

OHIO ETHICS COMMISSION

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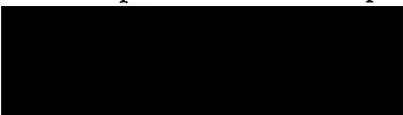
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David E. Freel, *Executive Director*

June 2, 2008

Informal Opinion 2008-INF-0602-1

Candace M. Jones
Chief Legal Counsel & Ethics Officer
Ohio Department of Development



Dear Ms. Jones:

On December 10, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. You explained that you are the Chief Legal Counsel of the Ohio Department of Development ("ODOD"), which provides administrative support for the Ohio Venture Capital Authority ("Authority"). The Authority was created to oversee the Ohio Venture Capital Program ("Program"). You asked if the Ethics Law and related statutes prohibit a member of the Authority from providing professional services to a venture capital fund that receives funding from the Program or to a company in which the venture capital fund has invested; or from having an ownership interest in a company in which a venture capital fund that receives funding from the Program has invested. You provided several attachments to your request and provided others at the Commission's request, including the Program Administrator's Agreement, Operator's Agreement, Lender's Agreement, and their amendments.

Brief Answer

As explained below, because of the Authority's substantial administrative discretion regarding the Program investment policies and its general oversight and monitoring responsibilities concerning the Program, the Ethics Law and related statutes prohibit a member of the Authority from being compensated for providing professional services to a venture capital fund that receives funding from the Program or to an individual company in which a venture capital fund has invested Program funds. A member of the Authority is also prohibited from having an ownership interest in a company in which a venture capital fund has invested Program funds.

Background—The Ohio Venture Capital Program

The Ohio General Assembly, in Ohio Revised Code Chapter 150., established the Program to increase the amount of private investment capital available in Ohio for Ohio-based business enterprises with the goals of increasing employment, creating additional wealth, and otherwise benefiting the economic welfare of the citizens of Ohio.¹ R.C. 150.01(B). To accomplish this purpose, the statute authorized the creation of a Program Fund from which investments are made into venture capital funds. R.C. 150.03. The Ohio Capital Fund, LLC, was established to serve as the Program Fund contemplated by the law. The Ohio Capital Fund has two members: the Program Administrator, which is the managing member of the Fund, and the Ohio Venture Capital Fund Trust (Trust). The Authority is the grantor of the Trust, and the trustee is ODOD.

The Authority was created to provide oversight of the Program. R.C. 150.02. The Authority consists of nine members, seven of whom are appointed by the Governor. R.C. 150.02(B). All appointees are required to have experience in the field of banking, investments, commercial law, or industry relevant to the purpose of the Program. *Id.* The Director of ODOD and the Tax Commissioner serve as ex officio, nonvoting members. *Id.* The Authority's specific statutory functions with respect to the Program include: establishing an investment policy governing the Program Fund investments and terms and conditions under which tax credits can be granted as security against lenders' losses, authorizing a lender to claim tax credits, and selecting and contracting with the Program Administrator. R.C. Chapter 150.

The Authority appointed the Buckeye Venture Partners, LLC (BVP), as the Program Administrator. The Program Administrator is responsible for acquiring loans for the Program Fund and managing and investing the funds in accordance with the investment policy established by the Authority. R.C. 150.03.

Prohibition Against Accepting Anything of Value—R.C. 102.03(E)

R.C. 102.03(D) and (E) limit the outside employment activities of a public official or employee if there are significant conflicts between his or her public duties and private employment. Of specific relevance to your question is R.C. 102.03(E), which states:

No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

Members of the Authority are public officials subject to the restrictions of R.C. 102.03. *See* R.C. 150.02(A) (the Authority's powers and duties are an essential governmental function and the Authority is subject to all laws generally applicable to state agencies and public officials).

¹ "Ohio-based business enterprise" means a person that is engaged in a business that employs as least one individual on a full or part-time basis at a place of business in Ohio, including a self-employed individual, and that is in the seed or early stage of business development requiring initial or early stage funding or is an established business enterprise developing new methods or technologies. R.C. 150.01(A)(4).

The term "anything of value" is defined to include money and every other thing of value. R.C. 1.03, 102.01(G); Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003. Compensation earned from a private employment or business activity is a thing of value. Adv. Op. No. 96-004.

The Ohio Ethics Law does not prohibit a public official from engaging in outside employment where no actual conflict of interest exists between his or her public and private positions. Adv. Op. No. 94-006. There are, however, situations where compensation received for outside employment is of such a character as to manifest a substantial and improper influence upon the public official with regard to his or her official duties. If a public official were to accept compensation for outside employment from a party that is also interested in matters before, regulated by, or doing or seeking to do business with his or her own public agency, the compensation would be of such a character as to impair the official's objectivity and independence of judgment with regard to official duties involving the source. Adv. Op. No. 2004-03 (a code enforcement official is prohibited from receiving payment for outside employment from a contractor subject to regulation by his or her public agency). When public officials exercise their official authority on behalf of the citizens, it is essential that they are not subject to divided loyalties regarding vendors and regulated and interested parties. For that reason, R.C. 102.03(E) prohibits any public official from soliciting or merely accepting payment for outside employment from these "improper" sources.² Id.

In your letter, you stated that the Authority does not make decisions regarding the individual investments of the Program Fund and has no direct relationship with the venture capital funds that receive Program Funds or the companies in which those venture capital funds invest. However, the Authority has the responsibility to establish investment standards and general limitations on allowable investments that it considers reasonable and necessary to carry out the purpose of the Program. R.C. 150.03(I).

For example, the Authority established, and can amend at its sole discretion, the "Investment Policy" (the outline of the policies and procedures to be followed by the Program Administrator to manage the Program), "Investment Process" (the process to be used in identifying, analyzing, and making investments in venture capital funds), "Investment Prohibitions" (the limitations on allowable investments, including prohibitions against investing in funds or companies with which the Program Administrator is associated), and "Investment Targets" (the percentage of the funds' committed indebtedness to be invested within a specified time period). See Program Administrator Agreement (January 31, 2005), Section 8. The Authority also established the "Venture Capital Fund Contract Language," which includes the terms and conditions that each venture capital fund must agree to in order to receive Program Funds. Id. The Authority has the discretion to approve or disapprove any deviations the Program Administrator wishes to make from these policies. Id.

The Authority also has the responsibility of monitoring the Program Fund and the right to inspect the Program Administrator's books and records. Id. at §11.1. The Program Administrator must notify the Authority of all its approvals or disapprovals of any investment or commitment of Program Fund monies in or to a venture capital fund prior to sending any

² R.C. 102.03(D) also prohibits any public official from using his or her position to secure payments for outside employment from a prohibited source.

notification to the fund and provide the Authority with any additional information it requests regarding the approval or disapproval. Id. In addition to the investment report, the Program Administrator must provide the Authority with a Quarterly Report with detailed information regarding the Program Fund investments in and commitments to venture capital funds and the venture capital funds' investments and commitments in portfolio companies. Id. at §11.3.

Even though the Authority does not directly make Program Fund investments, the Authority chooses, contracts with, and monitors the Program Administrator who manages the Program Fund. The Authority also exercises substantial administrative discretion regarding the Program by monitoring the investments and establishing and amending, as it considers necessary, the policies that determine how investments are made. The decisions that the Authority makes could definitely and directly affect the financial interests of venture capital funds that receive Program Funds and the companies in which they invest, including those to which an Authority member provides services or in which the member has an ownership interest.

The Authority also has a responsibility to make recommendations to the General Assembly for legislative modifications it feels would benefit the Program. R.C. 150.10(A)(7). For example, in its 2006-2007 Annual Report, the Authority recommended that the focus of the Program be expanded from investing exclusively in venture capital funds to investing directly in Ohio-based companies. This recommendation, if adopted, and any corresponding policies that the Authority establishes, could definitely and directly affect the financial and fiduciary interests of an Authority member who owns a company that is eligible to receive funding under the Program.

The Commission recognizes that the statute creating the Authority requires that the members have experience in an industry related to the purpose of the Program, such as the field of banking, investments, or commercial law. While it is apparent that the General Assembly wanted Authority members to possess relevant knowledge and experience, this requirement did not limit selection of Authority members to those who are directly associated with venture capital funds or business enterprises that meet the specific requirements necessary to be eligible to receive Program Funds. Further, there is nothing in the statute to suggest that the General Assembly intended to allow Authority members to participate in the Program.

Therefore, if an Authority member were to accept compensation for providing professional services to a venture capital fund that the Program has invested in, or a company in which the venture capital fund has invested, the compensation would be of such a character as to impair the Authority member's objectivity and independence of judgment with regard to his or her official duties involving the Program.³ The same is true if an Authority member has an ownership interest in a company in which a venture capital fund has invested Program Funds.

³ Depending on the facts and circumstances, if a public official can effectively withdraw from official actions that affect the interests of a business associate, he or she would not be subject to divided loyalties and his or her judgment regarding the party would not be impaired. Adv. Ops. No. 89-006 and 96-004. However, Authority members cannot withdraw from their statutory duties to establish investment standards and provide oversight for the Program.

Other Relevant Restrictions ⁴

If an Authority member is employed by a private organization and he or she represents the organization before state agencies, the Authority member would also be subject to R.C. 102.04(A), which provides that no person appointed to any board of the state shall:

[R]eceive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

R.C. 102.04(A) would prohibit an Authority member from receiving compensation from a venture capital fund or other company for representing the organization on a matter that is before the Authority. For example, an Authority member is prohibited from being compensated for providing personal services to a venture capital fund or any other company regarding its receipt or investment of Program Funds, or any other matter that will be reported to, reviewed, or monitored by the Authority. There is no exception to this prohibition. If an Authority member would be asked to represent the organization he or she serves before any other state agency, R.C. 102.04(A) would prohibit him or her from accepting compensation for the service unless he or she can meet the exception in Division (D). See Adv. Op. No. 2007-03 (attached). In order to meet the exception, the Authority member would be required to file a statement disclosing his or her activities and agreeing to disqualify himself or herself from matters before the Authority that affect any officials or employees of the agency before which he or she is representing the organization. But see R.C. 102.03(A)(1), discussed below.

The Authority members are also subject to the "Revolving Door" statute, R.C. 102.03(A)(1), which reads:

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.

(Emphasis added.)

⁴ R.C. 2921.42(A)(4), which prohibits a public official from having an interest in the profits or benefits of a public contract entered into by or for the use of a governmental agency with which the public official is connected, may also be relevant to your question. The purchase or acquisition of economic development services, through the use of Program Fund investments, is a public contract entered into for the use of the Authority as the overseer of the Program. Adv. Ops. No. 83-005, 84-011, and 88-006. Therefore, an Authority member is prohibited from having a definite and direct financial or fiduciary interest in the investments of the Program. However, since the Commission has determined that the associations you have described are prohibited under R.C. 102.03(E), it is not necessary to determine if they would also be prohibited under R.C. 2921.42(A)(4).

R.C. 102.03(A)(1) prohibits an Authority member, during his or her service with the Authority, from representing a venture capital fund or any other company that he or she serves, or any other person, before any public agency on any matter in which he or she personally participated as an Authority member. Representation includes any formal or informal appearance before, or written or oral communication with, any public agency, on behalf of any person. R.C. 102.03(A)(5).

“Personal participation” includes “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion,” and includes supervision or general oversight of other public officials or employees. R.C. 102.03(A)(1); Adv. Op. No. 91-009. The term “matter” includes any case, proceeding, application, determination, issue, or question. R.C. 102.03(A)(5). Matter also includes the reviewing, drafting, or other administrative activity regarding legislation. Adv. Op. No 2004-04. Therefore, an Authority member would be prohibited from representing any venture capital fund or any other company on issues regarding the Program.

Finally, Authority members should be aware of R.C. 102.03(B), which prohibits a public official or employee from disclosing or using confidential information acquired in the performance of his or her public duties. An Authority member is prohibited from disclosing or using any confidential information he or she acquired through his or her service with the Authority to benefit himself or herself, or any venture capital fund or other company for which he or she provides services or is otherwise associated. There is no time limit for this restriction. Adv. Op. No. 89-009.

Conclusion

As explained above, because of the Authority’s substantial administrative discretion regarding the Program investment policies and its general oversight and monitoring responsibilities concerning the Program, the Ethics Law and related statutes prohibit a member of the Authority from being compensated for providing professional services to a venture capital fund that receives funding from the Program and to an individual company in which a venture capital fund has invested Program funds. A member of the Authority is also prohibited from having an ownership interest in a company in which a venture capital fund has invested Program funds.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 29, 2008. 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,



Karen R. King
Advisory Staff Attorney