BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

CONFIDENTIAL

In re: Janet McDonald,

Respondent. **Complaint No. 16-061**

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ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT/COMPLAINANT

Respondent, Janet McDonald, served as a member of the District School Board of Flagler County and was a candidate for that position. Complainant is Frank J. Meeker of Palm Coast, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on September 10, 2018.

ALLEGATION ONE

Respondent is alleged to have violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate 2013 CE Form 6, "Full and Public Disclosure of Financial Interest."

APPLICABLE LAW

Article II, Section 8 Florida Constitution provides:

> (a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.
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> * * *
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> (i) Schedule–On the effective date of this amendment and until changed by law:
> (1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:
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> * * *

Section 112.3144(1), Florida Statutes, provides as follows

> (1) An officer who is required by s. 8, Art. II of the State Constitution to file a full and public disclosure of his or her financial interests for any calendar or fiscal year shall file that disclosure with the Florida Commission on Ethics.

ANALYSIS

Respondent was elected in November 2014 to the District School Board of Flagler County. (ROI 4) It is alleged that Respondent failed to properly disclose or identify assets on her 2013 and 2014 CE Form 6, "Full and Public Disclosure of Financial Interest," filings as a candidate and elected official. (ROI 1, Exhibits A, B) Regarding both the 2013 CE Form 6 and the 2014 CE Form 6, Complainant alleged the following:

a. Respondent reported real estate holdings in Flagler County, Florida, and Roxbury, Connecticut, in the aggregate rather than identifying each parcel individually.

b. Respondent failed to provide addresses, or some other such specific information, reflecting the location of each individual parcel she owned in Florida and Connecticut.

c. Respondent "grossly overstated" the aggregate values of her real estate holdings in Florida and Connecticut.

d. Respondent reported the aggregate value of bank accounts held at multiple financial institutions rather than reporting the specific values of accounts held at each institution.

e. Respondent reported an IRA valued at $100,000 but failed to list the individual assets within the IRA with values greater than $1,000.

(ROI 5)

2013 CE Form 6

On the first line under "Part B-Assets" of her 2013 CE Form 6, Respondent reported her non-homestead properties as "Real Estate-open land Palm Coast." (ROI 7, Exhibit A) On the second line under "Part B-Assets," Respondent reported "Real Estate - home Palm Coast." (ROI 7, Exhibit A) As of December 31, 2013, Respondent was the sole owner of seven non-homestead properties located in Flagler County. (ROI 9, Exhibit C) Respondent and her husband jointly owned a residence located at 5 Twisted Oak Place, Palm Coast, as well as property located at 18 Cypress Wood Drive, South, in Palm Coast. (ROI 9, Exhibit C) On the third line under "Part B-Assets" of her 2013 CE Form 6, Respondent reported "Real Estate-homes Roxbury CT." (ROI 10)

Respondent denied that she and her husband jointly owned the real estate in question prior to July 2015. (ROI 12) She confirmed that prior to July 2015, she was the sole owner of all the Florida and Connecticut real estate holdings in question. (ROI 12) During September 2014, she conveyed all of her real estate holdings to "The Dennis K. and Janet O. McDonald Family Trust."

(ROI 12) During July 2015, the Trust conveyed the properties to Janet O. and Dennis K. McDonald, husband and wife. (ROI 12)

Instructions on the 2013 CE Form 6, under Part B, provide direction for reporting assets. (ROI 14) The instructions read, "Assets individually valued at over $1,000: Description of asset (specific description is required - see instructions p. 4)." (ROI 14) On page four, under the heading "How to Identify or Describe the Asset," the instructions in pertinent part read, "Real property: Identify by providing the street address of the property. If the property has no street address, identify by describing the property's location in a manner sufficient to enable a member of the public to ascertain its location without resorting to any other source of information." (ROI 14) Thus, on her 2013 form, Respondent was required to disclose and identify or describe the real property in which she owned an interest. The properties listed by Respondent lack a requisite description.

Under the heading "How to Value Assets," the instructions for the 2013 CE Form 6 in pertinent part read, "Value each asset by its fair market value on the date used in Part A for your net worth. . . . Real property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available." (ROI 19) Respondent reported $215,000 as the aggregate value of the non-homestead properties in Florida, alluded to in line one under Part B of her 2013 CE Form 6. (ROI 15) Further, Respondent reported $450,000 as the value of her personal residence, but the assessed value provided by the Property Appraiser for Respondent's personal residence during 2013 was $256,751. (ROI 15) Respondent overstated the value by $193,249.

Respondent disclosed the aggregate value of her Connecticut homes as $2,250,000. (ROI 16) Broken down by property, the property assessor's records reflect that the assessed value of the

Baker Road property was $272,590 and the assessed value of the Wellers Bridge Road property was $638,200. (ROI 16) Consequently, the aggregate assessed value of the two Roxbury properties for 2013 was $1,013,190. (ROI 16) However, it was noted that the assessed values provided by the Town Assessors in Connecticut were equal to 70 percent of the estimated appraised value of a given property. (ROI 16) Consequently, the Roxbury Town Assessor's estimated that the appraised values were $389,420 for the Baker Road property and $911,720 for the Wellers Bridge Road property. (ROI 16) Utilizing the estimated appraised values provided by the Town Assessor, the aggregate value of Respondent's Roxbury properties for 2013 was $1,301,140, approximately $280,000 higher than the value Respondent disclosed.[1] (ROI 16)

The documents provided by Complainant further reflect that Respondent owned "5 upland pastures" in Sherman, Connecticut, with an assessed value of $102,400. (ROI 17) The estimated appraised values provided by the Sherman Town Assessor for the subject property for 2013 was $146,200. (ROI 17) Respondent failed to disclose her ownership of the Sherman property on her 2013 CE Form 6. (ROI 17)

On the fourth line under "Part B-Assets" of her 2013 CE Form 6, Respondent reported "Bank Accounts (Wells Fargo, HSBC, TD North)," with an aggregate value of $230,000. (ROI 20) Complainant alleged that Respondent was required to disclose a separate value for accounts held at each financial institution, but Respondent replied, "The banks are delineated and the total amount is aggregate, as allowed." (ROI 20, 21)

Under the heading "ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000," the instructions for the 2013 CE Form 6 in pertinent part read, "Provide a description of each asset you had on the reporting date chosen for your net worth (Part A), that was worth more than $1,000

[1] Assessed value – Respondent's disclosed value ($1,301,140 - $1,013,190 = $287,950).

and that is not included as household goods and personal effects, and list its value." (ROI 22) Further guidance is provided in Rule 34-8.004 - Disclosure of Net Worth, Assets and Liabilities, *Florida Administrative Code*, which states that CE Form 6 "shall provide space for the specific identification and value of each asset which exceeds $1,000 in value. . ." which indicates that an aggregate or combined amount is insufficient. See also CEO 12-10.

On the fifth line under "Part B-Assets" of her 2013 CE Form 6, Respondent reported "IRA," with a value of $101,000. (ROI 23) Complainant correctly alleged that Respondent was required to identify each asset within the IRA that had a value greater than $1,000. (ROI 23) Respondent stated, "IRA over $100K with listing of each value is not contained in the pages of directions included for filing CE Form 6." (ROI 24) Yet, under the heading "ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000," the instructions for the 2013 CE Form 6 specifically reference "assets held in IRAs" as an example of tangible and intangible personal property that should be disclosed as assets on the form. (ROI 25) The Commission has opined that an "'IRA" is a name given to a retirement savings plan created pursuant to Section 408 of the Internal Revenue Code, and is not property itself. Under the definition in Section 192.001(11)(b), the 'IRA' would not be intangible personal property which would have to be reported. Rather, the intangible personal property is the cash or investment products, held within the IRA." CEO 11-11 (footnote omitted)

Respondent's 2013 CE Form 6 was inaccurate as she failed to sufficiently and/or individually identify the locations and value of her real estate holdings in Flagler County, Florida, and Roxbury, Connecticut. Respondent overstated the value of her real estate holdings in Florida and Connecticut. She failed to identify the specific values of accounts held at each financial

institution. Lastly, she failed to list the individual assets within the IRA with values greater than $1,000. These failures are not insignificant, inconsequential, or diminimus.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes.

ALLEGATION TWO

Respondent is alleged to have violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate 2014 CE Form 6, "Full and Public Disclosure of Financial Interest."

APPLICABLE LAW

Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, as set forth under Allegation One, above.

ANALYSIS

2014 CE Form 6

On the first line under "Part B-Assets" of her 2014 CE Form 6, Respondent reported "Janet & Dennis McDonald Trust (open land & home, Palm Coast FL)," with $665,000 as the corresponding value. (ROI 26, Exhibit B)

On the second line under "Part B-Assets" of her 2014 CE Form 6, Respondent disclosed "Janet & Dennis McDonald Trust (homes Roxbury CT)," which she valued at $2,250,000. (ROI 27)

The instructions for completing the 2014 CE Form 6 are very similar to the instructions for the 2013 form. (ROI 28) A statement on the 2014 CE Form 6, under "Part B-Assets," provides instruction for reporting assets. (ROI 28) The subject statement reads, "Assets individually valued

at over $1,000: Description of asset (specific description is required - see instructions p.4)." (ROI 28) On page four, under the heading "How to Identify or Describe the Asset," the instructions read, "Trusts: You are deemed to own an interest in a trust which corresponds to your percentage interest in the trust corpus." (ROI 28)

Respondent advised that in September 2014, she conveyed all of her real estate holdings in Florida and Connecticut to The Dennis K. McDonald and Janet O. McDonald Family Trust. (ROI 29) Warranty Deeds reflect the transfer of the seven Flagler County properties Respondent owned individually and reflect the transfer of the two properties Respondent owned jointly with her husband. (ROI 29) The aggregate assessed value of the nine properties in question during 2014 was $388,002. (ROI 29) Additionally, the Warranty Deeds reflect that Respondent and her husband were co-trustees of the Trust. (ROI 29)

As of December 31, 2014, Respondent, individually, remained the sole owner of the two properties located in Roxbury, Connecticut. (ROI 30) Respondent did not convey the Roxbury properties to the Family Trust until February 6, 2015. (ROI 30) The Roxbury Town Assessor's records reflect that during 2014, the assessed value of the property located at 6 Baker Road was $272,590 ($389,420 estimated appraised value), and the property located at 117 Wellers Bridge Road was $638,200 ($911,720 estimated appraised value). (ROI 30) Respondent referenced "homes Roxbury CT" under "Part B - Assets" of her 2014 CE Form 6. (ROI 30) However, she did not disclose the addresses, or other identifying information, or the individual estimated values applicable to the Roxbury properties. (ROI 30)

The real estate documents pertaining to the 5 Upland Pastures Respondent owns in Sherman, Connecticut do not reflect that Respondent conveyed the Sherman property to the Family Trust. (ROI 31) Kathy Retter, Assistant Assessor for the Town of Sherman, confirmed that

Respondent presently is, and has been since May 2007, the sole owner of the 5 Upland Pastures in Sherman. (ROI 31) Respondent failed to disclose the Sherman, Connecticut property as an asset on her 2014 CE Form 6. (ROI 31)

On page four of the instructions for the 2014 CE Form 6, under the sub-heading "How to Identify or Describe the Asset," the instructions in pertinent part read, "Real property: Identify by providing the street address of the property. If the property has no street address, identify by describing the property's location in a manner sufficient to enable a member of the public to ascertain its location without resorting to any other source of information." (ROI 32)

Under "Part B-Assets" of her 2014 CE Form 6, Respondent reported "Bank Accounts (Wells Fargo, HSBC, TD North)," with an aggregate value of $200,000. (ROI 33) Under the heading "ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000," the instructions for the 2014 CE Form 6 in pertinent part read, "Describe, and state the value of, each asset you had on the reporting date you selected for your net worth in Part A, if the asset was worth more than $1,000 and if you have not already included that asset in the aggregate value of your household goods and personal effects." (ROI 35)

Under "Part B-Assets" of her 2014 CE Form 6, Respondent reported "IRA," with a value of $105,000. (ROI 36) Respondent was required to identify each asset within the IRA that had a value greater than $1,000. (ROI 36)

Under the heading "ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000," the instructions for the 2014 CE Form 6 in pertinent part read, "Assets also include investment products held in IRAs, brokerage accounts, and the Florida College Investment Plan. Note that the product *contained in* a brokerage account, IRA, or the Florida College Investment Plan, is your asset – not the account or plan itself." (ROI 38) [Emphasis in original.]

As with her 2013 CE Form 6, Respondent's 2014 CE Form 6 was significantly inaccurate because she failed to sufficiently and/or individually identify the locations and value of her real estate holdings in Flagler County, Florida and Roxbury, Connecticut. Respondent overstated the value of her real estate holdings in Florida and Connecticut. She failed to identify the specific values of accounts held at each financial institution. Lastly, she failed to list the individual assets within the IRA with values greater than $1,000.

Respondent made significant errors and omissions on her 2014 CE Form 6.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes.

RECOMMENDATION

It is my recommendation that:

1. There is probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate 2013 CE Form 6, "Full and Public Disclosure of Financial Interest."

2. There is probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate 2014 CE Form 6, "Full and Public Disclosure of Financial Interest."

Respectfully submitted this 2nd day of November, 2018.

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CEO 12-10 – April 4, 2012

FINANCIAL DISCLOSURE

METHOD OF REPORTING ASSETS

To: Name withheld at person's request (Counsel for the Florida Prepaid College Board)

SUMMARY:

Investment products held in Individual Retirement Accounts, 401(k)s, the Florida Retirement Investment Plan, the Florida College Prepaid Plans, and Deferred Option Retirement Accounts should be reported as assets on a CE Form 6, Full and Public Disclosure of Financial Interests, if their value exceeds the reporting threshold. When funds are held in a bank, credit union, or other institutional account, the account should be identified as an asset.

QUESTION 1:

What is the proper method of reporting, on a CE Form 6, Full and Public Disclosure of Financial Interests, assets held in an Individual Retirement Account?

Your question is answered as follows.

You write on behalf of the Chairman of the Board of the Florida College Prepaid Plan, who is required to file CE Form 6, Full and Public Disclosure of Financial Interests, and who has questions pertaining to the proper means of reporting various assets. You present the scenario of an Individual Retirement Account (IRA), containing individual investment products as follows: General Electric (GE) stock valued at $15,000, Kroger Corporation stock valued at $800, and stock in the Vanguard Large Cap Index Fund valued at $9,200.

Article II, Section 8, Florida Constitution, requires that "all elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests." It further states that "Full and public disclosure of financial interests shall mean filing with the custodian of state records by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 . . . ."

Your question is whether investment and savings vehicles, such as an IRA or a 401(k), are the "assets" to be reported, as opposed to the investment products that comprise the investment or savings vehicles.

Borrowing from the definitions in Black's and Ballentine's Law Dictionaries, we have long defined an "asset" as anything which can be made available for the payment of debts. See CEO 78-1. Given such a definition, an "asset" would include tangible and intangible personal property. The question then becomes whether it is the IRA or 401(k), or the products contained therein, which are the official's intangible personal property.

In CEO 11-11, we spoke to the proper reporting, on the CE Form 1, Statement of Financial Interests, of "intangible personal property," as required by Section 112.3145, Florida Statutes. In that opinion, we pointed out that "IRA" and "401(k)" are simply names given to certain types of retirement

savings plans created pursuant to federal law[1], and found that it is not the IRA or 401(k), but the property held *within* these plans, which is the intangible personal property. Thus, we said that investment products within an IRA or a 401(k) should be reported on a CE Form 1 as intangible personal property, if their value exceeds the threshold chosen by the reporting individual.

Similarly here, we find that the assets in the scenario you present are the GE stock valued at $15,000, the Kroger Corporation stock valued at $800, and the Vanguard stock valued at $9,200. The value of the Kroger Corporation stock does not exceed the reporting threshold of $1,000 and therefore that asset need not be reported. The GE and Vanguard stocks are each more than $1,000, and each stock should therefore be reported separately as an "asset" in Part B of CE Form 6.

QUESTION 2:

What is the proper method of reporting, on a CE Form 6, Full and Public Disclosure of Financial Interests, money held in bank accounts or other institutions?

Your question is answered as follows.

You present a scenario of $75,000 in cash in a residential safe, three separate checking accounts at three separate banks with balances of $10,000, $20,000, and $5,000, and another $5,000 in an IRA. You write that "bank accounts, like the IRA, are not intangible personal property. Rather, the cash within the accounts is the intangible personal property" and suggest that instead of reporting each account separately, the asset should be described only as "cash," and the value of the accounts should be aggregated with the $75,000 in the safe and reported as $115,000.

We agree that the $75,000 should be reported as "cash," but find that an account at a bank or other institution is fundamentally different from cash in a residential safe. 5 Fla. Jur. 2d Banks, s. 192 states:

> A deposit creates a mere chose in action, or right to money; it is a debt owing by the depository, collectible by the owner. When used in connection with a banking transaction, the term "deposit" denotes a contractual relation created when one delivers money or a thing to a bank, which receives it upon the agreement that the deposit will be paid out on the order of the depositor or returned to him or her on demand. As a general rule of Florida law, when funds are deposited with a bank, the bank takes title to money and owes debt to its customer, which corresponds to amount of deposit. Under Florida law, relationship between bank and holder of deposit account is contractual in nature. A bank receives a deposit of funds on the implied condition that it will only disburse the funds on the order of the depositor or someone authorized to act for the depositor. [Footnotes omitted.]

Because a checking or savings account is a right to receive money, it is an asset, and should be reported as such on a CE Form 6 as, for example: "savings account" "name of institution."

With respect to the IRA, pursuant to 26 U.S.C. s. 408, "the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries . . . ." In CEO 78-37, we found that where an official created savings accounts in his name but in trust for his children, the accounts were revocable trusts and were required to be reported

as assets. The courts have also referred to IRAs as "contracts." See, Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. 2nd DCA 2001), holding that an IRA is a contract with an institution that involves a third-party beneficiary designation, and the rights of a spouse named a beneficiary arise from that contract. Under either characterization, the funds contained in the account are the asset of the account owner, but as with a bank savings account, are not the equivalent of cash in a home safe. Therefore, such accounts should be reported as, for example: "Cash in IRA" "name of institution."

QUESTION 3:

> What is the proper method of reporting, on a CE Form 6, Full and Public Disclosure of Financial Interests, funds invested in defined benefit pension plans, defined contribution pension plans, Florida DROP benefits, and prepaid college savings plans?

Your question is answered as follows.

You have generally inquired about how to report funds invested in defined benefit pension plans, defined contribution pension plans, Florida DROP benefits, and prepaid college savings plans.

We are unable to answer your questions as to defined benefit and defined contribution pension plans with precision, because your materials do not indicate specifically the characteristics and features of the defined benefit or defined contribution pension plan at issue. However, in CEO 11-11 we advised that CE Form 1 filings regarding investments in the Florida Retirement System (FRS) Investment Plan—a defined contribution plan—should disclose all financial products held within the plan which had a value greater than the reporting threshold chosen. Our rationale there was that with the Investment Plan, the participant has a choice of various investment funds and allocates his or her contributions and account balance among them. We compared the Investment Plan to an IRA or 401 (k) because "the participant can choose and knows, at any given time, where his or her funds are invested and their value, and has the ability to manage those investments." While the potential for conflict arising from such known investments may be small, we reasoned, there is a public purpose to be served in requiring disclosure.

We also noted in CEO 11-11 that in contrast to the Investment Plan, the FRS Pension Plan is a defined benefit plan in which the participant has no voice in how the funds are invested and virtually no way to ascertain the present-day value of the investment. In addition to the practical inability of the reporting individual to calculate whether the value of the pension exceeds the reporting threshold chosen, we found that to the extent that the purpose of the Form 1 disclosure is to identify potential sources of conflict, that purpose is not served by requiring disclosure of the FRS pension. The vast majority of reporting individuals have no influence on pension investment decisions, we reasoned, and in the unlikely event they know what products Pension Plan funds are invested in, the sums invested are so large that an individual's interest in the invested-in company or product is diluted to the point that the potential for conflict is miniscule.

As to funds in Florida Prepaid College Plans, we found in CEO 11-11 that participants in the Prepaid College Plan, a plan in which the plan participant makes no investment choices and can transfer the Plan to another qualified family member or cancel the Plan and receive a refund (less a cancellation fee of up to $50 for participants who have had their Plan for less than two years) would report the Plan as intangible personal property if the balance exceeds the reporting threshold selected. Similarly, we believe the Florida Prepaid College Plan is an "asset," for purposes of Form 6 reporting, and should be reported as "Prepaid College Fund" "State of Florida" if its value exceeds $1,000.

We also found in CEO 11-11 that the Florida College Investment Plan is an investment vehicle in which participants may select one or any combination of five investment options. We found in that opinion, that as with an IRA, it is the investment product, not the Plan itself, that is intangible

personal property. Consistent with CEO 11-11, we find that the financial product or products which make up the Investment Plan are assets, and should be reported if their value exceeds $1,000.

Finally, as to money held in the Florida Deferred Retirement Option Program (DROP), in CEO 11-11 we found that the dollars accrued in such an account were intangible personal property of the reporting individual, and should be disclosed as "Deferred Retirement Option Account" "State of Florida" on the Form 1 if they exceed the reporting threshold. Similarly, we find here that such funds should be reported on the CE Form 6 if the value exceeds $1,000.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 30, 2012 and **RENDERED** this 4th day of April, 2012.

Robert J. Sniffen, *Chairman*

[1] Title 26 United States Code § 408 and Title 26 United States Code § 401(k), respectively.

CEO 11-11 – September 14, 2011

FINANCIAL DISCLOSURE

METHOD OF REPORTING INTANGIBLE PERSONAL PROPERTY

To: Charles M. Trippe, (General Counsel, Office of The Governor)

SUMMARY:

Funds or investment products held in Individual Retirement Accounts, 401(k)s, the Florida Retirement Investment Plan, the Florida College Prepaid Plans, and Deferred Option Retirement Accounts should be reported as intangible personal property on a CE Form 1, Statement of Financial Interests, if their value exceeds the reporting threshold selected by the filer.

QUESTION 1:

What is the proper method of reporting, on a CE Form 1, Disclosure of Financial Interests, assets held in an Individual Retirement Account?

Your question is answered as follows.

You write on behalf of several members of the Governor's staff who are required to file CE Form 1, Disclosure of Financial Interests. You have questions pertaining to the proper means of reporting intangible personal property[1] in on a number of scenarios. The first of these involves an individual with an Individual Retirement Account (IRA), the value of which totals $20,000. The individual investment products comprising the IRA consist of a long-term growth mutual fund worth $7,000; a short-term bond fund worth $6,000, and a mid-cap equity fund worth $7,000. The individual has selected the $10,000 reporting threshold[2].

Section 112.3145, Florida Statutes, provides, in pertinent part:

> (2)(b) Each state or local officer and each specified state employee shall file a statement of financial interests no later than July 1 of each year . . . .
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> (3) The statement of financial interests for state officers, specified state employees, local officers, and persons seeking to qualify as candidates for state or local office shall be filed even if the reporting person holds no financial interests requiring disclosure, in which case the statement shall be marked "not applicable." Otherwise, the statement of financial interests shall include, at the filer's option, either:
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> ***
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> (a)3. The location or description of real property in this state, except for residences and vacation homes, owned directly or indirectly by the person reporting, when such person owns in excess of 5 percent of the value of such real property, and a general description of any

> intangible personal property worth in excess of 10 percent of such person's total assets. For the purposes of this paragraph, indirect ownership does not include ownership by a spouse or minor child; . . .
>
> or
>
> (b)3. The location or description of real property in this state, except for residence and vacation homes, owned directly or indirectly by the person reporting, when such person owns in excess of 5 percent of the value of such real property, and a general description of any intangible personal property worth in excess of $10,000. For the purpose of this paragraph, indirect ownership does not include ownership by a spouse or minor child . . . .

Section 112.3145 does not define the term "intangible personal property," but in the gift law the Code of Ethics adopts the definition found in Section 192.001(11)(b), Florida Statutes[3], which states:

> "Intangible personal property" means money, all evidences of debt owed to the taxpayer, all evidences of ownership in a corporation or other business organization having multiple owners, and all other forms of property where value is based upon that which the property represents rather than its own intrinsic value.

"IRA" is a name given to a retirement savings plan created pursuant to Section 408 of the Internal Revenue Code[4], and is not property itself. Under the definition in Section 192.001(11)(b), the "IRA" would not be intangible personal property which would have to be reported. Rather, the intangible personal property is the cash or investment products, held within the IRA. In the scenario you have presented, none of the investment products has a value greater than the threshold selected—$10,000, and so none of the products would be required to be reported.[5]

QUESTION 2:

> What is the proper method of reporting, on a CE Form 1, Disclosure of Financial Interests, assets held in a 401(k)?

Your question is answered as follows:

A "401(k)" is another type of retirement savings plan, named for Title 26 United States Code § 401(k). In this plan employees can make contributions, which are sometimes matched by employers, and can select from a variety of investment products. Again, "401(k)" is merely the name given the type of plan—the intangible personal property is the funds or investment products held in the plan.

In the scenario you present, the employee has selected the $10,000 reporting threshold. The employee has a 401(k) with a total worth of $33,250, of which $15,000 is invested in a mutual fund and $13,250 and $5,000 are invested in two different publicly-traded stocks.

The employee would be required to report the mutual fund investment and the larger value of stock as intangible personal property, because these two investment products each exceed the reporting threshold.[6] On the form, for the "general description of intangible personal property" required by the statute, these would be listed as "mutual fund" "name of mutual fund" and "stock"

"name of corporation," as the form requires information regarding both "type of intangible and "business entity to which the property relates."

QUESTION 3:

What is the proper method of reporting, on a CE Form 1, Disclosure of Financial Interests, funds invested in the Florida Retirement System Investment Plan?

Your question is answered as follows:

In this scenario, the employee is a participant in the Florida Retirement System ("FRS") Investment Plan, and has $25,000 divided evenly between two mutual funds available under the plan. In responding to the question of how these funds should be reported, it is necessary to describe the difference between the FRS Investment Plan and the FRS Pension Plan.

The FRS Pension Plan is a defined benefit plan in which the employer and plan participant make contributions, and, upon retirement, the participant receives a defined benefit arrived at by a calculation based on his or her years of service, FRS membership class (Regular Class, Special Risk Class, etc.) and the particular benefit option chosen at the time of retirement. The participant has no voice in how the funds are invested. Further, absent employment of an actuary, who will even then have to make assumptions about how long the participant will work, how much he or she will earn, and which option he or she will chose at retirement, the plan participant has no way to ascertain the present-day value of the investment.

While there is an argument that an FRS Pension Plan should be considered intangible personal property in the strict definition of the term, several factors mitigate against requiring a reporting individual to report it as such on the Form 1. First, the inability of the participant to know the value of his/her pension at any given time prior to retirement makes it impossible to perform the calculation required to ascertain whether the value of the pension exceeds the reporting threshold chosen. In addition, to the extent that the purpose of the Form 1 disclosure is to identify potential sources of conflict, that purpose is not served by requiring disclosure of his FRS pension. The vast majority of reporting individuals have no influence on pension investment decisions and are unlikely even to know what products Pension Plan funds are invested in. Even in the rare case where a participant does know what products are invested in, the sums invested are so large that an individual's interest in the invested-in company or product is diluted to the point that the potential for conflict is miniscule.

In contrast, the FRS Investment Plan is a defined contribution plan, in which employer and participant contributions are set by law, but the ultimate benefit depends on the performance of the participant's investment funds. As with the Pension Plan, it is funded by contributions based on salary and FRS membership class (Regular Class, Special Risk Class, etc.). The Investment Plan directs contributions to individual member accounts, and the participant allocates his or her contributions and account balance among various investment funds. If the participant terminates service prior to meeting the one-year vesting requirement, he or she will be entitled to a refund of contributions.

The Investment Plan is in some ways more like an IRA or 401(k) than it is the Pension Plan—the participant can choose and knows, at any given time, where his or her funds are invested and their value, and has the ability to manage those investments. For these reasons, although the potential that these investments would give rise to a conflict may be small, there is a public purpose to be served in requiring disclosure.

In the scenario you describe, the employee participates in the Investment Plan, has $25,000 divided evenly between two mutual funds available under the plan, and has selected the $10,000

reporting threshold. Under these circumstances, the employee should report each of the mutual funds as intangible personal property, because each investment exceeds the threshold.[7]

QUESTION 4:

> Should money held in a Florida Prepaid College Plan be reported as Intangible Personal Property, on a CE Form 1, Disclosure of Financial Interests, if its value exceeds the reporting threshold?
>
> Your question is answered in the affirmative.

According to its website[8], Florida Prepaid College Plans offers two different plans: the Florida Prepaid College Plan and the Florida College Investment Plan. Both are "qualified tuition programs" under Title 26 United States Code § 529. The Florida Prepaid College Plan is a prepaid plan and is guaranteed by the State of Florida pursuant to Section 1009.98(7), Florida Statutes. The plan participant makes no investment choices, can transfer the Plan to another qualified family member, and can cancel the Plan and receive a refund, less a cancellation fee of up to $50 for participants who have had their Plan for less than two years. Participants in these plans would report the Plan as intangible personal property if the balance exceeds the reporting threshold selected. On the form, for the "general description of intangible personal property" required by the statute, this would be listed as "Prepaid College Fund" "State of Florida."

The Florida College Investment Plan is an investment vehicle designed to be used to accumulate funds to pay for college expenses. It is not guaranteed, and principal and investment returns fluctuate. Currently, participants may select one or any combination of five investment options. As with the IRA, the plan itself is not the intangible personal property—the investment product is. Therefore, participants in this plan would report the investment product or products as intangible personal property if the amount invested in the product exceeds the reporting threshold.

QUESTION 5:

> Should money held in a State of Florida Deferred Compensation Plan be reported as Intangible Personal Property, on a CE Form 1, Disclosure of Financial Interests, if its value exceeds the reporting threshold?
>
> Your question is answered in the affirmative.

The State of Florida's Deferred Compensation Program is a participant directed investment plan, pursuant to Title 26 United States Code § 457.[9] Like a 401(k), it allows employees to make tax deferred contributions into a broad range of investment options that have varying degrees of risk and return. As with the examples in questions 1 and 2, relating to IRAs and 401(k)s, the Deferred Compensation Program is not itself the intangible personal property, but merely the vessel for that property. The intangible personal property is the financial product invested in, and that product should be reported if its value exceeds the reporting threshold.[10]

QUESTION 6:

Should money held in the Florida Deferred Retirement Option Program be reported as Intangible Personal Property, on a CE Form 1, Disclosure of Financial Interests, if its value exceeds the reporting threshold?

Your question is answered in the affirmative.

The Deferred Retirement Option Program (DROP) provides members of the FRS Pension Plan with an alternative method for payment of retirement benefits for a specified and limited period. Under this program, the participant stops earning service credit toward a future benefit, his or her retirement benefit is calculated at the time the DROP period begins and the monthly retirement benefits accumulate in the FRS Trust Fund earning interest while the participant continues to work for an FRS employer. Upon termination, the DROP account is paid out as a lump sum payment, a rollover, or some combination of the two.

To some extent, DROP is like a savings account that the employee cannot access until termination of employment. However, despite this temporary inability to make a "withdrawal," the employee has an entitlement to the DROP funds. That being the case, the dollars accrued in the account can be said to be intangible personal property of the reporting individual, and should be disclosed as such on the Form 1 if they exceed the reporting threshold. On the form, for the "general description of intangible personal property" required by the statute, this would be listed as "Deferred Retirement Option Account" "State of Florida."

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 9, 2011 and **RENDERED** this 14th day of September, 2011.

_____

Robert J. Sniffen, Chairman

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[11] Part D of CE Form 1.

[12] Pursuant to Section 112.3145(3) a Form 1 filer may choose either the "dollar value threshold" method of reporting, whereby assets, liabilities, and income exceeding a set dollar amount is reported, or a "percentage threshold" method, under which assets liabilities, and income exceeding a certain percentage of the reporting individual's net worth or gross income must be reported.

[13] Section 112.312(12), Florida Statutes, which defines "gifts," states in subsection (a) that the definition of "gift" includes tangible or intangible personal property or the use thereof. Subsection (c) of the law states that "For the purposes of paragraph (a) 'intangible personal property' means property as defined in s. 192.001(11)(b)."

[14] Title 26 United States Code § 408.

[15] If using the "percentage threshold," method of reporting, the employee would include the total value of the investments held in the IRA in calculating his or her net worth, and report only those which exceeded 10% of total assets. For example, if the employee's total assets amounted to $60,000, the employee would be required to report the long-term growth mutual fund (worth $7,000) and the mid-cap equity fund (also worth $7,000.)

[16] If using the "percentage threshold," method of reporting, the employee would include the total value of the 401(k) investments in calculating his or her net worth, and report only those individual investments which exceeded 10% of total assets. For example, if the employee's total assets amounted to $140,000, the employee would be required to report the mutual fund – valued at $15,000 – but not the other two investments.

[7]If using the "percentage threshold," method of reporting, the employee would include the total value of the Investment Plan in calculating his or her net worth, and report only those investments which exceeded 10% of total assets. For example, if the employee's total assets amounted to $120,000, the employee would be required to report both mutual funds, as they are worth $12,500 each.

[8]http://www.myfloridaprepaid.com/compare-plans/

[9]https://www.myfloridadeferredcomp.com/SOFweb/index.htm

[10]As with the previous examples, the entire value of the investments held in the Deferred Compensation account should be included in the net worth calculation.