

REVISED PROPOSED DRAFT / NOT APPROVED / SUBJECT TO REJECTION

[SINGLE VIEW]

IT IS COMMISSION PRACTICE TO OFFER ALTERNATE PROPOSED DRAFTS OF ITS ETHICS INTERPRETATIONS WHEREVER THE QUESTIONS ARE REASONABLY SUSCEPTIBLE TO ANOTHER VIEW. STAFF BELIEVES THAT THE QUESTIONS POSED HERE ARE CONTROLLED BY CLEAR LANGUAGE OF COMMISSION RULES AND A SETTLED LINE OF ITS INTERPRETATIVE AUTHORITY.

THIS DRAFT WAS PUBLISHED TO THE AGENCY WEBSITE AT LEAST 5 DAYS BEFORE THE PUBLIC HEARING. THE LATTER APPEARS AS AN AGENDA ITEM FOR THE REGULAR MEETING OF THE ETHICS COMMISSION SCHEDULED FOR SEPTEMBER 30, 2011.

THE FOLLOWING IS INTENDED AS A STARTING POINT FOR DISCUSSION. AS ALWAYS, STAFF IS HAPPY TO REVISE IT AS THE COMMISSION MIGHT DIRECT.

November 17, 2011

RE: Ethics Interpretation EI-2011-003

Following a public hearing, the Ethics Commission, in the executive session portion of its regular meeting held November 17, 2011, considered your request for an ethics interpretation. You asked:

Do the Constitutional Ethics Rules [“the Rules”], Section 257:1-1-1 et seq. of the Rules of the Ethics Commission, 74 O. S. 2011, Ch. 62, App. prohibit the director of a state agency [“agency head”] from also serving as a member of the board of directors [“the board”] of a private, for-profit Oklahoma company [“the company”] if:

- 1. the agency head and the agency he or she serves has no regulatory authority over the company;*
- 2. the company does no business with any agency in state government, nor does it have an economic interest in matters before or affecting any state agency;*
- 3. the company does not retain or employ a registered lobbyist;*
- 4. the agency head would perform his or her responsibilities for the company during times that he or she would not be performing duties to the State of Oklahoma, either after hours or on leave time and the agency’s employer will be notified of both the outside position and the hours spent on same;*
- 5. the agency head will not be influenced in the proposed employment with respect to official acts, fraud or duty. He or she will not use official position to solicit or secure special privileges for the company or others. He*

or she will not disclose or offer to disclose to the company confidential information acquired by reason of his/her official position. The agency head will also not be influenced in the performance or nonperformance of his or her official duties or to undertake actions not permitted by law, or permit impairment of his or her independence of judgment;

6. should the agency head have access to confidential information as the result of his or her position as a state officer that might be of benefit to the company, he or she pledges not to disclose it;

7. the agency head does not anticipate a conflict to arise between his obligations to the State and those as a member of the company's board. Should a conflict arise, he or she pledges to recuse and abstain from participating in discussions or actions on the matter, either as a state officer or as a board member, and to record his or her abstention in the minutes of the meetings.

THE FACTS

You advised the Commission that:

- the seat on the company's board of directors is being offered due to your unique and varied background in the private sector and not because of your position in state government;
- the company is a privately owned limited liability company engaged in investments and management in the automotive, private capital, real estate and oil and gas industries;
- among its activities, the company partners with other private businesses to provide capital for acquisitions or to support growth and expansion; it partners with management teams to acquire businesses or divisions of larger companies; and also partners with private business owners to buy out shareholders, transition ownership to the next generation or provide liquidity to existing shareholders and partners with private businesses to solidify their capitalization in anticipation of significant growth or strategic opportunities;
- you will receive compensation from the company for your service on its board of directors in addition to your state salary, and be reimbursed for transportation, lodging and meals while participating in board meetings;

- you will be expected to serve on a company management committee, such as the compensation or audit committee. Your remuneration for these and other services to the company will be comparable to that of other members of the board of directors.

The Commission notes that it relies solely on these statements and has made no independent effort to confirm the facts. It therefore limits its ethics interpretation to the information you provided.

THE LAW

THE CONSTITUTIONAL ETHICS RULES

The intent behind the Rules on ethics and conflicts of interest is stated in Section 257:20-1-1, which, in relevant part provides:

General purpose and authority

(a) . . . The Ethics Commission finds that the proper operation of state government requires:

(1) that a state officer or state employee be independent and impartial;

* * *

(3) that a state officer or state employee not use state office to obtain private benefits;

(4) that a state officer or state employee avoid action which creates the appearance of using state office to obtain a private or inappropriate benefit; and

(5) that the public have confidence in the integrity of its government and state officers and state employees.

(b) It is the intent of the Ethics Commission:

(1) to protect against conflicts of interest and establish standards of conduct of elective officers and state employees in situations where conflicts may exist:

(2) **to attract those citizens best qualified to serve. Thus the rules against conflicts of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. State officers should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when such interests conflict with the responsibility of such officers to the public;**

(3) to discourage state officers and state employees from acting upon a private or business interest in the performance of a public duty;

* * *

5. That state officers and state employees shall exercise their powers and prerogatives without prejudice or favoritism.

Section 257:20-1-1

[emphasis added]

In this provision, the Commission recognized that while the Rules must safeguard the public interest, they must not deny state officers the opportunity – available to all other citizens – to acquire and retain private economic interests consistent with their duty to the public.

To protect the public interest, the Commission promulgated a rule prohibiting misuse of office. It provides:

Misuse of office

(a) No state officer or state employee shall use or attempt to use his or her official position to solicit or secure special privileges, exemptions or compensation for himself, herself or others, except in the performance of his or her duties or as may be allowed by law . . .

* * *

(b) No state officer or state employee, except in the performance of his or her duties, shall disclose or offer to disclose confidential information acquired by reason of his or her official position to any person, group or others not entitled to receive such confidential information, nor shall he or she use such information for his or her personal gain or benefit.

(c) No state officer or state employee shall:

(1) receive or solicit any compensation that would impair his or her independence of judgment for his or her services as an officer or employee of any state agency, from any source other than the state, unless otherwise provided by law; or

(2) accept or solicit other employment which would impair his or her independence of judgment in the performance of his or her public duties.

* * *

Section 257:20-1-4

The rule thus guards against using or attempting to use title of office to solicit or secure special privileges, exemptions or compensation, either for himself/herself or others, except in the job performance **or as may be allowed by law**. It also expressly prohibits disclosure of confidential information acquired by reason of official position to those not entitled to receive it or for personal gain or benefit and it prohibits soliciting/accepting compensation or other employment which would impair independence of judgment in the performance of public duties.

Also applicable is Rule 257:20-1-9. It precludes solicitation or acceptance of anything of value in return for being influenced in the performance or nonperformance of an official act, to

commit or aid or collude in allowing fraud or the opportunity for the commission of fraud or to solicit individually or on behalf of a regulatory governmental entity.

Restraints on solicitation or acceptance of anything of value-Disclosure

(a) **Influence of official act, fraud or official duty.** No state officer and no state employee shall, directly or indirectly, ask, demand, exact, solicit, seek, accept, assign, receive, or agree to receive anything of value for the state officer or employee or for any other person or entity, in return for being:

- (1) influenced in the performance of an official act;
- (2) influenced to commit, aid in committing, collude in, or allow fraud, or make an opportunity for the commission of fraud on a governmental entity; or
- (3) induced to perform or fail to perform an act in violation of the state officer's or state employee's official duty.

(b) **Soliciting individually or on behalf of a regulatory governmental entity prohibited.** No state officer and no state employee shall, directly or indirectly, ask, demand, exact, solicit, seek, accept, assign, receive or agree to receive anything of value individually or for or on behalf of a governmental entity from a business entity, its employees, officers or board members, or a person who has greater than a ten percent (10%) interest in such entity if the rates, charges, prices or fees charged by the business entity are subject to regulation by the governmental entity which the officer or employee serves. This provision does not apply to a campaign contribution properly received and reported, which is exempt from the definition of anything of value in Section 2 of Chapter 1 of this title, or to anything of value accepted on behalf of the state of Oklahoma pursuant to Subsection (e) of this subsection.

* * *

Section 257:20-1-9

The Commission also regulates state officers' and employees' private interests in public contracts. The Rule states:

State officers' and employees' private interests in public contracts

(a) **Prohibition on contracting with state –exceptions.**

- (1) No state officer or state employee shall sell, offer to sell or cause to be sold, rent or lease either as an individual or through any business enterprise in which he holds a substantial financial interest, goods, services, buildings or property to the governmental entity with which the officer or employee is associated or to any business entity licensed or regulated by the governmental entity which the officer or employee serves. . .

* * *

Section 257:20-1-10

Read together, these provisions determine whether, and under what circumstances, a state officer may accept an outside position “as allowed by law.”

THE COMMISSION’S INTERPRETATIVE AUTHORITY

The Commission has developed a body of interpretative authority pursuant to its constitutional grant to issue ethics interpretations.

Ethics Interpretations

Ethics Interpretations. The Ethics Commission may respond, pursuant to its rules, to questions of specific individuals seeking an interpretation of the Commission’s rules governing the ethical conduct for campaigns, state officers, or state employees. Any such official interpretation of ethics rules shall be binding on the Commission.

OKLAHOMA CONSTITUTION, Art. 29, Sec. 5

Within this body of authority are holdings on point.

Ethics Interpretation EI-1995-009 was considered within a year of the effective date of the initial set of Rules. It laid down a principle which has since guided outside employment issues. The Commission ruled that whether acceptance by a state officer/employee of a second position would impair independence of judgment is **fact sensitive**. ETHICS INTERPRETATION EI-1995-009, at pp. 1-2 Accordingly, these questions are considered on a case-by-case basis according to the given situation.

Sufficient facts were submitted in Ethics Interpretation EI-1996-009, where the Commission was asked if a state employee of the Oklahoma Department of Transportation [“ODOT”] may work part-time for an educational institution of the Oklahoma State System of Higher Education [“State System”]. The fact that independence of judgment in either position would not be impaired, the hours of the two would not be contemporaneous and that no confidential information would be either used or revealed on either job. The question turned on whether the proposed part-time employment was licensed or regulated by the full-time state employer.

The Commission found that Sections 257:20-1-4 and 20-1-10(a) regulate both state officers/employees supplemental employment and their ability to contract with the state. Because ODOT did not license or regulate any educational institution of the State System – and the other criteria was met – the Commission held that the Rules did not prohibit the proposed outside employment. ETHICS INTERPRETATION EI-1996-009, at pp. 1, 3

Also relevant is Ethics Interpretation EI-1996-007. There the Commission addressed the question of whether a cabinet secretary, who advised the governor about an agency, was permitted to become a non-voting, limited partner in a private venture capital arrangement in which that agency was also a non-voting partner. In reaching its decision, the Commission specifically relied on the

fact that the cabinet secretary had neither a seat, voice or vote on the agency concerning which he advised the governor. The state officer therefore lacked power, authority or control over that body. Moreover, the agency's participation in the venture was restricted. The Commission noted that neither the secretary nor the agency would have control over the investment. For those reasons, it held that the Rules do not prevent a state officer from entering a business relationship of the type the cabinet secretary proposed.

However, the Commission expressly found that the ruling would be otherwise in cases where the state officer had authority over either the agency or the investment. Under either scenario, "the secretary would be prohibited from making the investment or ineligible from exercising such authority." ETHICS INTERPRETATION EI-1996-007, at p. 2

In addition to ethics interpretations – which are issued by vote of the Members – the Rules provide for informal staff opinions. These require the prior approval of the Commission chairman or vice chairman and lie solely where questions are susceptible to a single analysis by the clear language of the rule and are neither the subject of litigation, investigation or legislation.

Powers and responsibilities of Commission

* * *

(h) **Ethics Interpretations.** The Commission may, in its discretion and where appropriate, issue ethics interpretations, pertaining to the provisions of this title when requested by any person or committee who may be subject to the jurisdiction of the commission . . . **The executive director or the general counsel may issue informal written opinions, as time permits and with the prior approval of the chair or vice chair, pertaining to the provisions of this title on questions that are susceptible to a single analysis by the clear language of the rule and are not the subject of litigation, investigation or legislation . . .**

* * *

Rules' Section 257:1-1-6

[emphasis added]

The Commission staff has rendered opinions relevant to these facts.

The question in Informal Opinion IO-1999-008 was whether the Rules preclude a director-designee, who was a full-time employee of a state governmental entity, from being retained/employed as a part-time city attorney. The question hinged on whether independence of judgment would be impaired, the hours of the two jobs were to be contemporaneous, confidential information gained in the primary employment would be disclosed in connection with the outside job and whether the primary employer would be informed of the secondary position.

Applying that criteria, staff found that the Rules permitted such employment since the two positions did not have contemporaneous hours, there existed no obvious connection which would

either encourage the disclosure of confidential information or impair judgment with respect to performing state duties, and the primary employer had been informed both of the secondary employment and the proposed hours of employment. INFORMAL OPINION IO-1999-008, at p. 2

Similarly, IO-2002-001 held that, provided the cited criteria was met, the Rules did not prohibit the director, manager or supervisor of a private security division of a state agency, which licenses and regulates Oklahoma's private security industry, from taking approved leave for the hours he or she taught at a private security training school outside his or her regular state agency work hours. This was subject to the primary employer having no supervisory duties with respect to licensing and regulating private security training schools, and that other qualified agency employees would also be allowed to assume such duties. INFORMAL OPINION IO-2002-001, at p. 3

In IO-2002-002, Rules' Section 257:20-1-4(c) was found not to prohibit either the general counsel or vice president of the board of regents for an institution of higher education from accepting compensated employment in a part-time "of counsel" capacity with a law firm which handled work for the board. The holding, however, was contingent upon reducing salaries to reflect one day per week spent working for the law firm, any additional time to be taken as annual leave, that the hours of the two jobs not be contemporaneous, that the board and firm be notified and that the arrangement be agreed upon in writing, so as to avoid the appearance of impropriety and/or potential conflicts of interest. The latter were made "conditions precedent" to the outside employment. INFORMAL OPINION IO-2002-002, at p. 3

THE ANALYSIS

The instant facts are analogous to the cited authority. Here, neither you nor the agency you serve has regulatory authority over the company nor does the latter have an economic interest in matters before or affecting your agency. The company does no business with – nor buys/sells anything from – you or the agency of which you are head. The facts therefore fall outside Rules' Sections 257:20-1-10(a) and 20-1-9(b).

With respect to Section 257:20-1-9(a), you pledge that you will not permit your position on the board of directors to influence your official acts or duty, or to commit fraud.

As pertains to Section 257:20-1-4, you agree not to use your official position to solicit or secure special privileges, exemptions or compensation for yourself or others, except in the performance of your duties or as may be allowed by law. Nor will you disclose, or offer to disclose, confidential information acquired by reason of your official position either to the company or any other person, group or others not entitled to receive such.

You also pledge that the compensation you receive from the company will not impair your independence of judgment for services as an agency director or state officer or that you will not

permit the position on the board of directors to impair your independence of judgment in the performance of your public duties.

With respect to other criteria, the Commission notes you will perform your responsibilities for the company during times when not performing duties to the State of Oklahoma; and the hours spent on each will therefore not be contemporaneous. The Commission notes that the Governor will be notified of both the outside position and the hours of same.

You pledge that you not be influenced in the proposed position with the company regarding your official acts or duty.

With respect to a situation where you have – or had – access to confidential information as the result of your position as a state officer that might be of benefit to the company, you agree to recuse from all aspects of company consideration on those matters and abstain from participating in discussions or actions either as a state officer or as a board member.

You do not anticipate a conflict to arise between your obligations to the State and those as a member of the company's board of directors. But, should a conflict arise, you agree to disqualify yourself and abstain from participating in discussions or actions on the matter either as a state officer or as a board member. With regard to your state position, you will record your abstention in the minutes or records of your agency.

The Commission thus finds that if, as a condition precedent, you meet all of these criteria, nothing in the Ethics Rules prevents you from accepting an outside position with the company as a member of its Board.

CONCLUSION

It is therefore the Ethics Interpretation of the Ethics Commission, as decided at its regular meeting held November 18, 2011, that the Rules do not prohibit the agency director from accepting a position on a board of directors of a private, for-profit Oklahoma company if, as a condition precedent:

- **the agency director and the agency he or she serves has no regulatory authority over the company or any private business it acquires, to which it provides capital, with which it partners or which it manages;**
- **the company and any private business it acquires, to which it provides capital, with which it partners or which it manages, does no business with the agency in state government the agency director serves, nor has an economic interest in matters before or affecting the state agency the agency director serves;**

- the agency director does not use his official position to solicit or secure special privileges, exemptions or compensation for himself, herself or others, except in the performance of his or her duties or as may be allowed by law; nor will he or she disclose, or offer to disclose, confidential information acquired by reason of his/her official position either to the company or any other person, group or others not entitled to receive such;

- the agency director will not permit the company nor any private business it acquires, to which it provides capital, with which it partners or which it manages to use his name or his official position in applications to, appearances before or dealings with any state regulatory, financing or economic development agency;

- the compensation the agency director receives from the company does not impair his or her independence of judgment for services as an officer of his/her state agency nor will he or she permit the position on the board of directors to impair his or her independence of judgment in the performance of his or her public duties;

- the agency director performs his or her responsibilities for the company during times when not performing duties to the State of Oklahoma and has notified the Governor of both the outside position and the hours of same;

- the agency director is not influenced by his or her position on the board of directors regarding the lawful conduct of his or her official acts or duty to the State of Oklahoma; does not use official position to solicit or secure special privileges for the company or others; will not disclose or offer to disclose to the company and any private business it acquires, to which it provides capital, with which it partners or which it manages, confidential information acquired by reason of his or her official position; will not be influenced in the performance or nonperformance of his or her official duties; will not undertake actions not permitted by law, nor permit impairment of his or her independence of judgment with respect to his or her public duties;

- should the agency director have – or had – access to confidential information as the result of his or her position as a state officer that might be of benefit to the company or any private business it acquires, to which it provides capital, with which it partners or which it manages, he or she recuses from all aspects of company consideration of those matters and abstains from participating in discussions or actions either as a state officer or as a member of the board of directors; and

- should a conflict arise between the agency directors obligations to the State and those as a member of the company's board of directors, he or she disqualifies himself/herself and abstains from participating in discussions or actions on the matter either as a state officer

or as a member of the company's board of directors. With regard to his or her state position, the agency director will record his or her abstention in the minutes or records of his/her agency.

* * *

Please be advised that, as noted, ethics interpretations are fact specific. They answer only the question or questions put forth in the underlying request. While they may shed light on other situations, this opinion does not necessarily control them. To be binding on the future action of this agency, the interpretation must be directed to the individual situation.

Our answer is specific to your particular circumstances. We offer no opinion of its application to the head of any other agency of government, regardless of title.

As noted, the Commission is authorized to issue ethics interpretations by Oklahoma Constitution Article 29, Section 5 and Rule 257:1-1-6(h) . Questions pertaining to other Oklahoma Statutes, the state and federal Constitutions or federal law cannot be interpreted by the Commission and must be referred to the appropriate authority.

Ethics Interpretations are issued not by staff, but by the Commissioners. Members consider briefs, testimony and input from the public who have prior notice of the issues and an opportunity to be heard on the questions presented in the ethics interpretation request. Following consideration in executive session, members then vote in open meeting on the matter.

Ethics Interpretations are published with sufficient deletions to prevent identification of the person or persons who request them. The name of the requestor is considered confidential. This letter has been labeled accordingly.

We trust the foregoing has answered your questions. Please advise if we may be of further assistance.

Respectfully,

Rebecca Adams, General Counsel
Oklahoma Ethics Commission