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November 2, 2009

Informal Opinion 2009-INF-1102-2

Candace M. Jones
Ohio Department of Development

Dear Ms. Jones:

On September 8, 2009, the Ohio Ethics Commission received your request for an advisory opinion. You asked if the Ethics Law and related statutes prohibit members of the Ohio Venture Capital Authority (Authority) from participating in matters attendant to the refinancing of the existing indebtedness supporting the Ohio Capital Fund.

Brief Answer

As explained more fully below, an Authority member is not prohibited from participating in matters attendant to the refinancing transaction, provided that, as you have stated, all current and future participants in the Ohio Venture Capital Program will receive a uniform benefit and no particular venture fund or early stage company will be affected in a selective or differential way by the refinancing transaction.

Facts

In your request letter, you referenced a prior opinion issued by the Commission on June 2, 2008, in response to your questions regarding the application of the Ethics Law and related statutes to Authority members if they were to engage in private employment or business activity with a venture capital fund or company that could receive funding from the Ohio Capital Fund.

You explained that, in order to protect against the potential conflicts of interest addressed in the Commission's opinion, the Department of Development (Development) proposed legislation to reconstitute the Authority as a three-person board of public officials and to create an advisory board of experts to support the Authority. However, the statutory changes to the Authority's composition and business administration in the final version of H.B. 1 are substantially different from those proposed by Development. You explained that H.B. 1 did not

create an advisory board. Instead, effective February 1, 2010, the Authority will be composed of three private citizen members with relevant expertise.¹ The two public officials who currently serve as non-voting members will no longer serve as members but will be available as advisors to the Authority. The terms of all Authority members serving on January 31, 2010, will expire on that date. You attached a copy of R.C. 150.02 as amended by H.B. 1 to your request.

You explained that H.B. 1 authorizes changes to the Ohio Venture Capital Program to facilitate refinancing so that the Authority can replace its current \$150 million credit facility with a more stable and less expensive structure. Because of changes in the credit market, the Ohio Capital Fund's current credit facility is not sustainable. You stated that the Authority needs to refinance existing indebtedness supporting the Ohio Capital Fund by January 31, 2010.

You explained that the statutory changes to the Ohio Venture Capital Program allow the Authority to enter into an agreement with an Ohio port authority to serve as the conduit issuer of revenue bonds. You explained that, in connection with the refinancing transaction, the Authority will need to take various actions, including: approving changes to its investment policy, amending provisions of the Program Administrator Agreement to reflect the new financing structure, entering into an agreement with a select port authority, and authorizing the refinancing transaction. The Authority will also retain outside counsel for the refinancing transaction.

You stated that the decisions associated with the refinancing differ fundamentally from the issues addressed in the June 2, 2008, opinion because no particular venture fund or early stage company will benefit in any unique or particular way from the refinancing transaction. You stated that the refinancing will: (1) benefit all current and future program participants in the same manner; and (2) serve the public policy goals of the program by providing a more stable and less expensive source of program funds. You also stated that all of the parties involved in the refinancing should be readily identifiable so that potential conflicts can be evaluated and managed by the Authority.

You explained that statutory changes made in H.B. 1, except for the new composition of the Authority, will be effective October 17, 2009. The Program Administrator, with the advice of counsel, has established an aggressive schedule to undertake and complete the refinancing transaction. You stated that, in light of the Commission's prior advisory opinion, the Authority requests further guidance from the Ethics Commission regarding its ability to act on matters attendant to the refinancing transaction.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

As noted earlier, you received an advisory opinion dated June 2, 2008, regarding outside employment and business activity restrictions that would apply to Authority members, in particular situations. The conclusions in the earlier opinion are consistent with this opinion and are included in this opinion as if restated here.

¹ The Commission notes that the members of the newly configured Authority will be subject to all of the provisions of the Ethics Law and related statutes discussed in its June 2, 2008, advisory opinions in the same way as the seven members of the current Authority. A copy of the June 2, 2008, opinion is attached to this opinion.

Members of the Authority are public officials subject to the conflict of interest restrictions of R.C. 102.03, which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of 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.
- (E) 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.

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).

Any beneficial or detrimental economic impact of a decision made by a public governing board is within the definition of "anything of value." R.C. 1.03, 102.01(G). Adv. Ops. No. 89-003 and 90-012.

R.C. 102.03(D) prohibits an official from using his or her position to secure a definite and direct benefit or avoid a definite and direct detriment for any other party if the relationship between the official and the party is such that the benefit to the other party will have a substantial and improper influence upon the official such that his or her objectivity or independence of judgment is impaired. Adv. Ops. No. 88-004, 88-005, and 89-005. R.C. 102.03(E) prohibits a public official from soliciting or accepting anything of substantial value for any party with whom the official has a close relationship. The purpose of these restrictions is to ensure that, when making a decision in his or her public role, a public official is not substantially and improperly influenced by the impact of the decision on the official's own interests or the interests of other parties with whom the official has close family, economic, business, or other connections. Adv. Ops. No. 91-001, 91-004, and 96-004.

While the law prohibits a public official from participating in a matter before his or her public agency in which the official or a party with whom the official has a close relationship has a definite and direct interest, the law does *not* prohibit a public official from participating in a matter where the interest is speculative, minimal, undefined, or peripheral. Adv. Op. No. 88-005 and 93-016. Additionally, a public official is not prohibited from participating in matters being considered by his or her public agency that result in a general, uniform benefit for all individuals served by or connected with the official's public agency. See e.g. Adv. Ops. No. 88-004, 91-006, 92-013, and 2001-06. The Commission has stated that a public official should not be precluded from participating in such decisions that he or she was duly elected or appointed to make, unless the official would secure a benefit for himself or herself, or another party with whom the official has a close family, economic, or fiduciary relationship, that is *definite and direct*, such that it is, unique, particular, or distinguished in any way from the benefit secured by

all other persons served by the public entity. Adv. Op. No. 2001-06. It is the definite and direct benefit that gives rise to a conflict of interest for a public official or employee. *Id.*

For example, in Advisory Opinion No. 85-006, the Commission explained that a public official is not prohibited from participating or voting on general legislation that provides a uniform benefit or detriment to all citizens in a jurisdiction, including matters involving taxes, sewer and water services, and some zoning code revisions. See Adv. Ops. No. 88-004 and 2007-01. Additionally, in Advisory Opinion No. 2001-06, the Commission explained that a member of the Ohio Tuition Trust Authority (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. However, the Commission also cautioned that the OTTA member would be 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.

You have stated that the decisions the Authority would make concerning the refinancing will not benefit any particular venture fund or early stage company but instead will benefit all current and future program participants in the same manner. The law does not prohibit an Authority member from acting on matters attendant to the refinancing provided that, as you have stated, the refinancing will affect all interested parties in same manner.

However, an Authority member is prohibited from taking any action, in his or her official capacity, to secure an *individual or differential* benefit for himself or herself or for a party with which he or she has a close familial, fiduciary, or financial connection. You stated that all of the parties involved in the refinancing should be easily identifiable so that any potential conflicts can be evaluated and managed. Authority members must be conscientious in identifying any potential conflicts that may arise.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 30, 2009. 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