

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 property¹ 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 threshold².

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

(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:

(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 Statutes³, 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 Code⁴, 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 militate 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 website⁸, 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

^[1]Part D of CE Form 1.

^[2]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.

^[3] 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)."

^[4] Title 26 United States Code § 408.

^[5] 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.)

^[6] 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.