

SEP 20 2021

RECEIVED

**BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS**

CONFIDENTIAL

In re: Nicole Heather Fried,

Respondent.

Complaint No. 21-097

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, Nicole Heather Fried, serves as the Commissioner of Agriculture and Consumer Services. Complainant is Evan Power of Tallahassee, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics 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 August 22, 2021.

ALLEGATION ONE

Respondent is alleged to have violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by failing to accurately disclose income on her 2017 CE Form 6, "Full and Public Disclosure of Financial Interests."

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.

* * *

(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:

- a. A copy of the person's most recent federal income tax return;
or
- b. A sworn statement which identifies each separate source and amount of income which exceeds \$1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income.

* * *

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 Commissioner of Agriculture and Consumer Services for the State of Florida on November 6, 2018, and began her term in office on January 8, 2019. (ROI 1, 9) As a candidate for Commissioner, she was required to file an accurate 2017 CE Form 6, "Full and Public Disclosure of Financial Interests." (ROI 2, Exhibit A) Respondent reported \$84,000 in income from Igniting Florida, LLC, on her original 2017 form, which was filed on June 20, 2018. (ROI 3, 9, Exhibit A)

On May 28, 2021, Respondent filed a CE Form 6X, "Amendment to Full and Public Disclosure of Financial Interests," to increase income reported from Igniting Florida to \$165,761. (ROI 3, 9, Exhibit B) Under Part G – Explanation of Charges," Respondent wrote "Corrected Gross Income listing in Part D." (ROI 9) Thus, her reported income from Igniting Florida, LLC, was amended from the previously reported \$84,000 to \$165,761. (ROI 9, Exhibit B) The complaint was filed with the Commission on Ethics on June 4, 2021. (Complaint, p. 1)

Jason B. Blank, Esquire, signed each of Respondent's disclosure forms and amendments indicating that he prepared them for Respondent. (ROI 8) Attorney Blank explained that he worked with Respondent "to provide guidance and recommendations as we prepared her Form 6 disclosures for those years." (ROI 8) He further explained that "[t]he Commissioner provided the requested information [verbally] during the course of our conversations relating to the required financial information needed for disclosure." (ROI 8) Blank added that "matters came to my attention that led me to believe further review and amendment might be needed for the Commissioner's disclosures." (ROI 8) He then consulted with Respondent's accountant and reviewed Respondent's tax returns determining that Respondent's disclosures required amending. (ROI 8)

Complainant alleges that Respondent was a registered lobbyist with the firm Colodny Fass in 2017, but did not disclose income received from that firm on her 2017 and 2018 CE Form 6. (ROI 5) Records of the Office of Florida Lobbyist Registration and Compensation reflect Respondent registered as both a Legislative and Executive Branch lobbyist for the consulting firm Colodny Fass for the years 2015 and 2016. (ROI 11) The records do not reflect Respondent registered as a lobbyist for Colodny Fass with either branch of government for 2017 or 2018. (ROI 11) Thus, Respondent had no income from lobbying activities to disclose.

The Commission on Ethics' Investigator gave Respondent several opportunities to schedule an interview; however, Respondent's attorney, Benedict P. Kuehne, did not make her available during the course of the investigation or before the investigation was finalized. (ROI 13) Instead, Respondent's attorney submitted a response on her behalf. (Exhibit C)

Financial disclosure requirements increase awareness of potential conflicts for those in public service with a higher level of public trust. Annually completing a financial disclosure form alerts filers to potential issues they may face while serving in their public role. The form helps them identify potential conflicts between their public roles and their private lives. If a filer is reminded of personal financial interests and relationships, he or she may stop and ask more questions before moving forward on a potential conflict. Ultimately, financial disclosure is designed to prevent filers from acting on potential conflicts of interest through the increased awareness the form provides to filers.

In addition, financial disclosure benefits the public by clearly offering additional transparency in government. Florida citizens have the right to know that public officials and employees have the citizens' best interests in mind and not their own when making decisions in

their public role. The disclosure form makes that information available in a very accessible way. That did not occur here as Respondent's originally filing was inaccurate.

Therefore, based upon 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 failing to accurately disclose income on her 2018 CE Form 6, "Full and Public Disclosure of Financial Interests."

APPLICABLE LAW

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

ANALYSIS

In 2018, Respondent was required to file an accurate 2018 CE Form 6. (ROI 2, Exhibit A) On July 1, 2019, Respondent filed her 2018 CE Form 6. (ROI 10) She reported \$0 income from Igniting Florida, LLC, on her original form. (ROI 3, Exhibit A) On January 30, 2020, she filed an amended 2018 CE Form 6 disclosing \$72,000 in income from Igniting Florida, LLC. (ROI 4, Exhibit B) On May 28, 2021, Respondent again amended the income to increase the amount received from Igniting Florida to \$351,480. (ROI 3, Exhibit B) Thus, her reported income from Igniting Florida, LLC, was amended from the previously reported \$0 to \$72,000 to \$351,480. (ROI 10, Exhibit B)

As stated previously, contrary to the allegation, Respondent earned no lobbying income from Colodny Fass in 2018. Accordingly, she had no income to report.

In addition, Complainant alleges Respondent failed to accurately disclose assets on her 2018 CE Form 6. (ROI 6, Exhibit A) Respondent listed the total value of her retirement accounts as \$156,934.18. (ROI 12) The form's instructions for the "ASSETS INDIVIDUALLY VALUED AT MORE THAN \$1,000" provide that the filer is to itemize the investment products contained within the reported investment vehicles. (ROI 12) The specific language is: "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." (Emphasis in original.) (ROI 12)

An attachment to Respondent's 2018 CE Form 6 indicates that her retirement accounts are as follows:

Roth IRA-Royal Alliance	\$42,943.32
IRA (Roll Over)-Royal Alliance	\$22,149.30
401(K)-Schwab	\$36,589.81
IRA (Roll Over)-Fidelity	\$31,076.84
Roth IRA-Fidelity	\$24,174.91

According to Respondent's attorney, Mr. Kuehne, "the retirement accounts are held precisely as disclosed, and do not represent holdings in individual products. The accounts are the products themselves. ..." ¹In support of his position, Mr. Kuehne cited CEO 12-10. Without more information, it is presumed that the retirement disclosures were accurate. Nonetheless, Respondent's 2018 form was inaccurate as originally filed, regarding income.

Therefore, based upon 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.

¹ Letter to Millie Fulford from Benedict P. Kuehne, dated August 10, 2021, p. 5. (Exhibit C)

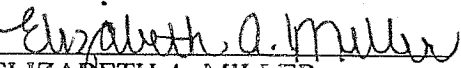
RECOMMENDATION

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 failing to accurately disclose income on her 2017 CE Form 6, "Full and Public Disclosure of Financial Interests."

2. There is probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by failing to accurately disclose income on her 2018 CE Form 6, "Full and Public Disclosure of Financial Interests."

Respectfully submitted this 20th day of September, 2021.


ELIZABETH A. MILLER
Advocate for the Florida Commission
on Ethics
Florida Bar No. 578411
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3702

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, 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*

¹¹ Title 26 United States Code § 408 and Title 26 United States Code § 401(k), respectively.

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*

¹¹ Title 26 United States Code § 408 and Title 26 United States Code § 401(k), respectively.