

SEC AO2000-011

May 17, 2000

SUBJECT: Conflicts of Interest for County, City and Town Council Members who sit on various boards.

SUMMARY: A public official should recuse himself from all matters in which a business with which he is associated has an economic interest. A business with which associated includes those non-profit agencies and boards on which a public official serves, unless he serves on the agency or board in his official capacity as a council member.

QUESTION: This opinion is issued in response to the ongoing concern the State Ethics Commission has regarding violations of Section 8-13-700(A) and (B) of the Ethics Reform Act of 1991, by public officials who participate in, and vote on matters before their councils involving the economic interest of a business with which the public officials are associated through their employment or membership on the board or other governing bodies, not affiliated with their councils.

DISCUSSION: The State Ethics Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act no. 248 of 1991; Section 2-17-5 et seq. and Section 8-13-100 et seq., as amended, 1976 Code of Laws of South Carolina). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Failure to disclose relevant information may void the opinion.

Section 8-13-700(A) provides as follows:

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is

associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.

Section 8-13-700(B) provides as follows:

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;

* * *

(3) if he is a public employee, he shall furnish a copy of the statement to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;

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(4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;

* * *

(5) if he is a public member, he shall furnish a copy to the presiding officer of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause such disqualification and the reasons

for it to be noted in the minutes.

Section 8-13-100(3) defines business as:

(3) 'Business' means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

Section 8-13-100(4) defines business with which he is associated as:

(4) 'Business with which he is associated' means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

Section 8-13-100(11) defines economic interest as:

(11)(a) 'Economic interest' means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

Section 8-13-100(30) defines official capacity as:

(30) 'Official capacity' means activities which:

(a) arise because of the position held by the public official, public member, or public employee;

(b) involve matters which fall within the official responsibility of the agency, the public official, the public member, or the public employee; and

(c) are services the agency would normally provide and for which the public official, public member, or public employee would be subject to expense reimbursement by the agency with which the public official, public member, or public employee is associated.

The Commission has issued many Advisory Opinions setting forth the proper procedure to which a public official must adhere when required to take an official action on a matter that would affect the economic interest of a business with which he is associated. See SEC AO92-14, AO92-77, AO92-115, AO92-131, AO92-145, AO92-152, AO92-221, AO95-10 and AO98-09. The Commission in AO92-014 stated "(t)hus on matters affecting the economic interests of business or individual where there is an association, there are three steps which should be taken: 1. The preparation of a written statement describing the matter of potential conflict, which is to be made a part of the meeting minutes, 2. Abstention or recusal from action, vote, and deliberation on the matter, and 3. To avoid any influence, absenting oneself from the meeting location."

In addition, the Commission has reviewed those situations in which the public official has not had to recuse himself because he is a member of a large class. See SEC AO92-64, AO92-92 and AO92-201. The opinions primarily deal with council members who are also school district employees or spouses of school district employees and the question posed is whether those council members could vote on the school board appropriation. The Commission in AO92-201 stated "(s)ince the four Council Members are either school district employees or married to a school district employee, their interest is potentially no greater or less than that of all other members of the group of school employees. Therefore, the State Ethics Commission sees no prohibition against the four Council Members participating in the deliberations and votes on the school district budget issue. **The members are advised, however, that issues directly affecting their own economic interests to greater extent than other members of the school district employee group will necessitate following the procedures of Section 8-13-700(B).**" (Emphasis added.) The large class exception is just that, an exception to the recusal requirements of Section 8-13-700(B) for public officials and businesses with which they are associated and this exception must be reviewed case by case to determine whether a large class exists.

A final exception to the recusal requirement is that situation in which the public official sits on a board in his official capacity as a council member. In order to be serving in his official capacity, the public official must sit on a board, foundation, agency, etc. which is an arm or child of the council, i.e. created by council and existing solely at the discretion of council. In addition the public official must sit on the board, etc based solely on his position on council. Clearly many public officials are asked to sit on boards of non-profits because of their public status, but that status does not, in and of itself, fall within this exception to the recusal requirements. The Commission has issued two Orders dismissing complaints under this exception. See C2000-014 Decision and Order and C2000-049 Decision and Order. In both complaints the Respondent was

an elected member of council who sat in his official capacity on a board which was a creation of council. Finally the prohibitions of Section 8-13-700, as it applies to a business with which a public official is associated, does not include an association of which the official is a member and not an officer, director or employee. See C98-035 Decision and Order.

The Commission is aware that many times public officials are voting on total council budgets which include appropriations to businesses with which they are associated. In those situations, the public official should request that the appropriation be a line item budget matter separate from the total budget. The public official could then vote on the total budget and follow the recusal requirements of Section 8-13-700(B) for the line item budget matter.

CONCLUSION: The Commission is mindful that public officials often sit on various boards and agencies because they are public officials; however, unless they sit on council created boards in their official capacity as council members, then the boards, non-profits, agencies, etc. are businesses with which they are associated. A public official should recuse himself from all matters in which a business with which he is associated has an economic interest.

KEY WORDS: Business With Which Associated, Economic Interest, Official Capacity

ANNOTATIONS: 8-13-100 (3), (4) and (11), 8-13-700 (A) and (B),