

Advisory Opinion 2017-01 (Cite as: 2017 OK Ethics 01)

Dear Mr. Joseph:

We are responding to your advisory opinion request concerning the application of the Oklahoma Ethics Rules to the purchase of bonds by members of the Council of Bond Oversight.

You ask, in effect, the following question:

Is it a conflict of interest under the Ethics Rules for a member of the Council of Bond Oversight to purchase bonds in either the primary or secondary markets from a state governmental entity's bond issue the Council voted to approve?

The Legislature created the Council of Bond Oversight ("Council") to allow for "significant systemic oversight of state governmental entity issuers of bonds and other obligations."¹ The members of the Council are appointed state officers.²

Prior to submitting a bond proposal to the Council for approval, the state governmental entity issuing the bonds selects a financing team, including an underwriter(s), through a competitive request for proposal ("RFP") process. The Council, with the assistance of the State Bond Advisor, reviews a summary of the proposed bond issue, including the security pledged, repayment structure, and other outstanding debt of the issuer. The Council determines if a proposed bond issue has a legal and beneficial purpose which can be legitimately funded by bond indebtedness issued by the state governmental entity, and either disapproves the financing or approves it with conditions. Once a bond issue is approved by the Council, the Council has no further involvement in the bond issue.³

¹ 62 O.S. Supp. 2016 § 695.3.

² 62 O.S. Supp. 2016 § 695.6a; *Oklahoma City v. Century Indemnity Co.*, 62 P.2d 94, 97 (Okla. 1936) (an officer's position is created by law and his duties, which include exercise of some portion of the sovereign power, are imposed or authorized by law).

³ Background information provided by State Bond Advisor, on file; 62 O.S. Supp. 2016 §§ 695.8-695.9.

Prior to the underwriter offering bonds for sale, information about the upcoming offering is published both on the Council's website at

https://apps.ok.gov/bondadvisor/Recent_News/index.html and on the Municipal Securities

Rulemaking Board's electronic municipal market access ("EMMA") website at

<https://emma.msrb.org>. In a negotiated sale, once the underwriter receives sufficient orders for the bonds the issuer and underwriter agree on a final price and the bonds are sold and delivered.

An issuer can also decide to sell bonds in a competitive sale, in which case the bonds are sold to the winning bidder(s). In either case, the primary offering period ends when all bonds are sold.

After bonds are sold in the primary offering, bonds are traded in the secondary market by broker-dealers acting on behalf of their clients or on their own behalf. A Council member, along with the general public, would have the opportunity to purchase bonds in both the primary offering period and the secondary market through brokers.⁴

Your question relates to Ethics Rule 4, Conflicts of Interest, which establishes "rules of ethical conduct for state officers and employees by prohibiting conflicts between their public duties and private economic interests." Ethics Rule 4.1. Specifically, your question relates to Ethics Rules 4.4, Misuse of Authority, and 4.7, State Officer Impartiality. The only conflict of interest that would potentially arise under the Ethics Rules is where a Council member voted to approve or participated in approval of the bond issue. If a Council member was absent at the meeting where approval was discussed or recused from participation and was not present in the meeting where approval was discussed, the Ethics Rules would not be implicated. We are only providing an opinion under the conflict of interest provisions of the Ethics Rules. There may be other conflict of interest provisions in the Constitution and statutes that apply.

⁴ Background information provided by State Bond Advisor, on file.

Ethics Rule 4.4

Ethics Rule 4.4, Misuse of Authority, provides, in pertinent part, “[e]xcept as permitted by law or these Rules, a state officer or employee shall not use his or her State office (1) for his or her own private gain....”⁵ We do not believe a Council member voting to approve a state governmental entity’s bond issue, and then purchasing the bonds in either the primary or secondary markets, constitutes a misuse of authority under the Ethics Rules.

Once the Council votes to approve a bond issue, the Council has no further involvement in the issue. The marketing, pricing, and delivery of the bonds are the responsibility of the issuing state governmental entity and its financing team. When the issuing state governmental entity’s financing team agrees on an offering price with the underwriter, or decides to sell bonds in a competitive sale, bonds are made available to investors in the primary market.⁶ At that time, the Council member has no greater opportunity to purchase the bonds than does the public. The Council member’s vote does not provide him with any personal gain that is not available to the public. In this situation, the Council member’s vote to approve a state governmental entity’s bond issue, and then his subsequent purchase of the resulting bonds, is not a misuse of authority under the Ethics Rules.

Ethics Rule 4.7

Ethics Rule 4.7, State Officer Impartiality, provides, in pertinent part:

In the event a state officer or employee:

⁵ Ethics Rule 4.4 goes on to provide that its prohibitions do not apply to any act that is customary for the state officer or if such act is permitted by the Constitution, statutes, or Ethics Rules. The Constitution, the statutes, and the Ethics Rules do not expressly permit a member of the Council to purchase state-issued bonds in the primary or secondary markets. We have not been provided sufficient information to determine if it would be customary for a member of the Council to purchase bonds in the primary or secondary markets.

⁶ Background information provided by State Bond Advisor, on file.

- (1) knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the *material financial interests* of the state officer...; or
- (2) knows that a person with whom he or she has a business relationship other than a routine consumer transaction is a party to or represents a party to such matter; or
- (3) determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his or her impartiality in the matter;

the state officer or employee shall not participate in the matter unless he or she is required to do so by law or permitted to do so by these Rules. This provision shall not apply when the effect of the matter applies equally to all members of a profession, occupation or large class.

Id.(emphasis added).

We must analyze your question under each of the subsections, (1), (2), and (3), in Ethics Rule 4.7. Ethics Rule 4.7(1) seeks to prevent a state officer from participating in and voting on a matter which will affect the state officer's "material financial interests." "Material financial interest" is defined in Rule 4.7, but does not include ownership of bonds issued by a governmental entity. Accordingly, Ethics Rule 4.7(1) does not prevent a Council member from purchasing bonds from a state entity's bond issue he voted to approve.

Your question does not present facts that fall under Ethics Rule 4.7(2). Ethics Rule 4.7(3) prevents a state officer from participating in and voting on a matter where "the circumstances would cause a reasonable person with knowledge of the relevant facts to question his or her impartiality in the matter." In essence, this provision seeks to eliminate even the appearance of impropriety by a state officer or employee. We must determine if a reasonable person with knowledge of all the facts would question a Council member's impartiality where the Council member participates in or votes to approve a state governmental entity's bond issue

and the Council member subsequently purchases the resulting bonds in the primary or secondary markets.

In *Westinghouse Electric Corp. v. Grand River Dam Authority*, 1986 OK 20, 720 P.2d

713, the Court gave the following guidance to public officials:

Government agencies are uniquely endowed with the power to implement the public will, and as such, are subject to the highest levels of scrutiny by the people whom they serve. Government officials and employees must exercise great care *to avoid even the appearance of impropriety* in their duties; for they, like Caesar's wife, must be above reproach.

Id. at 717-18 (emphasis added).

We agree the public must have confidence in state officials, and Council members must avoid even the appearance of impropriety. We believe we must make a distinction between a Council member's purchase of bonds in the primary market versus purchase in the secondary market. We believe a reasonable person would question the impartiality of a Council member who votes for approval or participates in approval of a bond issue and then purchases the resulting bonds in the primary market. A Council member seeking to buy bonds in the primary market would more likely have to intentionally seek to purchase such bonds. The general public does not have as much access or purchasing power to buy bonds in the primary market in order to realize a financial gain as do sophisticated investors. A Council member buying bonds he voted to approve or in which he participated in approval could realize a financial gain not attainable by most members of the public, causing a reasonable person to question whether the Council member's motivation for voting to approve or participating in approval of the bond issue was to further his own interests. Consequently, a Council member would be prohibited under Ethics Rule 4.7(3) from voting to approve or participating in approval of a state governmental entity's bond issue and then purchasing the resulting bonds in the primary market.

However, Ethics Rule 4.7 does not apply “when the effect of the matter applies equally to all members of a profession, occupation or large class.” Because bonds are more available to the public in the secondary market, we believe this provision applies to a situation in which a Council member votes to approve a state governmental entity’s bond issue and then purchases the resulting bonds in the secondary market. A Council member would not necessarily be aware of bonds purchased on his behalf in the secondary market if he is not actively involved in investment decisions concerning his investments.

Conclusion

It is not a misuse of authority under Ethics Rules 4.4, Misuse of Authority, for a member of the Council of Bond Oversight, who participates in approval of bond indebtedness issued by a state governmental entity, to purchase the resulting bonds in either the primary or secondary markets. A reasonable person would question the impartiality of a Council member who participates in approval of a bond issue and then purchases the resulting bonds in the primary market. A Council member who purchases such bonds in the primary market is in violation of Ethics Rule 4.7(3). Ethics Rule 4.7 does not apply “when the effect of the matter applies equally to all members of a profession, occupation or large class.” Because bonds are more available to the public in the secondary market, the Ethics Rules do not prohibit a Council member from participating in approval of a state governmental entity’s bond issue and then purchasing the resulting bonds in the secondary market.

It is therefore the official opinion of the Oklahoma Ethics Commission that:

1. It is a not conflict of interest under Ethics Rules 4.4, Misuse of Authority, for a member of the Council of Bond Oversight to vote to approve bond indebtedness issued by a state governmental entity and then purchase the resulting bonds in either the primary or secondary markets because the Council member’s vote does not provide him with any personal benefit that is not available to any other member of the public.

2. Bonds are not as accessible to the general public in the primary market, and a person could reasonably question a Council member's impartiality where the Council member participates in approval of a state governmental entity's bond issue and then purchases the resulting bonds in the primary market; therefore, Ethics Rule 4.7(3) prohibits a Council member from purchasing a state governmental entity's bonds in the primary market where the member participated in approval of the state governmental entity's bond issue.
3. Ethics Rule 4.7 does not apply when the effect of the vote to approve a matter applies "equally to all members of a profession, occupation or large class"; because a Council member's vote to approve a bond issue makes bonds available to the general public in the secondary market, a Council member is not prohibited from purchasing bonds in the secondary market even if he voted to approve the bond issue.
4. The Ethics Rules would not be implicated if a member of the Council of Bond Oversight purchased bonds from a bond issue approved by the Council but the member did not participate in approval of the bond issue.
5. This opinion is issued solely in reference to the conflict of interest provisions of the Ethics Rules. Other conflict of interest provisions in the Constitution and statutes may apply.