

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

July 14, 2000

Informal Opinion 2000-INF-0714

C. Lee Johnson, Director
Ohio Department of Development

Dear Mr. Johnson:

The Commission was recently asked whether the Ethics Law and related statutes prohibit an appointed member of the Industrial Technology and Enterprise Advisory Council (ITEAC) from participating as an investor in a tax credit program. In preparing a response to that question, the Commission examined the powers and duties of the ITEAC. As a result of that examination, the Commission determined that it was appropriate to consider, under the authority granted in R.C. 102.02(B) and OAC 102-5-01, whether members of the ITEAC exercise the type of authority that subjects them to the financial disclosure requirements of the Ohio Ethics Law. The Commission further decided to address the question pertaining to financial disclosure in an advisory opinion separate from that issued to the investor in the tax credit program, whose question will be addressed in a future advisory opinion.

Brief Answer

As explained more fully below, in accordance with R.C. 102.02(B) and OAC 102-5-01 and 102-5-02, each member of the ITEAC who is not already required to file an FDS will be requested to file an annual FDS, reflecting their financial interests for the complete preceding calendar year, beginning in 2000. The members of the ITEAC will be requested to file within ninety days of the date of this opinion, on or before September 21, 2000. Members who are appointed after June 23, 2000, will be requested to file within 90 days of their appointment dates or, if appointed between January 1 and April 15, by April 15.

Financial Disclosure Filing Requirement

Pursuant to R.C. 102.02(B) and OAC 102-5-01 and 102-5-02, the Ethics Commission is empowered to examine various statutorily created state boards, commissions, agencies, institutions, bureaus, councils, and other instrumentalities of the State to determine whether the members and chief administrative officer of these public entities hold positions that

involve "a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts." If the Commission determines that the officials do exercise such discretion, the Commission may require the officials to file annual FDS's reflecting their financial interests in the complete preceding calendar year. In making the determination regarding the exercise of administrative discretion by any board or its staff, the Ethics Commission analyzes the statutory and regulatory authority of each board, commission, or, in this case, council.

The Industrial Technology and Enterprise Advisory Council (ITEAC)

The ITEAC was created pursuant to R.C. 122.29. The ITEAC is composed of nine members, seven of which are appointed by the Governor with the advice and consent of the Senate, one of which is a member of the Senate appointed by the President of the Senate, and one of which is a member of the House of Representatives appointed by the Speaker of the House of Representatives. The seven members appointed by the Governor are to be selected for their knowledge of, and experience in, industrial research and development, business, higher education, and federal research and development programs with an emphasis on the development of new technology, and the use of existing resources in the university and business communities for industrial research. R.C. 122.29(B).

R.C. 122.30 provides that the ITEAC is vested with the powers and duties set forth in sections 122.28 to 122.36 of the Revised Code "to promote the welfare of the people of the state through the interaction of the business and industrial community and educational institutions in the development of new technology and enterprise." With respect to the specific powers and duties of the ITEAC, R.C. 122.30 provides the following:

- (B) The industrial technology and enterprise advisory council shall do all of the following:
 - (1) Make recommendations to the director of development as to applications for assistance pursuant to sections 122.28 to 122.36 of the Revised Code. The council may revise its recommendations to reflect any changes in the proposed assistance made by the director.
 - (2) Advise the director in the administration of sections 122.28 to 122.36 of the Revised Code;
 - (3) Adopt bylaws to govern the conduct of the council's business.

Based on a review of other statutory provisions, however, the ITEAC has powers not mentioned in R.C. 122.30. In particular, the ITEAC has powers with respect to the tax credit program involving small, Ohio-based research and development and technology transfer companies and investors of those companies.

Under this program, an investor who proposes to make an investment of money in an Ohio entity may apply to an Edison center for a tax credit under R.C. 122.151. In order to qualify for the tax credit, the investment must be made in a "qualified trade or business," which is defined by R.C. 122.15(C) to include any trade or business that primarily involves research and development, technology transfer, bio-technology, or the application of new technology developed through research and development or acquired through technology transfer. Further, eight other requirements, as enumerated in R.C. 122.151(A), must be met. For instance, the Ohio entity must have had less than one million dollars of gross revenue during its most recently completed fiscal year or it must have had a net book value of less than one million dollars at the end of that fiscal year. See R.C. 122.151(A)(2).

In order to receive investments of money under R.C. 122.151 that qualify an investor for a tax credit under R.C. 122.152, a business must apply to an Edison center for a determination as to whether the business is an Ohio entity eligible to receive such investments. R.C. 122.154. The Edison center then reviews the application, determines whether the business is an Ohio entity eligible to receive investments of money that qualify for the tax credit, and sends written notice to the ITEAC and the business of its initial determination. Id. Within four weeks after the ITEAC receives a notice of recommendation from an Edison center, an ITEAC committee established under R.C. 122.151 reviews the recommendation and issues a final determination of whether the business is an Ohio entity eligible to receive investments of money under R.C. 122.151 that qualify an investor for a tax credit under R.C. 122.151. Id. The committee that reviews the Edison center's initial determination is established by the ITEAC and it is composed of three members of the ITEAC. See R.C. 122.151(C).

After the Edison center receives an application from an investor who proposes to make an investment of money in an eligible entity, the center reviews it, determines whether the investor should be recommended for the tax credit, and sends written notice of its initial determination to the ITEAC and to the investor. R.C. 122.151(A). Within four weeks after the ITEAC receives a notice of recommendation from an Edison center, the same three-person committee established in the manner described above reviews the recommendation and issues a final determination of whether the investor is eligible for a tax credit under R.C. 122.151(A). The Director of Development may then disapprove any application recommended by an Edison center and approved by the ITEAC if the director determines that the entity in which the applicant proposes to invest or has invested is not an Ohio entity eligible to receive investments that qualify for the credit. See R.C. 122.15(G).

After receiving notice of approval for an investment of money from the ITEAC committee formed under R.C. 122.151, an investor, within a period of time determined by the committee, may make the investment and apply to the ITEAC for a tax credit certificate. R.C. 122.152(A). If the ITEAC is satisfied that the investor has made the investment in the proper form, the ITEAC issues to the investor a tax credit certificate indicating that the investor is allowed a tax credit in an amount equal to twenty-five per cent of the investment. Id. An investor who is issued a tax credit certificate under R.C. 122.152(A) may claim a nonrefundable credit for the taxable year in which the certificate is issued, equal to the amount indicated on the certificate, against any state tax liability. R.C. 122.152(B). The Director of Development may disapprove a credit for which a tax credit certificate has been issued under R.C. 122.152, if the director determines that the entity in which the applicant proposes to invest or has invested is not an Ohio entity eligible to receive investments that qualify for the credit. R.C. 122.151(G).

Based on the statutory scheme outlining the tax credit program, the entire ITEAC exercises final discretionary authority in at least one instance, and the three-person committee of the ITEAC exercises final discretionary authority in at least two instances. First, the three-person committee of the ITEAC has the authority to determine whether an investment meets the criteria of R.C. 122.151(A). This determination is not subject to review by the Director of Development. See R.C. 122.151(G). Second, after the determination has been made concerning the nature of the investment and the entity in which the funds are to be invested, the entire ITEAC issues a tax credit certificate indicating that the investor is allowed a tax credit in an amount equal to twenty-five per cent of the investment if the ITEAC is satisfied that the investor has made the investment in the proper form.

Based upon the powers and duties of the ITEAC under the tax credit program explained above, the Ohio Ethics Commission finds that members of the ITEAC hold positions that exercise the kind of discretion described in OAC 102-5-01 and 102-5-02. As such, the members of the ITEAC, and its chief administrative officer, are required to file annual financial disclosure statements with the Ethics Commission.

Council Members Serving in Other Public Positions

Based on the statutorily-mandated composition of the ITEAC, at least two of the nine members of the ITEAC already hold public positions for which they are required to file FDS's. The two members of the ITEAC who are also members of the general assembly file annual FDS's with the Joint Legislative Ethics Commission.

No person is required to file more than one financial disclosure statement for any given calendar year. R.C. 102.02(A)(10). Any member of the ITEAC who currently files a financial disclosure statement for a calendar year as a result of service in another public position, whether the statement is filed with the Ohio Ethics Commission, the Joint

Legislative Ethics Committee, or the Board of Commissioners on Grievances and Discipline, is not required to file another FDS because of service on the ITEAC.

The Ethics Commission requests that the individuals who hold other public positions for which they are already required to file an FDS with the Ohio Ethics Commission indicate all of their filing capacities on each year's filing to clarify their multiple filing capacities. If necessary, the filers are invited to contact the Ethics Commission for assistance in completing the FDS's.

Confidential Financial Disclosure Statements and Filing Fees

Financial disclosure statements filed by members of state councils who receive no compensation for their service are kept confidential by statutory provision. R.C. 102.02(B). The Ethics Commission is required to examine these confidential filings to determine whether any potential conflict of interest exists for the person who filed the FDS. If the Commission determines that a potential conflict of interest exists, the Commission will make that portion of the statement available for public inspection.

Members of the ITEAC are not compensated for their service on the council. See R.C. 122.29(B)(9). Therefore, the FDS's filed by members of the ITEAC who hold no other public position for which filing is required will be kept confidential. However, the forms filed by members of the ITEAC, for their service in other public positions that they hold, are subject to public inspection. In addition, an FDS filed by a chief administrative officer of the ITEAC would not be kept confidential if the chief administrative officer received compensation for his or her service.

The ITEAC is responsible for paying the FDS filing fees for its chief administrative officer and members of the council who do not hold other positions for which they are required to file FDS's with the Ethics Commission or Joint Legislative Ethics Committee. See R.C. 102.02(E)(4). For more information regarding the payment of filing fees, please contact the Ethics Commission.

Conclusion

As explained above, in accordance with R.C. 102.02(B) and OAC 102-5-01 and 102-5-02, each member of the ITEAC who is not already required to file an FDS will be requested to file an annual FDS, reflecting their financial interests for the complete preceding calendar year, beginning in 2000. The members of the ITEAC will be requested to file within ninety days of the date of this opinion, on or before September 21, 2000. Members who are appointed after June 23, 2000, will be requested to file within 90 days of their appointment dates or, if appointed between January 1 and April 15, by April 15.

C. Lee Johnson, Director
July 14, 2000
Page 6

The Ohio Ethics Commission approved this advisory opinion at its meeting on June 23, 2000. The Ethics Commission will proceed to amend the list of agencies required to file annual financial disclosure statements under OAC 102-5-02, to include the Industrial Technology and Enterprise Advisory Council. With this letter, the Ethics Commission has enclosed blank 1999 financial disclosure statements for the chief administrative officer of the ITEAC, and the members of the ITEAC who have not already filed disclosure statements for service in another public position, to complete.

If you have any questions about the financial disclosure filing requirements, the information to be disclosed, or the process followed, please contact Donna Skaggs, Financial Disclosure Analyst, for assistance.

Sincerely,



Timothy L. Gates
Staff Attorney

Enclosures: Eight (8) Financial Disclosure Statements

Cc: Marlo Tannous, Chief Legal Counsel
Department of Development