact that there is nothing in Amendment 12 indicating that these provisions are intended to be abolished, the Proposed Rule could be construed so as to undermine the ability of special districts to effectively deliver public infrastructure for new development in Florida and causing widespread market instability.

As an example, the vast majority of water control districts around the state (approximately 70 in total) have governing boards elected on a one-acre/one-vote basis (s. 298.12, F.S.). Often times, an agricultural operation owns large tracts of land in a district and, by voting its acreage, will elect owners or employees of the business to the governing board. These districts assess non-ad valorem assessments on a per-acre basis so while the farm may have a greater say in board elections, it also pays a larger portion of the district’s operating expenses. Under the proposed rule, virtually any decision made by such a district’s governing board could be construed to provide a “disproportionate benefit” to the farming business and put the board member at jeopardy of being charged with an ethics violation.

10. **The Proposed Rule will impose excessive regulatory and other costs on public officers and employees, as well as private landowners and Florida taxpayers.**

As noted above, the Proposed Rule creates a vague, arbitrary standard that is inconsistent with the plain language of Section 8(h)(2). As a result, government officials will have difficulty knowing how to comply with the Proposed Rule, leading to increased litigation and regulatory costs, and adverse impacts to economic development, jobs, tax bases, the availability of public officers and employees and more. Certain of these economic impacts are listed below:

- **Public decision-making on all levels.** from the lifeguard at the city pool to the police officer, to city and county commissions, to board members in special districts created for the purpose of benefiting landowners within the district boundaries, will be subject to potentially multiple ethics challenge, resulting in a chilling effect on such decision-making and increased litigation costs to defend governmental decisions, thereby increasing regulatory costs at least by over $200,000 within the next year.
- **The chilling effect from the Proposed Rule may result in delayed proceedings, a lack of qualified candidates for public office, and even a failure to act where necessary** (though a failure to act in and of itself is
covered by the Proposed Rule, putting public officers and employees in an even more confusing situation). While quantifying a lack of qualified candidates for public office is difficult, poor decision-making at the local and state level could have potentially significant effects on the future ability of Florida to meet the continuing demands of growth.

- The Proposed Rule and related chilling effect will result in damage to the tax bases of cities, counties and special districts, as public officials are less able to effectively make decisions without fear of being accused of "abusing" their positions.
- The Proposed Rule, in part because of its vagueness and uncertainty, will likely increase the costs of public officers and director’s insurance, for which there is already a limited market.
- The Proposed Rule will also undermine the ability of landowners and governmental entities to take advantage of new special districts as a financing tool, which have the advantage of increasing tax bases, creating jobs and promoting economic development, along with focusing the burden of specific infrastructure improvements necessary for development on the individuals that enjoy the benefits of the infrastructure program. Instead, without special districts, the burden of a multitude of improvements, from much needed roadway infrastructure, to school buildings, to utility improvements, will be borne by cities, counties and the state, greatly increasing regulatory costs. In addition, developers will be forced to search for more costly sources of capital and will have to pass those increased costs on to homeowners. As noted above, without these special districts, public infrastructure costs in Florida would have increased in 2018 alone by millions of dollars.

The Proposed Rule will undoubtedly increase administrative costs for the Commission on Ethics as the staff makes a “case by case” decision on a multitude of ethical challenges. Litigation costs associated with defending a rule challenge can also be expected if the Commission on Ethics does not reconsider an alternative draft of the vague and arbitrary rule.

11. The Draft Rule is also invalid because COE failed to create a Statement of Estimated Regulatory Costs.

Section 120.54(3)(b), Florida Statutes requires, in pertinent part and with emphasis added, that:

[A]n agency must prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if:

a. The proposed rule will have an adverse impact on small business; or

b. The proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within 1 year after the implementation of the rule.
As noted above, the Draft Rule will increase regulatory costs well in excess of $200,000 within 1 year after the implementation of the rule.

WHEREFORE, for the foregoing reasons, the undersigned respectfully requests that the Commission: (i) decline to adopt the Proposed Rule, (ii) instead consider and adopt the Lower Cost Regulatory Alternative, and Alternative Rule, proposed separately by the undersigned, and (iii) take such other action as may be appropriate and consistent with the foregoing.

Respectfully submitted,

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In re:

PROPOSED RULE 34-18.001

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LOWER COST REGULATORY ALTERNATIVE
-and-
REQUEST FOR A PUBLIC HEARING AND A STATEMENT OF ESTIMATED REGULATORY COSTS

The Commission cannot move forward with adoption of the proposed rule 34-18.001 ("Proposed Rule") for both procedural and substantive reasons. Procedurally, and pursuant to Sections 120.54(3)(e) and 120.541(1)(a), Florida Statutes, the Proposed Rule cannot be filed for adoption until 21 days after the Commission prepares a Statement of Estimated Regulatory Costs ("SERC") and provides that to all parties who have submitted a lower cost regulatory alternative and makes that available to the public.

Substantively, the Proposed Rule improperly expands the scope of Article II, Section 8(h)(2) of the Florida Constitution by creating a new, vague and arbitrary ethical standard for “disproportionate benefit” that is unmoored from the language of Amendment 12 and existing ethics standards. It will have the effect of creating uncertainty for governmental officials and employees regarding conflicts, and will adversely affect economic development and regulatory costs. Instead, to provide certainty to public officers and employees and safeguard against adverse effects to economic development and regulatory costs, the Commission should consider alternative rule language that: (i) includes a definition of “public officer” and “public employee;” (ii) defines “disproportionate benefit” based on the long-established principles set forth in Chapter 112, Florida Statutes, such that by complying with Chapter 112, the individual at issue has complied with this Proposed Rule; and (iii) adopts an intent standard that to abuse one’s position it takes more than mere knowledge.

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1 This Lower Cost Regulatory Alternative and Request for a Public Hearing and Statement of Estimated Regulatory Costs is being submitted on behalf of the Association of Florida Community Developers ("AFCD") and the Florida Association of Special Districts ("FASD"). AFCD is comprised of various Florida developers and other entities whose mission is to provide a leadership role in the creation of quality community development and the formulation of a responsible approach to the planning and development of Florida’s future. AFCD’s members are directly affected by the Proposed Rule because of its potential affect on special districts that are used by AFCD members to deliver public infrastructure for community development throughout Florida. FASD’s membership is comprised of registered special districts in the State of Florida. FASD’s members are directly affected by the Proposed Rule because the Proposed Rule would impose regulatory requirements on their public officers and employees.
I. Special Districts in Florida: Brief Historical Overview

A special district is an independent special purpose unit of local government, most often established at the request of a developer or landowner with governmental approval (at the local or state level or by special act of the legislature). Special districts offer an attractive and cost-effective means of providing for the financing and management of major infrastructure systems and services to support the development of land within the district boundaries (e.g., roads, water management and control, water and sewer, etc.) Some special districts can also provide parks, recreational amenities, environmental stewardship, waste collection and mosquito control, among other public facilities and services.

Establishment of special districts helps address Florida’s growing pains, including for residential, commercial and mixed-use projects. Permitting agencies require long-term assurances that infrastructure be maintained even after developer’s involvement in a project ends and special districts provide this long-term maintenance capability. Some special districts may issue long-term tax-exempt bonds for certain facilities, which enables development of infrastructure at a lower overall cost of debt and such debt is pledged by non-ad valorem special assessments and user rates/fees by those landowners within the district’s boundaries. Most planned communities in Florida use one or more types of special districts to provide the infrastructure necessitated by growth.

Special districts are units of government, subject to all of the same safeguards as other units of government. Board members are considered local elected officials for purposes of financial disclosure and the sunshine law. Community development districts (“CDD’s”), a type of special district, turnover from landowner elected board members to resident elected board members at six years and 250 resident electors. This means that at least for the first six years, developer representatives are generally serving as the members of the Board by design, who then make decisions impacting land, facilities and services within the boundaries of the district, including their own. Many special act districts, adopted by legislative act, which are typically unusually large areas of land operated for a special purpose such as for conservation requiring a special focus on environmental stewardship and development typically occurs over an unusually long period of build-out, have different turnover mechanisms but generally are also governed initially by landowner elected board members. Water control districts, established pursuant to Chapter 298, are also governed by landowner elected boards, as their primary function is to provide water management and drainage to lands, which may be agricultural, transitional, or developed. Almost all special districts are created to specially benefit the property and landowners within the District such that nearly all special district board members are substantially affected by the Proposed Rule.

II. Under Florida law, the Commission cannot move forward with its Proposed Rule without first preparing a SERC.

Section 120.54(1)(d), Florida Statutes provides that:

In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law,
choose the alternative that does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives. (Emphasis added.)

Section 120.541(a), Florida Statutes requires the Commission to prepare a SERC in response to this Lower Cost Regulatory Alternative prior to adopting the Draft Rule:

Upon the submission of the lower cost regulatory alternative, the agency shall prepare a statement of estimated regulatory costs as provided in subsection (2), or shall revise its prior statement of estimated regulatory costs, and either adopt the alternative or provide a statement of the reasons for rejecting the alternative in favor of the proposed rule. (Emphasis added.)

The Proposed Rule cannot be filed for adoption until 21 days after the Commission prepares the SERC and distributes it. Specifically, Section 120.54(3)(e), Florida Statutes, states:

A rule may not be filed for adoption less than 28 days or more than 90 days after the notice required by paragraph (a), until 21 days after the notice of change required by paragraph (d), until 14 days after the final public hearing, until 21 days after a statement of estimated regulatory costs required under s. 120.541 has been provided to all persons who submitted a lower cost regulatory alternative and made available to the public, or until the administrative law judge has rendered a decision under s. 120.56(2), whichever applies. (Emphasis added.)

Section 120.54(3)(b), Florida Statutes further requires, in pertinent part:

[A]n agency must prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if:

a. The proposed rule will have an adverse impact on small business; or

b. The proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within 1 year after the implementation of the rule. (Emphasis added.)

Significantly, the Proposed Rule will have an adverse impact on economic growth, small business, job creation, investment, regulatory costs, cities and counties in an amount that is expected to exceed $1 million over the next 5 years (and $200,000 within 1 year), for a number of reasons including, but not limited to the following:

- The Proposed Rule creates a new, vague standard for “disproportionate benefit” that allows for the Commission to define “disproportionate benefit” on a case-by-case basis and without reference to any ascertainable metric. The Proposed Rule is so vague that it frustrates the intent of an abuse of position standard, such that the prohibition may apply to most special
district board members at one time or another and especially substantially affect landowner elected (one acre, one vote) officials.

- The Proposed Rule creates a new, vague standard that is not tied to “abuse” of position, as delegated by the Florida Constitution. Instead, the Proposed Rule prescribes intent as mere knowledge without any malice, corruption, or other wrongful intent, required to “abuse” one’s office.

- Accordingly, public decision-making on all levels, from the lifeguard at the city pool to the police officer, to city and county commissions, to board members in special districts created for the purpose of benefiting landowners within the district boundaries, will be subject to potentially multiple ethics challenges, resulting in a chilling effect on decision-making and increased litigation costs to defend governmental decisions, and thereby increasing regulatory costs at least by over $200,000 within the next year.

- The chilling effect of the Proposed Rule may result in delayed proceedings, a lack of qualified candidates for public office, and even a failure to act where necessary (though a failure to act in and of itself is covered by the Proposed Rule, putting public officers and employees in an even more confusing and precarious situation). While quantifying a lack of qualified candidates for public office is difficult, poor decision-making at the local and state level could have potentially significant effects on the future ability of Florida to meet the continuing demands of growth.

- The chilling effect of the Proposed Rule will result in damage to the tax bases of cities, counties and special districts, as public officials are less able to effectively make decisions without fear of being accused of “abusing” their positions.

- The Proposed Rule, in part because of its vagueness and uncertainty, will likely increase the costs of public officers and director’s insurance, for which there is already a limited market.

- The Proposed Rule will also undermine the ability of landowners and governmental entities to take advantage of new special districts as a financing tool, which have the advantage of increasing tax bases, creating jobs and promoting economic development, along with focusing the burden of specific infrastructure improvements necessary for development on the individuals that enjoy the benefits of the infrastructure program. Instead, without special districts, the burden of a multitude of improvements, from much needed roadway infrastructure, to school buildings, to utility improvements, may increasingly be borne by cities, counties and the state, greatly increasing regulatory costs. In addition, developers will be forced to search for more costly sources of capital and will have to pass those increased costs on to homeowners.

- In 2018 alone, independent special districts issued approximately eight hundred fifty million dollars in tax exempt bonds to finance infrastructure. The average interest rate on those bonds was approximately 5.25%. While it’s difficult to estimate precisely, the comparable cost of private equity – estimated very conservatively – for that period would have been at least 10%. Accordingly, it’s
reasonable to assume that, without the use of special districts, the cost of interest on borrowing for public infrastructure would have almost doubled and increased the cost by many millions of dollars. See attached excerpt pages from MBS Capital Markets, LLC’s Florida Community Development District, Market Update, Year-End 2018. See also Affidavit of Patrick Neal, attached hereto.

- The Proposed Rule will undoubtedly increase administrative costs for the Commission on Ethics as the staff makes a “case by case” decision on a multitude of ethical challenges. Litigation costs associated with defending a rule challenge can also be expected if the Commission on Ethics does not consider an alternative draft of the vague and arbitrary rule.

More specifically, the Proposed Rule is so vague and fails to give effect to the language of Amendment 12 in these ways:

- The Proposed Rule fails to define “public officer” or “public employee” and, accordingly, it could include a wide array of individuals, including city, county, and special district officers, members of the Legislature, advisory bodies, part time employees, independent contractors, procurement officials, etc. It is wholly unclear to whom the Proposed Rule applies.
- The Proposed Rule creates a “new ethical standard” even though Florida law already has a long-established ethics standard set forth in the Code of Ethics, Chapter 112, Florida Statutes. Accordingly, one could be in compliance with the Code of Ethics (including misuse of public position under 112.313), and the Commission’s own advisory precedent, but nevertheless be in violation of this purportedly new Constitutional standard. This was not what the Constitutional Review Commission intended.
- Amendment 12 requires that the violation be an “abuse” of the public official’s position, and yet the Proposed Rule describes intent as mere “knowledge.” In doing so, the Proposed Rule creates a standard that is contrary to the plain language of Amendment 12. How is simple knowledge an abuse?
- Amendment 12 requires that the COE prescribe the requisite “intent”. The Proposed Rule deviates from the plain meaning of the word intent, the plain language of Amendment 12 and the direction of the Constitutional Review Commission, by not prescribing “intent”. Knowledge is not intent.
- The term “disproportionate benefit” in the Proposed Rule is not clearly defined. Instead, the Proposed Rule lists factors that would be considered in deciding whether an individual public officer or employee would have a disproportionate benefit, and leaves open the question whether the benefit could be economic or something else. The Proposed Rule further leaves open the question of how “disproportionate” would be measured – especially when benefit could be non-economic – and who is included in the “class” of benefited individuals. Some of the factors listed are from the existing statutory definition of “special private gain or loss,” though they are not identical. It is unclear whether current precedent in “special private
gain or loss” would apply or whether the guidance or exemptions of s.112.313 apply. Accordingly, the Proposed Rule would create inconsistencies between the law and the Proposed Rule and its potential interpretations.

- The Proposed Rule also adds the phrase “refrained from acting”, which is otherwise undefined and not referenced in Amendment 12. It is also absent from current ethical standards. Does an absence from a meeting constitute “refraining from acting”? Does a previously required abstention constitute “refraining from acting”? In what other context is “refraining from acting” a violation of the law?

- What happens if a public officer or public employee knows that it will violate this rule by an action it is asked to take? Can and/or should he or she abstain? Per the Proposed Rule, abstention may be a failure to act which would also run afoul of the Proposed Rule. The Proposed Rule fails to answer these questions.

- Amendment 12 includes the language, “business with whom he or she contracts,” and that language needs clarification. For example, if I am a city commissioner in a small city whose utilities are provided by a private utility company such that I have a “contract” with them for utilities at my personal residence, and I vote (or fail to vote!) on an easement in favor of that private company, have I violated this Proposed Rule?

- The vast majority of water control districts around the state (approximately 70 in total) have governing boards elected on a one-acre/one-vote basis (s. 298.12, F.S.). Often times, an agricultural operation owns large tracts of land in a district and, by voting its acreage, will elect owners or employees of the business to the governing board. These districts assess non-ad valorem assessments on a per-acre basis so while the farm may have a greater say in board elections, it also pays a larger portion of the district’s operating expenses. Under the proposed rule, virtually any decision made by such a district’s governing board could be construed to provide a “disproportionate benefit” to the farming business and put the board member at jeopardy of being charged with an ethics violation.

In sum, the Proposed Rule creates a vague, arbitrary standard that is inconsistent with the plain language of Amendment 12. As a result, government officials will have difficulty knowing how to comply with the Proposed Rule, leading to increased litigation and regulatory costs, and adverse impacts to economic development, jobs, tax bases, the availability of public officers and employees and more.

III. In order to minimize or avoid the costs identified above, the Commission should adopt an alternative proposed rule that would rely upon the already existing standards for “abuse” of a public official’s position under Chapter 112, Florida Statutes.

The following proposed rule will accomplish the objective of the Constitutional provision being implemented, but at a much lower cost, because it relies on the existing standards under
Chapter 112, *Florida Statutes* for “abuse” of a public official’s position and prescribes the requisite intent:

**PART 1: Define Public Officer**

As part of the alternative rule, the Commission should establish the definition for “public officer” and “public employee” using definitions set forth in Chapter 112, *Florida Statutes*.

**PART 2: Define Disproportionate Benefit**

No public officer or public employee shall abuse use his or her official position to obtain an economic benefit for him or herself, his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest that is materially greater than any economic benefit accruing to other similarly situated persons.

(1) In determining whether there is a materially greater economic benefit, the following factors shall be considered:

a. The size of the class affected by the vote or action.

b. The nature of the interests involved.

c. The degree to which the interests of all members of the class are affected by the vote or action.

d. The degree to which the officer or employee, his or her spouse, children or employer; or any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest receives a greater economic benefit when compared to other members of the class.

e. The degree to which there is uncertainty at the time of the vote or action as to whether there would be any economic benefit to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit must also be considered.

(2) No public officer or employee shall be considered to have abused used his or her official position in violation of this section if s/he has complied with the Code of Ethics as it relates to the vote or action taken.

**PART 3: Requisite Intent**

The requisite intent for finding a violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is that the public officer or employee acted with wrongful intent and for the purpose of obtaining, any economic benefit for his or herself; his or her spouse, children, or employer; any business with which
he or she contracts; any business in which he or she is an officer, a partner, a director, or a proprietor; or any business in which he or she owns an interest that is materially greater than any economic benefit accruing to other similarly situated persons resulting from some act or omission of a public officer or employee which is inconsistent with the proper performance of his or her public duties.

The above language is consistent with the existing standards set forth in Chapter 112, Florida Statutes. Not only does the language rely on existing definitions of public officer and public employee to determine who is subject to the rule, but it also specifically incorporates the existing Code of Ethics to be the established standard for determining whether a public officer or employee has abused his/her position to obtain a “disproportionate benefit.” By patternning from existing standards, the Commission will satisfy the constitutional mandate set forth in Amendment 12 and will also give certainty to the public, including to the individuals to whom this applies. Chapter 112 has been established law for some time, and has well established definitions, standards and precedent. By utilizing current provisions and precedent of the Code of Ethics, the Commission can implement the intent of the constitutional amendment while avoiding substantial administrative costs in defining an entirely new standard and code of conduct. Such adoption would avoid the regulatory issues with the Proposed Rule language and provide implementing officials with concrete guidance and safe harbors when analyzing and approaching their ethical duties.

IV. Request for a Hearing on the Proposed Rule

Pursuant to Section 120.54(3)(c)1., Florida Statutes, the undersigned, on behalf of the AFCD and FASD as “affected persons,” hereby make a formal request for a public hearing on the Proposed Rule. While the Commission has already scheduled such a hearing for June 7, the undersigned would ask that the hearing be held initially and then continued until the Lower Cost Regulatory Alternative presented herein can be reviewed, and a SERC can be completed and distributed for public review.
WHEREFORE, for the foregoing reasons, the undersigned respectfully request that the Commission: (i) analyze and consider this Lower Cost Regulatory Alternative; (ii) prepare a Statement of Estimated Regulatory Costs; (iii) hold and then continue the scheduled June 7 public adoption hearing; (iv) adopt the Alternative Rule described herein; and (v) take such other action as may be appropriate and consistent with the foregoing.

Respectfully submitted,

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Jennifer Kilinski
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Telephone No. (850) 222-7500
Facsimile No. (850) 224-8551
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jenk@hgslaw.com
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Attorneys for the Florida Association of Special Districts

Attachments:

Excerpt from MBS Capital Markets, LLC’s Florida Community Development District, Market Update, Year-End 2018

Affidavit of Patrick Neal
### Florida CDD Special Assessment Tax-Exempt Market Activity

#### 2011-2018 (millions)

<table>
<thead>
<tr>
<th>Year</th>
<th>New Money (millions)</th>
<th>Refundings (millions)</th>
<th>New/Ref Combo (millions)</th>
<th>Total (millions)</th>
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<td>183.380</td>
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</table>

Source: Thompson/Reuters & Bloomberg (As of 12/31/2019)
Florida CDD Special Assessment New Money Issuance

- As the real estate market has recovered, special tax district issuance increased nationally, particularly in Florida.

- Since January 2011, there have been 323 special assessment new money CDD transactions in Florida totaling $3.6 billion.
Florida CDD New Money Issuance by County (2011 – 2018)

<table>
<thead>
<tr>
<th>County</th>
<th># Deals</th>
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<tbody>
<tr>
<td>Alachua</td>
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<tr>
<td>Brevard</td>
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<td>Collier</td>
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<td>Duval</td>
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<td>Hernando</td>
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<tr>
<td>Hillsborough</td>
<td>63</td>
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<tr>
<td>Lake</td>
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<td>Lee</td>
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<td>Manatee</td>
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<td>Miami-Dade</td>
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<td>Nassau</td>
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<td>Okaloosa</td>
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<td>Orange</td>
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<td>Osceola</td>
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<td>Palm Beach</td>
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<td>Pasco</td>
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<td>Sarasota</td>
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<tr>
<td>St. Johns</td>
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<tr>
<td>St. Lucie</td>
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<tr>
<td>Sumter</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>323</td>
</tr>
</tbody>
</table>

Source: Thompson Reuters & BKI (As of 12/31/2018)
Florida CDD Historical Pricing Trends

- Tax-exempt interest rates bottomed out shortly after “Brexit” in July 2016 with the 30-year “AAA” MMD scale hitting a 1.93%.
- Spread to the “AAA” MMD scale showed some additional compression in 2018 with spreads having settled into a range with most 30-year new money A bond only (pass-through to homeowners) transactions priced between 200-225 over the “AAA” and A-1/A-2 bond transactions (A-2 is developer paydown component) between 235-275 over.
- Credit spreads between deals have compressed from as wide as 150 basis points upon new issuance activity resuming post-recession in July 2013 down to 25-50 basis points in 2018. Spread widening is likely if housing data shows signs of a slow down and/or outflows in the tax-exempt market are experienced.
- At year-end 2018, the 20-year and 30-year MMD “AAA” were sitting at 2.84% and 3.02%, respectively.

30 Year “AAA” MMD Scale vs. 30-Year Florida CDD New Money Transactions (7/1/2013 – 12/31/2018)
Florida CDD Recent Pricing Trends

30 Year "AAA" MMD Scale vs. 30-Year Florida CDD New Money Transactions (6/30/2018 – 12/31/2018)

Source: Thompson Reuters & Bloomberg (As of 12/31/2018)
STATE OF FLORIDA  
COUNTY OF Sarasota  

AFFIDAVIT

BEFORE ME, the undersigned authority, this day personally appeared Patrick Neal, who by me first being duly sworn and deposed says:

1. I am over eighteen (18) years of age and am competent to testify as to the matters contained herein. I have personal knowledge of the matters stated herein.

2. I, Patrick Neal, am employed by Neal Communities, and serve as CEO. In the course of my employment, I work to develop planned communities within Florida, and often use special districts such as community development districts ("CDDs") to help finance the public infrastructure improvements associated with these projects. I also previously served as Chairman on the Commission on Ethics.

3. A special district is an independent special purpose unit of local government, most often established at the request of a developer or landowner with governmental approval. Special districts offer an attractive and cost-effective means of providing for the financing and management of major infrastructure systems and services to support the development of land within the district boundaries, such as roads, water management and control, water and sewer utilities, landscaping/hardscaping, etc. Establishment of special districts helps meet Florida’s demand for growth, and most planned communities in Florida use one or more types of special districts to provide the infrastructure necessitated by growth.

4. Special districts are units of government, subject to all of the same safeguards applicable to other units of government. Board members are considered local elected officials for purposes of financial disclosure and the sunshine law. CDDs turnover from landowner elected board members to resident elected board members at six years and 250 resident electors. This means that at least for the first six years, landowners within the district are generally serving as the members of the Board by design and thereafter residents are elected to the Board, who then make decisions impacting land, facilities and services within the boundaries of the district, including their own. This time-frame is actually shorter than the typical turnover time-frame for a homeowner’s association (which typically turns over at 90% build-out).

5. Proposed Rule 34-18.001 will make it more difficult to use special districts to help meet the demand in Florida for new growth. In particular, and despite the provisions of Florida’s Code of Ethics, the proposed rule is unclear on whether, in the early years of the project when it is under development, developer representatives can vote on matters affecting the developer as the primary landowner.
6. If in fact developer representatives can no longer vote on such matters, then special districts will not be a viable option for me to finance public infrastructure for my projects because it will be difficult if not impossible to find qualified Board Supervisors to participate. Because such participation would expose Board Supervisors to liability, it will be difficult, if not impossible, to find qualified persons to serve on a Board when no one except the landowner has a real interest in the project when it is under development, and many of the statutes governing special districts provide for no, or limited, compensation for such positions. Absent the use of special districts, and in light of the proposed Rule 34-18.001, the cost of financing public infrastructure will be more expensive, increase the cost of homes, and harm my business economically.

FURTHER AFFIANT SAYETH NOT.

By:

Patricia Neal

SWORN AND SUBSCRIBED before me this ___ day of June, 2019, by

Patrick Neal, for Neal Communities, who is [ ] personally known to me or [ ] has provided ______________ as identification, and who did / did not take an oath.

NOTARY PUBLIC

Print Name: Aubrey L. Calvert
Notary Public, State of Florida
Commission No.: GG164484
My Commission Expires: 12-19-21
I am concerned about the interpretation of the term “disproportionate benefit.” The proposed rule is vague, over broad, and inconsistent with the Constitutional Amendment. This is problematic for my clients, community development districts. In my experience over 30-years of managing districts the boards act in the best interests of their communities and take their fiduciary duties to the communities very seriously. I hope the ultimate rule will recognize that these board members have and likely will continue to behave in the best interests of their communities. New rules governing their actions are not needed.
Our law firm represents more than 100 community development districts formed and operating pursuant to Chapter 190, Florida Statutes. We are very concerned that the proposed rule will thwart the legislature’s intent to permit community development districts to provide for the management and financing of basic community development services. Furthermore, the proposed rule is vague and ambiguous, and as currently stated it would be very difficult to advise public officials as to their ethical obligations under the proposed rule. It needs to be further developed to ensure that it is consistent with Florida Statutes and the scope of the constitutional amendment approved by the voters. We support and echo the comments of others who have raised similar concerns about the proposed rule.

Thank you,

Straley Robin Vericker
Tampa, Florida
Ladies and Gentlemen,

This responds to proposed Rule: 34-18.001 Chapter: ABUSE OF POSITION TO OBTAIN DISPROPORTIONATE BENEFIT. Here are questions intended to identify factors that contribute to confusion about the way things should be done, and what we are allowed or not allowed to do under this proposed Rule with respect to Community Development Districts, established in accordance with Chapter 190 Florida Statutes ("CDD"): 

- This rule encompasses “public officer” or “public employee”. How does this rule apply to individuals serving as CDD Manager and/or appointed as Secretaries, Treasurers, members of CDD advisory boards or committees?

- Some beneficial outcomes may be unforeseen, uncertain, or something other than economic or measurable in monetary terms. In comparison to what would a “disproportionate benefit” be measured for those types of benefits? Would it be in violation or inappropriate to simply ignore benefits which cannot be valued, measured, or realized for certain?

- How does knowledge of a potential disproportionate benefit equate to violation of the Rule? For example, a CDD funded and operates a stormwater management system that benefits all property owners within the District, and all owners contribute towards the costs of funding and operating the stormwater management system. The CDD encompasses multiple neighborhoods. The majority of benefits accrue to each neighborhood uniformly; that is flood prevention generally benefits both developed and undeveloped property with an added benefit of protection against vertical structure damages. Individual CDD Board members are property owners in that CDD. Suppose that the CDD needs to upgrade the stormwater management system, and so its Board adopts a 5-year capital improvement plan. Due to financial constraints, the plan is designed to improve the system in one neighborhood at a time, as opposed to all at once, over a 5-year period. In the event of a flood in the fourth year of the 5-year construction period, there is potentially a disproportionate benefit accruing to ‘public officers’ that own property in those neighborhoods in which work was completed before the flood event and end of the construction period (added or improved flood protection).

>Does the CDD Manager violate the Rule by implementing the 5-year storm water improvement plan? If so, what could be mitigating circumstances?

>Did the CDD Board members violate the Rule by approving the 5-year improvement plan?

- In determining/evaluating a ‘disproportionate benefit’, would a financial benefit to individual property owners within a CDD (increased property prices due to road improvements or stormwater runoff improvements) be offset by non-financial benefits to other users or potential future users of CDD improvements (reduced accident costs, less congestion, flood prevention)?
- How will this Rule be enforced?
- What are the penalties for violating the Rule?
- What are the exceptions for CDDs?

By way of background, my firm serves as District Manager for more than 40 CDDs with operational budgets in excess of $25 million and bonds issued to fund public infrastructure in excess of $600 million serving over 24,000 parcels. We employ three individual District Managers that plan, organize and oversee the day-to-day operations of the CDDs, and are appointed by CDD Boards as Secretary and/or Treasurer.

In light of the foregoing, the proposed Rule is vague and ambiguous.
Ms. Virlindia Doss  
Executive Director  
The Florida Commission on Ethics  
PO Drawer 15709  
Tallahassee, FL 32317-5709

June 6, 2019

Dear Ms. Doss:

I am the Chief Operating Officer of the Citrus Research and Development Foundation (CRDF), a Direct Support Organization of the University of Florida. I am writing because I have been made aware of rules under consideration by the Commission on Ethics which have to do with the implementation of Amendment 12.

CRDF is funded by citrus grower box tax money and, of late, a direct appropriation by the Florida Legislature. It is governed by a board of directors, most of whom are citrus growers or citrus processors. Our task is to fund the research needed by the Florida citrus industry. We do this by evaluating research proposals brought to us through a Request for Proposals process. The proposals are approved by the board upon the recommendation of one of two CRDF committees. These committees are, again, composed primarily by citrus growers or citrus processors.

The research we fund benefits the Florida citrus industry, which in turn and in theory benefits CRDF board members and committee members because they are part of the industry. It is a model which has worked well since 2009, but concerns arise if the board or committee members are deemed public officers or public employees for the purpose of the rule you are considering. Needless to say, we do not believe that board or committee members of a Direct Support Organization are “public officers” or “public employees” for the purpose of the amendment. Therefore, please take this into consideration as you consider the rule, and please apprise if I may help answer questions or assist in any other way.

Sincerely,

Rick Dantzler

700 Experiment Station Rd - Lake Alfred, FL 33850 - Phone (863) 656-5264
June 6, 2019

VIA EMAIL AND HAND DELIVERY
DOSS.VIRLINDIA@LEG.STATE.FL.US

Verlinia Doss
Executive Director
Commission on Ethics
P.O. Drawer 15709
Tallahassee, Florida 32317-5709

Re: Proposed Rule 34-18.001

Dear Ms. Doss:

We represent The Villages of Lake-Sumter, Inc. and its affiliated entities ("The Villages") and often work with the currently 16 Community Development Districts (CDDs) providing services to the residents and businesses located within The Villages. We submit these comments relating to the proposed Commission on Ethics Rule 34-18.001 (the "Proposed Rule"). We ask this letter be placed in the Record.

As you may be aware, CDDs are established under chapter 190, Florida Statutes, for the express purpose of managing and financing basic services for communities. They serve an additional purpose for The Villages, which is located in 3 counties and 3 cities. With the exception of a few small areas that have HOA’s, there are no mandatory HOA’s or POA’s within The Villages and, the enforcement work for covenants and restrictions has been delegated by the Florida Legislature to The Villages CDDs. In many ways they can enforce — but have never had to — those sorts of violations akin to what a city or county would enforce with their code boards. Without the CDDs and the roles they serve with The Villages, we could not properly manage a development that currently has 125,000 residents and will eventually have 250,000.

Each CDD is headed by a 5-person board of supervisors who are charged with the responsibility for planning, managing and financing improvements, not to mention adopting rules under the APA or dealing with covenants and restrictions within the boundaries of the CDDs, including, as necessary, special assessments, procurement of engineering and other services, and the financing of improvements through the sale of bonds. Those bonds are easily
placed because the CDDs have performed this function since the early 90's and are trusted both by the cities and counties they are in and by the bond market.

In its current form, the Proposed Rule appears to apply to CDD supervisors, as well as all employees of the CDDs – in this case over 1,300 - and leaves those individuals without clear guidance regarding the conduct that may be deemed an ethical violation should the Proposed Rule become effective. Currently, those CDDs are represented by outside counsel who provide ethics training and advice regarding compliance with ethics standards. However, the Proposed Rule makes no reference to the existing Florida Code of Ethics, nor does it require any misuse of a public position in order for a violation to be found. Furthermore, the lack of specificity of the Proposed Rule is particularly problematic given its impacts not only on individual public officials or employees, but also on their family members, employers, any business they hold a position with or have some ownership in, and every individual or business with which the public officials or employees have a contract. The impacts, therefore, will be felt not only by the public official or employee, but also by businesses - both large and small - that those officials and employees hold a position with, have an ownership in, or contract with.

The Villages and its CDDs joins in the comments included in the good faith proposal for a lower cost regulatory alternative submitted to the Commission on behalf of the Association of Florida Community Developers and the Florida Association of Special Districts ("the Associations") and urge the Commission to defer adoption of the Proposed Rule implementing article II, § 8(h)(2) of the Florida Constitution until the lower cost regulatory alternative proposed by the Associations has been reviewed and a response prepared as required by § 120.541, Florida Statutes. Moreover, we urge that the Commission take no final action on the Proposed Rule until after a full assessment of its impacts on small businesses, small cities, and small counties, as is required by § 120.54(3)(b), Florida Statutes. Finally, and most importantly, a deferral will give those of us who are substantially and adversely effected by this more time to work with Commission staff to seek a mutually acceptable agreement on implementation language.

Sincerely,

[Signature]

Martha Harrell Chumbley
Nancy G. Fannan

cc: Gray Schafer  SCHAFER.GRAYDEN@LEG.STATE.FL.US
Senior Attorney, Florida Commission on Ethics
Governmental Management Services - South Florida, LLC serves as district manager to over 60 community development districts and I would like to comment that we concur with the comments submitted by the Association of Florida Community Developers and the Florida Association of Special Districts.
Chris - I left you a voicemail re: the contacts we’ve had here at EOG raising concerns with the Proposed Rule on Amdt 12 and requesting additional time to provide input. I wanted to make sure to pass along this information in advance of the Commission’s meeting. I’m happy to provide the specific information we’ve received.

Joe

The sender is not in your contact list.

Report Junk
The following article is included in the materials at the request of Ben Wilcox, Research Director for Integrity Florida
The constitutional language, which appeared as Amendment 12 on the ballot in November 2018 and passed with 80 percent of the vote, aimed to ban public officials from using their office to "disproportionate benefit." | Flickr

Critics howl over hazards of 'Swiss Army knife' of ethics enforcement

By MATT DIXON | 06/18/2019 05:01 AM EDT

TALLAHASSEE — An anti-corruption measure approved by voters in November has drawn last-minute fire from communities who say it could inadvertently tie the hands of hundreds of small districts that deliver specialized government services.
The constitutional language, which appeared as Amendment 12 on the ballot in November 2018 and passed with 80 percent of the vote, aimed to ban public officials from using their office to “disproportionate benefit.”

The Florida Commission on Ethics on Friday, after months of work, punted on a rule that would define the term “disproportionate benefit” and move the amendment closer to becoming law. The task was nearly complete when the panel was hit with a wave of resistance hours before a scheduled vote to implement the draft anti-corruption language.

Unlike other constitutional amendments passed by voters in November, lawmakers gave the anti-corruption language no attention during the spring legislative session and its implementation has flown largely under the radar. Once the rule is in place, lawmakers will be responsible for setting penalties for violations.

In the face of opposition, including pushback from residents of the politically influential retirement community The Villages, the ethics commission delayed a vote, opting instead to hold a fourth public hearing on the issue.

The delay angered Don Gaetz, a former Senate president who had worked on the proposal as a member of the Constitution Revision Commission, which proposes changes to the state constitution every 20 years. The CRC approved the proposal, known as Amendment 12, which was then passed by nearly 80 percent of voters.

“Hopefully, another public hearing will help the Commission grasp the clear intent and black-letter meaning of the constitution,” Gaetz told POLITICO Monday. “The commission has a historic obligation and opportunity to end the abuse of public office for private gain. This is the ethics commission’s high-water mark.”
The opposition is coming from lawyers who represent special districts, or subsets of government that oversee specific policies and deliver specialized services to small geographic areas. Many districts are led by board members with limited power and, typically, deep subject matter expertise. Many who serve also own land within the district and can thus be affected by their own official decisions.

Groups representing the special districts say the ethics commission’s anti-corruption language is too broad and could tie a board’s hands.

Attorney Jennifer Kilinski of Hopping Green & Sams represents the Association of Florida Community Developers. Under the broad definition of the proposed amendment, people who serve on district boards easily could find themselves in violation, she said.

“Think about tourist development councils or hospital districts that require a certain level of expertise, where you do have potential conflict situations,” Kilinski said during the commission meeting Friday. “I can’t imagine a person that has that knowledge that would be willing to serve.”

The sentiment is shared by residents of The Villages, who are concerned the constitutional language could entangle people serving on its 16 Community Development District boards. Attorney Martha Chumbler of Carlton Fields, who represents The Villages, said the language should be tied to the state’s current ethics code.

“If you don’t reference the current code of ethics, then public officials and public employees at every level in state and local government don’t know what their action or inactions will be,” she said at Friday’s meeting. “Will they be unethical?”

Gray Schafer, a senior attorney for the commission, disagreed. Voters and the Constitutional Revision Commission weren’t looking simply for existing ethics language to be added to the state constitution.

To make his point, Schafer relied, in part, on Gaetz’s words from an April South Florida Sun-Sentinel opinion piece, which he read during the meeting.

“This law could be the Swiss Army knife of ethics enforcement,” said Schafer, reading from the Gaetz op-ed. “It’s a defining moment to be bold or go easy. I don’t expect the ethics commission will get another chance like this for a very long time.”
Kilinski said the proposal fails to define intent when a public official benefits as a result of his or her vote.

"If you receive a benefit and you know about it, you’re in violation of the law whether you’ve abused your position, which is not what the CRC or the voters intended,” she said during the commission meeting.

Gaetz said he had no desire to exempt special districts or soften language to help board members.

“The black-letter language of the constitution does not carve out special districts,” he said.
I strongly support clear and transparent ethical rules and regulations for public officials and lobbyists. Staff and lobbyists actually control policy in Tallahassee, not the elected officials who bow down to lobbyists and special interests for campaign money. This is terribly wrong, and one reason why the majority of citizens don't have faith in government nor their elected officials.

Dennis A. Lopez,
Tampa Fla
Schafer, Grayden

From: Schaefer, Grayden  
Sent: Wednesday, June 26, 2019 9:27 AM  
To: ‘dadkins777@bellsouth.net’  
Subject: RE: Public Records Request

Thank you, Mr. Adkins. I look forward to seeing you on July 26th.

Gray Schafer

From: dadkins777@bellsouth.net <dadkins777@bellsouth.net>  
Sent: Tuesday, June 25, 2019 6:35 PM  
To: Schaefer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>  
Cc: ‘Trupti Shar’ <Trupti@dayspringvillage.org>  
Subject: RE: Public Records Request

Mr. Shafer

Thank you so much, I will make sure I place this important workshop on my schedule. I believe this is one of the most important rules facing the Commission in a very long time. Thank you for your careful work on gathering input and allowing the public to comment.

I believe that any rule should include the public officials that serve on the community development districts and the stewardship district and other special districts since this is a new and emerging form of public service and will require the oversight to ensure that the public interests are properly protected.

I still believe that the jurisdiction of the public official is relevant to whether there is a disproportionate benefit. I understand that this is a rule and as such how the Commission defines the term “public employee” and “public official” will be important aspects of any rule in establishing principles and criteria and standards that are easily understood and have plain meaning.

I look forward to seeing you on July 26th

Doug Adkins  
904-583-0134-cell

From: Schaefer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>  
Sent: Tuesday, June 25, 2019 5:15 PM  
To: Douglas Adkins <dadkins777@bellsouth.net>  
Subject: RE: Public Records Request

Mr. Adkins:

I wanted to let you know that the workshop on the rule will be held during the public session of the Commission on Ethics’ July meeting, which is on July 26, 2019. The meeting will be held at 9:00 AM on the Third Floor of the First District Court of Appeal in Tallahassee. More information about the workshop can be found on the main page of the Commission’s website (http://ethics.state.fl.us/index.aspx).

Gray Schafer
From: Douglas Adkins <dadkins777@bellsouth.net>
Sent: Tuesday, June 18, 2019 2:53 PM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: Re: Public Records Request

Mr Schafer

Let me know the date - I will attend as well.

Doug

Sent from my iPhone

On Jun 18, 2019, at 1:26 PM, Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us> wrote:

The Commission decided during the hearing to continue the matter. They asked us during the hearing to schedule another workshop that as many of them could attend as possible. We are working on scheduling that workshop now.

From: Douglas Adkins <dadkins777@bellsouth.net>
Sent: Tuesday, June 18, 2019 11:57 AM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Cc: Stillman, Kerrie <STILLMAN.KERRIE@leg.state.fl.us>
Subject: Re: Public Records Request

Mr Schafer

Thanks for the follow up. Did the Commission take any action on June 7th?

Doug Adkins

Sent from my iPhone

On Jun 18, 2019, at 10:09 AM, Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us> wrote:

Mr. Adkins:

While reviewing the emails regarding rulemaking on Amendment 12, I noticed the particular message below, which was sent by Mr. Larry Sellers to Chris Anderson and myself on March 25, 2019 at 8:43 AM. It simply says: “Thank you very much.”

I double-checked our response to your records request and I think this email was inadvertently left out. I want to provide this email to you, though, as I think it falls within the time-frame of your records request. Hope you are doing well.

Gray Schafer
Senior Attorney
Florida Commission on Ethics
(850)-488-7864
From: larry.sellers@hklaw.com <larry.sellers@hklaw.com>
Sent: Monday, March 25, 2019 8:43 AM
To: Anderson, Chris <ANDERSON.CHRI$@leg.state.fl.us>
Cc: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Amendment 12 Update:

Thank you very much.

Lawrence Sellers | Holland & Knight
Partner
Holland & Knight LLP
315 South Calhoun Street, Suite 600 | Tallahassee, FL 32301
Phone 850.425.5670 | Fax 850.224.8832
larry.sellers@hklaw.com | www.hklaw.com

From: Anderson, Chris <ANDERSON.CHRI$@leg.state.fl.us>
Sent: Monday, March 25, 2019 8:36 AM
To: Sellers, Lawrence E (TAL - X35670) <larry.sellers@hklaw.com>
Cc: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Amendment 12 Update:

Larry,
It was good to see you too. As to the rule, the latest should be the working draft prepared by staff (which is on our website, www.ethics.state.fl.us, top right of face page, under important dates).
Gray, if this is not the latest, please let me know.
Chris
C. Christopher Anderson, III
General Counsel and Deputy Executive Director
Florida Commission on Ethics
(850) 488-7864

From: larry.sellers@hklaw.com <larry.sellers@hklaw.com>
Sent: Friday, March 22, 2019 6:07 PM
To: Anderson, Chris <ANDERSON.CHRI$@leg.state.fl.us>
Cc: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: Amendment 12 Update:

Hey Chris—

It was good to see you yesterday.

As to the Amendment 12 rulemaking: Would you mind asking the appropriate person to send me a copy of the latest draft rule, please?
Thanks very much.
Good afternoon,

I just wanted to send a message of support to you and the State Ethics Commission regarding your task of "keeping the teeth" in any enforcement against lobbyists and public officials receiving gifts. I know disproportionate benefit has some ambiguity to it, but I hope you guys get it right and keep the special interests and tit-for-tat attitudes out of state government as much as possible.

Thank you for your work, your time, and attention.

--

Stephen Cox
scox443@gmail.com
Mr. Shafer

The disproportionate benefit rule that is pending before the Commission on Ethics is only as good as the willingness of the Commission to exercise a fair and equitable approach to how it conducts investigations to determine whether a disproportionate benefit exists. In reviewing the facts of the above referenced complaint, in my opinion the investigation conducted by the Commission was flawed in that it did not use its subpoena powers to obtain from the State of Nevada the records that would reveal who the owners of American Screener Company, LLC (NV20161465869)?

It appears that the Florida State University had concerns about possible conflicts of interest and had to seek out a legal opinion from the FSU general counsel. As I understand the documents, it appears that the FSU legal counsel said there was no conflict of interest provided Florida Psychological Associates owned the technology that was central to the $800,000 contract dealing with the CELPHIE screener. The facts appear to indicate in my opinion that the CELPHIE was not owned by FPA but instead was owned by a mysterious company created in Nevada to shield the owners from detection in August 2016. If American Screener Company, LLC owns the CELPHIE technology then both FSU and the Commission on Ethics should have used their authority to unmask or reveal the true nature of the ownership so the absence of a conflict could be clearly established.

The failure of the Commission to act and use its subpoena powers to seek some simple records from the State of Nevada in my opinion forms the basis for an “omission” on the part of the Commission and or its employees and thus creates a disproportionate benefit in that it is impossible to determine whether any illegal act was associated with the contract between Florida Psychological Associates and the Florida State University.

If Florida State University inspector general office cited in its report that $169,000 in public funds is unaccounted for, then in my opinion it only makes sense that the investigator or whoever is charged with investigating these facts would want to know who is benefitting from the monies that FSU paid to FPA who then in turn paid to American Screener Company, LLC. Why would someone with a start up small business seeking a $1 million dollar single source agreement with a major university want to create a secret company in Nevada and then subcontract with them to create additional transactions, banking transfers and movement of money that all creates additional costs and work. Why not just create that same company in Florida since all of its activity was in Florida?

The Commission on Ethics has the legal authority to seek subpoenas for records to help ensure that the public trust has not be compromised, when the Commission fails to make a reasonable effort to seek all relevant documents associated with a case such as the one mentioned above then we must ask ourselves does this “omission” create a disproportionate benefit to the person who is being investigated in that absent these facts it is impossible to establish who actually is benefitting whether properly or improperly.

In my view this all lends to the fact that no one should file a complaint with the Commission on Ethics as the investigative process is not well defined and it leaves the process open to the jaded view of personalities rather that a simple unbiased review of what the facts are and what those facts suggest. It is better to refer a complaint to the state attorney and leave it at that, if there is any concern let the state attorney decide whether to file a complaint or not. The average citizen can be harmed by public officials who despite the presence of evidence there was a violation of law can be ruled innocent with the notion there is “no corrupt intent”. This then allows public officials to utilize the public funds
to hire lawyers to seek retaliation against all those who might file a complaint of any type. The incomplete investigative process is evident and the “omissions” made by the investigators play a key role in determining what happens.

https://www.nvsos.gov/sosentitysearch/CorpDetails.aspx?lx8nvq=QluQ37NJLrcDkKi5rA9CEA%253d%253d&nt7=0


I look forward to seeing you and the others who wish to speak on the proposed rule. I have no other interest in this rule other than to see that the process of improving public confidence in our elected officials is improved and that investigations of whatever type conducted are complete and work towards surfacing the facts to ensure that there is some degree of accountability. I wish the Commission would turn its attention to the problem with its investigative process and understand that despite having two similar fact patterns depending on the lawyers or personalities involved the commission will make two different recommendations (Hagan case and the Slay case).

Perhaps the Commission should ask the local state attorneys to conduct these investigations since they are trained professionals who will be duty bound to seek the facts and pursue the fact pattern in a unbiased and fair manner. Maybe it's time to rethink how the Commission handles investigations, especially with regards to the disproportionate benefit rule that is being considered. Just my opinion on this issue but I feel we could be doing better.

Doug Adkins
Fernandina Beach, Florida