

# OHIO ETHICS COMMISSION

Sarah M. Brown, *Chairman*  
Robert Browning, *Vice Chairman*



8 East Long Street, 10<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-7090  
Fax: (614) 466-8368  
Web site: [www.ethics.ohio.gov](http://www.ethics.ohio.gov)

David E. Freel, *Executive Director*

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August 29, 2006

Informal Opinion 2006-INF-0829

Nicole M. O'Reilly

[REDACTED]

Dear Ms. O'Reilly:

On June 20, 2006, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you asked whether the Ethics Law and related statutes prohibit you, as a former employee of the Office of the Treasurer of State (Treasury), from representing your new employer, US Bank, to seek investments with state agencies.

### Brief Answer

As explained more fully below, R.C. 102.03(A)(1) prohibits you, for one year from the date you left your public position, from representing US Bank before any public agency on any matter in which you personally participated during your public employment. Due to the broad scope of your authority at the State Treasurer's Office, you should wait one year before soliciting deposits or other business from the Treasurer's Office and other public agencies if you personally participated in matters affecting those agencies. Further, you are prohibited by R.C. 2921.42(A)(3) from profiting from contracts, including investments of public funds, you authorized or were part of a process of authorizing or managing while in public office for one year from the date you left your public position.

### Facts

In your letter, you stated that you were the Senior Financial Manager for the Office of the Treasurer of State. The Treasurer appoints an investment expert member to each of the five state retirement systems and to the Workers' Compensation Oversight Commission. You stated that, in your position, you acted as the liaison between the Treasurer's office and five pension board representatives, and the Workers' Compensation Oversight Commission representative. You managed some of the searches for the investment experts. You oversaw the tobacco funds by managing the consultants and money managers, and serving as the Treasury liaison to the fund boards. You reported directly to the Treasurer and Deputy Treasurer and did not supervise any employees.

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Specifically, you stated that you reviewed and managed investment consultants' and money managers' contracted services, and/or influenced their terminations. You researched and wrote Requests for Investments (RFIs), reviewed all respondents' proposals, and made recommendations as to which firms to hire. You participated in the broker/dealer approval process by ensuring that those applicants did in fact have the licenses required by state statute. You negotiated fees and attended due diligence meetings. You reviewed and made recommendations regarding the linked deposit programs, the BidOhio program, Center for Public Investment Management presenters, and the Treasurer's legislative agenda.

You stated that in your new position as Vice President of the Government Banking Division of US Bank, you will act as the business development relationship manager for state and municipal public sector accounts. Your duties will include promoting and marketing bank products and treasury management services to public entities, including depository, custodial and investment services. You will respond to banking Requests for Proposals (RFPs), Requests for Investments (RFIs), and Requests for Quotations (RFQs) from public entities.

**Revolving Door Law—R.C. 102.03(A)(1)**

R.C. 102.03(A)(1), the "Revolving Door" prohibition of the Ohio Ethics Law, provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

Chapter 102. of the Revised Code, the Ohio Ethics Law, establishes a standard of conduct for all public officials and employees within the State and prohibits them from using their official positions to benefit their private interests or the interests of others with whom they hold certain business or personal relationships. Ohio Ethics Commission Advisory Opinion No. 93-004. See also Adv. Op. No. 89-014. R.C. 102.03(A) is designed to protect the public interest by prohibiting situations from arising where a former public official or employee "will engage in a conflict of interest or realize personal gain at public expense from the use of 'inside' information." State v. Nipps, 66 Ohio App.2d 17, 21 (1979). Referring to the revolving door law, the Court stated: "The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government."

The term "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is an employee of any public agency. R.C. 102.01(B) and (C). As a former employee of the Treasury, you are subject to the prohibitions of R.C. 102.03(A)(1). Adv. Op No. 91-003.

A "person," for purposes of R.C. 102.03(A)(1), includes a government agency, individual, corporation, business trust, partnership, or association. R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003. The definition of "person" would include your current employer, US Bank.

The term "represent" is defined in R.C. 102.03(A)(5) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Adv. Ops. No. 86-001. Please note that this restriction does not just apply to representation before the State Treasurer's Office, but also to any state or local public entity, including, for example, state boards or commissions, public colleges or universities, or the public retirement systems. Activity that would fall within this definition is an appearance in a formal proceeding or meeting, and informal "lobbying" of government personnel by telephone or in person. Id. Also included within the definition of "represent" is the preparation of any written communication that is submitted to a public agency, including formal documents, filings, informal letters, notes, and e-mails, regardless of whether the former employee signs the communication. Adv. Ops. No. 87-001 and 92-005.

The prohibition in R.C. 102.03(A) applies to any "matter" in which a public employee personally participated. Please note that the term "matter" is broadly defined in R.C. 102.03(A)(5) to include "any case, proceeding, application, determination, issue, or question." Adv. Op. No. 99-001. "Matter" also includes such items as a dispute of special or public importance and a controversy submitted for consideration. Id. The law does not prohibit a former public employee from representing an employer on new matters or matters in which she had not participated as a public official or employee. Adv. Op. No. 84-005. In the situation you have described, any recommendation, review, research, negotiation, or management of any individual investment and/or consulting contract you performed at the Treasury is a "matter" for purposes of R.C. 102.03(A)(1).

R.C. 102.03(A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion 86-001, the Ethics Commission explained that where a public employee prepared a memorandum for her superior recommending approval or disapproval, helped to draft an order, or approved or disapproved an application, the public employee personally participated for purposes of the prohibition. The Commission has further explained that where the public employee has exercised "supervision or general oversight" over other personnel in their work on a matter, she has personally participated for purposes of the prohibition. Adv. Ops. No. 86-001 and 91-009. However, if an application had merely been filed, but no administrative action other than receipt of the filing had taken place prior to the public employee's resignation; she would not be considered to have personally participated. Id.

In this instance, you stated that during your employment with the Treasury, you exercised general oversight concerning various funds and programs even though you did not supervise other personnel. Any oversight, as well as any decision, approval, disapproval, recommendation,

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advice, investigation, or other exercise of administrative discretion you made as a Treasury employee falls within the definition of "personal participation" as described in R.C. 102.03(A)(1).

R.C. 102.03(A) prohibits a public employee, during public service and for one year after public employment, from representing any person, on a matter in which she personally participated, before any public agency, and not just before the agency with which she was previously employed. Adv. Ops. No. 86-001, 87-001, and 92-005. The one-year period of the restriction dates from the day the employee leaves her public position, not from the day she participated in the matter. If the public employee personally participated in a particular matter five years ago, she is prohibited from representing any person on that matter for one year after leaving public office.

#### **Application of the Revolving Door Law to Presented Facts**

In your letter, you indicated that in your new position you will act as the business development relationship manager for state and municipal public sector accounts. You stated that in this position, you will promote and market bank products, investments, and treasury management services to public agencies.

As applied to you, R.C. 102.03(A)(1) prohibits you, for a period of one year from the date you left your public position, from representing US Bank or any other entity, before any public agency, on any matter in which you personally participated at any time during your public employment. Adv. Ops. No. 89-003, 91-009, 92-005, and 99-001. In the situation you described, you are prohibited from representing US Bank regarding investments, products, services, or other business to any public agency, including the Treasury, if you personally participated in those transactions as a Treasury employee. Where you reviewed, advised, managed, terminated, continued, or approved investment consultants' or money managers' contracted services as a Treasury employee, you would be prohibited from representing US Bank regarding those issues. Additionally, you are prohibited from representing your current employer regarding any RFIs you wrote for the Treasury that concerned US Bank. If you personally participated in adopting policies as a Treasury employee regarding RFPs, RFIs, RFQs, or other bank related business, you would be prohibited from representing US Bank on those matters.

It must be noted that R.C. 102.03(A)(1) does not prohibit US Bank from seeking business from public agencies. It prohibits you personally from contact and interaction with public agencies on the bank's behalf in matters in which you have participated. Due to the broad scope of your authority as a Treasury employee, you should wait one year before soliciting or responding to RFPs, RFIs, or RFQs regarding new deposits, treasury management, custodial, investment, or other business from the State Treasurer's Office. This would also apply to any other public agency if you personally participated in matters that affected that agency.

**Profiting from Public Contracts—R.C. 2921.42(A)(3)**

R.C. 2921.42(A)(3) restricts your ability to profit from contracts that you authorized while you were employed by the Treasury. R.C. 2921.42(A)(3) provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The term "public official" is defined, for purposes of R.C. 2921.42, to include any elected or appointed officer or employee of the state or any political subdivision. R.C. 2921.01(A). As an employee of the Treasury, you are subject to the provisions of R.C. 2921.42(A)(3).

The term "public contract" is defined, for purposes of R.C. 2921.42, as the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either. R.C. 2921.42(G)(1)(a). A political subdivision's deposit of public funds in a bank serving as a public depository is a "public contract." Adv. Op. No. 93-001. See also Adv. Ops. No. 83-003, 85-007, and 92-008. Therefore, an investment, or a contract for investment consultant services, made on behalf of the State Treasurer's Office is a "public contract" for purposes of R.C. 2921.42(A).

A public contract will be deemed to have been "authorized" by a public official if the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves. Adv. Ops. No. 88-008, 91-009, and 92-017. As discussed above, in your public position, you managed and took part in the approval process regarding investments and investment advisors' contracted services. Therefore, you are prohibited by R.C. 2921.42(A)(3) from profiting from the public contracts which were approved or authorized by you as a Treasury employee. Adv. Ops. No. 87-004, 88-008, and 93-001.

A public official who is employed by a private company that is awarded a public contract is deemed to profit from that public contract if: (1) the establishment or operation of the company with which the official serves is dependent upon receipt of the contract; (2) the creation or continuation of the official's position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate the official or as a basis for the official's compensation; or (4) the official would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008. As a Treasury employee with broad discretion, you played a role in authorizing Treasury contracts. Therefore, you are prohibited from occupying a position of profit in those contracts for one year from the date you leave your public position. Adv. Op. No. 88-008.

**Disclosure of Confidential Information—R.C. 102.03(B)**

You should also be aware of R.C. 102.03(B), which reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Pursuant to this section, you are prohibited from disclosing or using, without authorization from the Treasury, any confidential information that you acquired in the course of your official duties as a Treasury employee. No time limit exists for this prohibition. Adv. Op. No. 88-009. It is effective while you serve in the public position and after you leave public employment. *Id.*

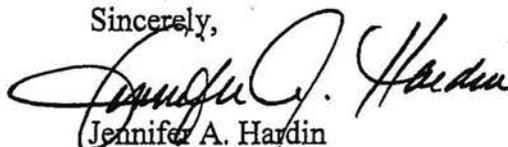
**Conclusion**

As explained above, R.C. 102.03(A)(1) prohibits you, for one year from the date you left your public position, from representing US Bank before any public agency on any matter in which you personally participated during your public employment. Due to the broad scope of your authority at the State Treasurer's Office, you should wait one year before soliciting deposits or other business from the Treasurer's Office and other public agencies if you personally participated in matters affecting those agencies. Further, you are prohibited by R.C. 2921.42(A)(3) from profiting from contracts, including investments of public funds, you authorized or were part of a process of authorizing or managing while in public office for one year from the date you left your public position.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 22, 2006. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin  
Chief Advisory Attorney