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Advisory Opinion 2002-009

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SEC AO2002-009

January 16, 2002

SUBJECT: CONFLICTS OF INTEREST FOR PUBLIC OFFICIALS SITTING ON VARIOUS BOARDS

SUMMARY: A public official should recuse himself from all matters in which a business with which he is associated has an economic interest. A business with which associated includes those non-profit agencies and boards on which a public official serves, unless he serves on the agency or board in his official capacity as a council member.

QUESTION: City council members sit on the boards of various non-profit corporations. Under what circumstances must a city council member recuse himself from deliberating and voting on appropriations to these same non-profit corporations?

DISCUSSION: The State Ethics Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act no. 248 of 1991; Section 2-17-5 et seq. and Section 8-13-100 et seq., as amended, 1976 Code of Laws of South Carolina). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Failure to disclose relevant information may void the opinion.

The following two questions were considered:

1. City Council typically makes annual appropriations in support of a number of community service non-profit corporations. Assume that the non-profit's governing by-laws provide that one or more members of the non-profit's government board must be appointed by Columbia City Council. Assume further that Columbia City Council has resolved to appoint one of its members to the non-profit governing board.

Is the member so appointed required to recuse him/herself from deliberations and votes concerning budgetary matters affecting the non-profit?

Section 8-13-700(A) provides as follows:

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.

Section 8-13-700(B) provides as follows:

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;

* * *

(4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;

Section 8-13-100(3) defines business as:

(3) 'Business' means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

Section 8-13-100(4) defines business with which he is associated as:

(4) 'Business with which he is associated' means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

Section 8-13-100(11) defines economic interest as:

(11)(a) 'Economic interest' means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

Section 8-13-100(30) defines official capacity as:

(30) 'Official capacity' means activities which:

(a) arise because of the position held by the public official, public member, or public employee;

(b) involve matters which fall within the official responsibility of the agency, the public official, the public member, or the public employee; and

(c) are services the agency would normally provide and for which the public official, public member, or public employee would be subject to expense reimbursement by the agency with which the public official, public member, or public employee is associated.

In SEC AO2000-011 the Commission issued an Advisory Opinion setting forth the proper procedure to which a public official must adhere when required to take an official action on a matter that would affect the economic interest of a business with which he is associated. The Commission citing AO92-014 stated“(t)hus on matters affecting the economic interests of business or individual where there is an association, there are three steps which should be taken: 1. The preparation of a written statement describing the matter of potential conflict, which is to be made a part of the meeting minutes, 2. Abstention or recusal from action, vote, and deliberation on the matter, and 3. To avoid any influence, absenting oneself from the meeting location.”

In addition to the large class exception, not applicable to this request, the Commission stated “a final exception to the recusal requirement is that situation in which the public official sits on a board in his official capacity as a council member. In order to be serving in his official capacity, the public official must sit on a board, foundation, agency, etc. which is an arm or child of the council, i.e. created by council and existing solely at the discretion of council. In addition the public official must sit on the board, etc based solely on his position on council. Clearly many public officials are asked to sit on boards of non-profits because of their public status, but that status does not, in and of itself, fall within this exception to the recusal requirements.” SEC AO2000-011 at page 5.

In a confidential informal advisory opinion issued to a municipality, staff concurred with the requestor that when a council member sat on a board in his official capacity, notwithstanding the fact that the board was not council created, he was not required to recuse himself on matters that came before council which would affect the economic interest of the board. In the question presented the council member is not sitting on a council created board; however, he is sitting in his official capacity, as defined in Section 8-13-100(30). It is not enough that the non-profit corporation requires a council member to sit on its board, but that council will appoint the member to the board in his/her official capacity. In that case the non-profit corporation is not a business with which the council member is associated and no recusal is required during deliberations and votes on budgetary matters affecting the corporation.

2. Columbia City Council typically makes annual appropriations in support of community service non-profit corporations. From time to time, one or more of these non-profit corporations retains a member of City Council for the provision of paid consulting, legal or other professional services. These services are provided on an occasional basis; there is no long-term financial association between the non-profit and the Councilmember.

Is a City Councilmember who provides services as outlined above required to recuse him/herself from deliberations and votes concerning budgetary matters affecting the

community service non-profit corporation?

The question is whether the corporation is a business with which the council member is associated when the member provides the noted services. The definition of "business with which associated" list several terms which are inapplicable to the services provided. The council member is clearly not an employee; however, he may be a compensated agent. In SEC AO2000-004 the Commission concluded "that the Ethics Act does not define the term 'compensated agent', nor has the Commission specifically defined the term in its prior opinions or decisions. Accordingly, the State Ethics Commission hereby defines 'compensated agent' as 'any ongoing client relationship in which the public official, public member, or public employee, receives compensation for services rendered'.

The Commission continued "[f]urther, it is the opinion of the State Ethics Commission that a public official's, public member's, or public employee's participation in a matter involving a business with which the public official, public member or public employee is a 'compensated agent', gives rise to a rebuttable presumption that to take an action or make a decision which affects the economic interest of the business with which associated would therefore be a violation of Section 8-13-700(A) and (B), South Carolina Code of Laws, 1976, as amended."

A council member who has an ongoing client relationship with a community service non-profit corporation must recuse him/herself when matters affecting the economic interest of the corporation come before council. The council member must determine whether the services he provides are occasional and therefore do not rise to the level of an ongoing client relationship.

CONCLUSION: When public officials sit on boards of non-profit corporations in their official capacity as public officials, the non-profit corporations are not businesses with which they are associated and recusal is not required. A public official should recuse himself from all matters in which a business with which he is associated has an economic interest to include those businesses with which the council member has an on-going client relationship.

KEY WORDS: Business With Which Associated, Economic Interest, Official Capacity, Compensated Agent.
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ANNOTATIONS: 8-13-100 (3), (4), (11) and (30) 8-13-700 (A) and (B)
