



**OHIO ETHICS COMMISSION**

THE ATLAS BUILDING  
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July 16, 1993

Informal Opinion 1993-INF-0716

Board of Directors  
Columbus Municipal Airport Authority

Dear Board Members:

You have asked whether Company AA, an investment banking firm, may contract with the Columbus Municipal Airport Authority (Port Authority) to serve as the placement agent for, or underwriter of, the Authority's revenue bonds, in light of the fact that one of the members of the Port Authority's Board of Directors, Director A, is Chairman and CEO of Company A, which wholly owns Company AA, and is a member of the board of directors of Company AA.

This question was extensively analyzed in an informal advisory opinion to the Port Authority which was approved by the Ethics Commission and issued on March 9, 1993. However, the issue remained whether the exemption found in the Uniform Public Securities Law, R.C. 133.02(C), would apply to the Director in his capacity as Chairman and CEO of Company A.

R.C. 133.02(C) reads as follows:

An individual as such, or as an officer, director, stockholder, or employee of or owner of any interest in an entity, or relatives or business associates of such individual, purchasing securities or fractionalized interests in public obligations as the original or subsequent purchaser, or providing a credit enhancement facility, or acting as a lessor, trustee, fiscal agent, financial adviser, paying agent, or registrar related thereto, shall not be deemed to be interested, either directly or indirectly, solely by reason of such purchase, provision, or relationship, in such purchase or sale or servicing or in the contract evidenced by the securities or the fractionalized interests in public obligations or the credit enhancement facility, for the purpose of any law of this state that prohibits a public officer, servant, or employee, or his relatives or business associates, from being interested in any contract of the particular issuer or obligor. (Emphasis added.)

As stated in the advisory opinion issued on March 9, 1993, a determination whether R.C. 133.02(C) is factually and legally applicable to any particular bond issue is for the issuer's legal adviser. However, the Commission, in this advisory opinion and the previous opinion, discuss the specific effect of R.C. 133.02(C) on Director A, so that reference may be had to the discussions if R.C. 133.02(C) is found generally applicable to the Port Authority's bond issue.

In the previous advisory opinion, the Commission held that R.C. 133.02(C) applied to Director A in his capacity as director of Company AA, such that R.C. 2921.42(A)(4) would not prohibit Director A from serving with the Port Authority if Company AA contracted with the Port Authority and Division (A)(1) would not prohibit Director A from participating to secure the contract for Company AA.

However, as mentioned above, Director A also serves as CEO and Chairman of Company A and would thus have a fiduciary interest, and perhaps a financial interest, in the public contract between the Port Authority and Company AA, in that capacity. It must be determined, therefore, whether R.C. 133.02(C) would also apply to Director A in his capacity as CEO and Chairman of Company A.

The terms of R.C. 133.02(C), as set forth above, apply only to individuals who serve as directors, officers, or stockholders of the entity that is purchasing securities or acting as financial adviser, and the individuals' business associates. In this instance, Director A serves in a fiduciary capacity with Company A. However, Company A is not the entity serving as the underwriter or financial adviser. The terms of the exemption of R.C. 133.02(C) would thus not be met here, regardless of R.C. 133.02(C)'s applicability otherwise, since Company A is not the entity that would serve as underwriter or financial adviser for the Port Authority. Thus, the prohibitions of R.C. 2921.42 would apply as described more fully in the previous opinion, without application of R.C. 133.02(C), to Director A in his capacity as Chairman and CEO of Company A.

It has been argued that since Director A's interest as director of Company AA is expressly exempted by R.C. 133.02(C), then Director A's interest as Chairman and CEO of Company A should also be exempt since it exists only by reason of the relationship or business association with Company AA.

If the only relationship between Director A or Company AA, and Company A, were that of "business associates," and if Company A had no independent interest in the contract, then such argument would be persuasive. However, Director A and Company AA are not merely business associates of Company A. Company A and Director A, as a

fiduciary to Company A, have an independent financial interest in the contract. Director A is the Chairman and CEO of Company A, and Company A wholly owns Company AA and financially benefits from the business of Company AA. Therefore, Company A, and Director A, as Company A's Chairman and CEO, would have an interest in the contract between Company AA and the Airport Authority. This is not a matter of mere business associates where one associate benefits indirectly from any and all business conducted independently by the other associate. If Company A were merely the business associate of Company AA and Director A, then Company A would benefit only indirectly, if at all, from any compensation earned by Company AA under the contract with the Port Authority. In this instance, however, Company A itself, as the parent corporation which wholly owns Company AA, directly benefits from the earnings of Company AA.

Although R.C. 133.02(C) does provide an exception for officers and directors of the particular company which is providing services to the public agency, R.C. 133.02(C) does not provide a broad and absolute exception for all who might also profit from the public agency's contracts for underwriting services and financial advice. While R.C. 133.02(C) may create an exemption in limited circumstances in order that persons with financial and business experience and acumen may utilize that experience on behalf of the public good as public officials, R.C. 133.02(C) should not be read as rendering the Ethics Law inoperative for all officials who may have business interests that conflict with their public responsibilities.

As the Commission stated in Advisory Opinion No. 85-007 with respect to the exemption of the Uniform Depository Act, "the Commission believes that the exemption sweeps too broadly when it permits such interested parties to serve in public positions with significant discretion in the deposit or investment of public funds." In this instance, Director A is empowered to exercise significant discretion with respect to the award of the Port Authority's business, and any exemption to the restrictions against the use of that discretion for the benefit of the official himself or companies with which he holds fiduciary responsibilities must not "sweep too broadly," but be considered in light of the protections of the Ethics Law. The Ethics Law does not absolutely bar Company AA from doing business with the Port Authority, but does impose reasonable protections upon the conduct of such business.

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This informal advisory opinion was approved by the Ethics Commission at its meeting on July 16, 1993. The opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. It does not purport to interpret other laws or rules. If you have any questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in cursive script that reads "Melissa Warheit". The signature is written in black ink and is positioned to the right of the typed name.

Melissa A. Warheit  
Executive Director