

OHIO ETHICS COMMISSION

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Advisory Opinion Number 2001-06
September 7, 2001

Syllabus by the Commission:

(1) The Ohio Ethics Law and related statutes do not prohibit a member of the Tuition Trust Authority, who is also an investor in any college savings program administered by the Authority, from participating as an Authority member with respect to any matters that would result in a general, uniform benefit or detriment to all investors in the program.

(2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of the Tuition Trust Authority, who is also an investor in any college savings program administered by the Authority, from voting, discussing, deliberating, formally or informally lobbying, or otherwise using the authority or influence of his position to secure or solicit any benefit that is unique, particular, or distinguished, in any way, from benefits accruing to all other members of the program in which he is an investor.

(3) This advisory opinion affirms the holding of Advisory Opinion No. 93-007 with respect to the conflict of interest provisions set forth in Section 102.03 of the Ohio Revised Code, and reverses the application of the holding to a member of the Ohio Tuition Trust Authority who is also an investor in a college savings program administered by the Authority.

(4) This advisory opinion affirms the holding of Advisory Opinion No. 93-007 that tuition payment contracts entered into pursuant to the Revised Code are not "public contracts" and, therefore, a member of the Ohio Tuition Trust Authority does not have a prohibited interest in a public contract if he invests in a college savings program administered by the Authority.

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The Ohio Ethics Commission has been asked to reconsider the holding of Advisory Opinion No. 93-007. In that opinion, the Commission was asked whether there are any restrictions under the Ohio Ethics Law and related statutes that are applicable to an individual who has been appointed to the Ohio Tuition Trust Authority and also participates in the State's College Savings Program.

Brief Answer

As discussed more fully below, R.C. 102.03(D) and (E) do not prohibit members of the Ohio Tuition Trust Authority (OTTA) from investing in any college savings program administered by the OTTA. A member of the OTTA who invests in a college savings program administered by the OTTA is not prohibited from participating in matters before the OTTA that would result in a general, uniform benefit or detriment to all investors in the program, including the OTTA member. A member of the OTTA, who is also an investor in any college savings program administered by the OTTA, is prohibited from taking any action to secure or solicit any benefit that is unique, particular, or distinguished, in any way, from benefits accruing to all other members of the program in which he is a participant. This opinion reverses the application of the conflict of interest restriction set forth in Advisory Opinion No. 93-007.

Advisory Opinion No. 93-007

In Advisory Opinion No. 93-007, the Commission concluded that the Ohio Ethics Law and related statutes do not, per se, prohibit an individual who invests in the Ohio Prepaid Tuition Program from serving as a member of the OTTA. The Commission also concluded that tuition payment contracts entered into pursuant to the Revised Code are not "public contracts" and, therefore, a member of the OTTA does not have a prohibited interest in a public contract if he invests in the college savings program. The Commission affirms these conclusions in Advisory Opinion No. 93-007.

The Commission went on to advise that R.C. 102.03(D) would prohibit an OTTA member, who invests in a tuition savings program administered by the OTTA, from participating, in any way, in decisions of the OTTA that would have a definite and particular impact on his financial interests or the interests of his beneficiaries under the program. For example, the Commission stated that an OTTA member would be prohibited from participating in decisions such as setting the purchase price for tuition credits. The Commission stated that R.C. 102.03(D) does not prohibit an OTTA member, who invests in a tuition savings program administered by the OTTA, from voting or otherwise participating in any official matters that would not have a definite and particular impact on his financial interests or the interests of his beneficiaries under the program.

The Commission's decision was based on the fact that the OTTA has numerous responsibilities that involve considerable discretion regarding the Tuition Trust Fund and Prepaid Tuition Program, such as investment (R.C. 3334.11) and actuarial evaluation (R.C. 3334.12). The Commission concluded that the performance of these responsibilities relative to the Prepaid Tuition Program could definitely and directly influence an OTTA member as an investor in the Prepaid Tuition Program and could have an impact on the appreciation in the value of his tuition credits.

In this opinion, the Commission reverses the application of the latter two conclusions in Advisory Opinion No. 93-007 to members of the OTTA and revises the application of the conclusions in light of legislation recently adopted in Ohio to create a new variable college savings plan, called the "CollegeAdvantage" program. Before providing guidance, this opinion must first explain the CollegeAdvantage Program.

CollegeAdvantage

The college investment program under CollegeAdvantage is established and administered by the OTTA pursuant to R.C. 3334.02(A) and (C). The program allows contributors to make contributions to college savings program accounts created for the purpose of paying future tuition and other higher education expenses, with variable rates of return depending on the programs chosen. Contributions to any program under CollegeAdvantage are state-tax deductible. Withdrawals of earnings are free from state income taxes, and will be free of federal income taxes as of January 1, 2002, if the earnings are used for higher education expenditures.

CollegeAdvantage offers tuition savers the option of investing in the Guaranteed Savings Fund, administered by the OTTA. The Guaranteed Savings Fund was formerly called the Ohio Prepaid Tuition Program, and was the program considered in Advisory Opinion No. 93-007. The Guaranteed Savings Fund is backed by the full faith and credit of the state of Ohio, and earnings are guaranteed to keep pace with tuition inflation at Ohio's four-year universities.

CollegeAdvantage offers a variety of other investment options with variable rates of return. OTTA has partnered with a private investment company, Putnam Investments, to manage the variable investment funds that are part of CollegeAdvantage. These variable investment funds operate under separate laws and regulations. The investments in the variable savings funds are not guaranteed. Earnings are market-based and will fluctuate based on market performance. The OTTA does not perform the same duties with respect to the variable investment program that it performs for the Guaranteed Savings Program, such as setting the purchase price of tuition units.

OTTA Authority Regarding Variable Investment Programs

In June 2000, the OTTA was empowered to create a variable investment program to provide the citizens of Ohio with a choice of tax-advantaged college savings programs and the opportunity to invest in more than one type of college savings program at a time. R.C. 3334.02(C). The General Assembly stated that the variable investment program would allow contributors to make cash contributions to variable college savings program accounts providing variable rates of return on contributions. Id.

The OTTA has a number of statutory duties with respect to the variable college savings program. R.C. 3334.08(A)(9) provides that the OTTA shall contract for the provision of all or part of the services necessary for the management and operation of the variable college savings program. R.C. 3334.19(A) provides that the OTTA shall contract with one or more insurance companies, banks, or other financial institutions to act as its investment agents and to provide services with respect to the variable college savings programs. The services contracted for can include: purchase, control, and safekeeping of assets, record keeping and accounting for individual accounts and the program as a whole, and providing consolidated statements of account. R.C. 3334.19(A)(1)-(3). The OTTA shall adopt rules for the implementation and operation of the variable college savings program. R.C. 3334.08(B).

The OTTA is required to adopt an investment plan that sets forth investment policies and guidelines to be utilized in the administration of the variable college savings program. R.C. 3334.19(A). During any "interim investment period," the definition of which shall be set by the OTTA in its rules, the OTTA shall be the trustee for the variable college savings program, and shall receive and hold all payments, deposits, and contributions to the program. R.C. 3334.20(C) and (D).

R.C. 3334.08(A)(14) provides that the OTTA can enter into an agreement with the Treasurer of State whereby the Treasurer will receive direct deposits from any depositor of a bank or savings and loan authorized to do business in the state of Ohio, and credit those deposits to either the Tuition Trust Fund or the Variable College Savings Fund. The OTTA must maintain a separate account for each variable college savings program contract, and has the authority to terminate any variable savings program contract if the contributions in the contract do not meet statutory minimum amounts. R.C. 3334.08(A)(22) and (21) (respectively); 3334.19(B). The OTTA also has the authority to terminate the entire variable college savings program. R.C. 3334.21 provides that the program can be terminated by statute, or by a determination by the OTTA that the program is not financially feasible.

Therefore, although Putnam Investments may perform the routine management and operation of the variable college savings programs it offers under a contract with the OTTA, the OTTA retains considerable authority with respect to the variable college savings programs. Further, if the OTTA is not satisfied with Putnam Investments, it appears that the OTTA is free to contract with other financial institutions to perform the administration of the variable college savings program.

Application of R.C. 102.03(D) and (E)

In Advisory Opinion No. 93-007, the Commission stated that R.C. 102.03(D) would prohibit an OTTA member, who invests in the Ohio Prepaid Tuition Program, administered by the OTTA, from participating in decisions of the OTTA that would have a definite and particular effect on his financial interests or the interests of his beneficiaries under the program. At this time, the Commission affirms this conclusion. Because the OTTA has significant authority with respect to the Guaranteed Investment Fund and the variable college savings funds, this conclusion would also apply to an OTTA member who participates in either fund. Further, the Commission determines that R.C. 102.03(E) would prohibit an OTTA member, who participates in a tuition investment program administered by OTTA, from soliciting anything of value, such as increased tuition savings benefits, from OTTA.

While the Commission affirms its conclusion in Advisory Opinion No. 93-007, it reverses the application of the conclusion. In Advisory Opinion No. 93-007, the Commission stated that an OTTA member would be prohibited from participating in decisions such as setting the purchase price for tuition credits, because those decisions would have a definite and particular impact on the financial interests of the OTTA member or his beneficiaries under the college savings program.

The question for the Commission is whether the benefit that accrues to OTTA members who invest in the college savings programs, from decisions that affect the OTTA members in the same manner as they affect all other participants in the college savings program, would have a substantial and improper influence on the OTTA members such that they would be prohibited, by R.C. 102.03(D) and (E), from participating in OTTA decisions on these matters.

General, Uniform Benefit

In its advisory opinions, the Commission has stated that R.C. 102.03(D) and (E) do not prohibit a public official from participating in matters being considered by his public agency that result in a general, uniform benefit for all individuals served by or connected with his public agency. The Commission has stated that a public official should not be precluded from participating in such decisions that he was duly elected or appointed to make, unless he would secure a benefit for himself, or another party with whom he has a close family, economic, or fiduciary relationship, if the benefit that is unique, particular, or distinguished in any way from the benefit secured by all other persons served by the public entity. It is the unique, particular, or distinguished benefit that gives rise to a conflict of interest for a public official or employee.

Most recently, in Advisory Opinion No. 2001-01, the Commission concluded that a city council member who is also a volunteer firefighter is not prohibited from participating in matters that uniformly affect the fire department, as a whole, or the officials and employees of the fire department as a class, without unique or special financial benefit or detriment to any individual fire department official or employee. The Commission stated that the thing of value that results from these decisions goes to the fire department, or a class of individuals, rather than to any individual official or employee. Adv. Op. No. 2001-01. For this reason, the Commission stated that, while something of value results from these decisions, it is not of such a character as to manifest a substantial and improper influence upon the council member with respect to the performance of his council duties involving the fire department. *Id.* However, the Commission went on the caution that a council member, who is also an unpaid volunteer firefighter, is prohibited from participating in any matters that definitely and directly affect the financial interests of any individual member of the fire department personnel. *Id.* See also Adv. Op. No. 88-004 (many general issues before a public body would provide a uniform benefit to all citizens served by the body, including the public officials making the decision, and the public officials are not prohibited from participating in the consideration of those issues).

Application to OTTA Members

As stated above, R.C. 102.03(D) and (E) would prohibit an OTTA member, who invests in a tuition savings program administered by the OTTA, from participating in decisions of the OTTA that would have a definite and particular effect on his financial interests or the interests of his beneficiaries under the program. For example, R.C. 102.03(D) and (E) would prohibit the OTTA member from participating in any OTTA decision regarding his individual college savings account, including any OTTA action to terminate or continue the account.

However, applying the Commission's precedent on securing, soliciting, or receiving a general, uniform benefit to the situation before the Commission, R.C. 102.03(D) and (E) do not

prohibit an OTTA member, who invests in a tuition savings program, from acting on matters before the OTTA that affect all tuition investment program participants in the same manner. In such instances, although the member may receive a benefit, or suffer a detriment, as a result of the decisions of the OTTA, the benefit or detriment will be the same general, uniform benefit or detriment that results for all participants in the college savings program.

For example, an OTTA member who invests in the Guaranteed Savings Fund is not prohibited from voting, discussing, deliberating, or acting in any other way on matters affecting the purchase price for tuition units under the Guaranteed Savings Fund. All fund investors will have to pay whatever price is set by the OTTA for any units purchased under the Fund. An OTTA member who is an investor in the fund would not have an opportunity to secure a particular and definite individual financial benefit if he participated in the decision of the OTTA with respect to setting tuition unit prices.

With respect to the variable savings funds, R.C. 102.03(D) and (E) would not prohibit an OTTA member who invests in the funds from participating in any OTTA decision regarding the investment plan that sets forth any policies and guidelines, so long as the policies and guidelines affect all participants in a general, uniform manner. R.C. 3334.19(A). The OTTA member would not be prohibited from acting on decisions involving the costs to be paid by the plan participants or benefits to be secured by plan beneficiaries, so long as those decisions do not result in a benefit for or detriment to the OTTA member that is unique, particular, or distinguished in any way from the benefit for or detriment to all other investors in the variable savings funds.

As stated in Advisory Opinion No. 93-007, regardless of the particular facts and circumstances, an OTTA member who invests in a tuition savings program is also prohibited, by R.C. 102.03(D) and (E), from misusing his position as an OTTA member to secure any benefit under the plan. The OTTA member is prohibited from taking advantage of his unique access to the Authority, in any way, to secure any greater or particular benefit or privilege for himself or the beneficiaries to the investments he holds. *Id.* The OTTA member is also prohibited, by R.C. 102.03(E), from accepting or soliciting any greater or particular benefit that is not available to all members of the plan generally. Adv. Ops. No. 92-013 and 92-019.

Conclusion

As discussed more fully above, R.C. 102.03(D) and (E) do not prohibit members of the Ohio Tuition Trust Authority (OTTA) from investing in any college savings program administered by the OTTA. A member of the OTTA who invests in a college savings program administered by the OTTA is not prohibited from participating in matters before the OTTA that would result in a general, uniform benefit or detriment to all investors in the program, including the OTTA member. A member of the OTTA, who is also an investor in any college savings program administered by the OTTA, is prohibited from taking any action to secure or solicit any benefit that is unique, particular, or distinguished, in any way, from benefits accruing to all other members of the program in which he is a participant. This opinion reverses the application of the conflict of interest restriction set forth in Advisory Opinion No. 93-007.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) The Ohio Ethics Law and related statutes do not prohibit a member of the Tuition Trust Authority, who is also an investor in any college savings program administered by the Authority, from participating as an Authority member with respect to any matters that would result in a general, uniform benefit or detriment to all investors in the program; (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of the Tuition Trust Authority, who is also an investor in any college savings program administered by the Authority, from voting, discussing, deliberating, formally or informally lobbying, or otherwise using the authority or influence of his position to secure or solicit any benefit that is unique, particular, or distinguished, in any way, from benefits accruing to all other members of the program in which he is an investor; (3) This advisory opinion affirms the holding of Advisory Opinion No. 93-007 with respect to the conflict of interest provisions set forth in Section 102.03 of the Ohio Revised Code, and reverses the application of the holding to a member of the Ohio Tuition Trust Authority who is also an investor in a college savings program administered by the Authority; and (4) This advisory opinion affirms the holding of Advisory Opinion No. 93-007 that tuition payment contracts entered into pursuant to the Revised Code are not "public contracts" and, therefore, a member of the Ohio Tuition Trust Authority does not have a prohibited interest in a public contract if he invests in a college savings program administered by the Authority.


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Ohio Ethics Commission