

OHIO ETHICS COMMISSION

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June 24, 2002

Informal Opinion 2002-INF-0624-1

Marlo B. Tannous
Chief Legal Counsel
Ohio Department of Development

Dear Ms. Tannous:

In a letter received by the Ohio Ethics Commission on April 11, 2002, you ask whether the Ethics Law and related statutes prohibit a member of the Ohio Housing Finance Agency (OHFA) board, who is employed by a subsidiary of the National City Corporation, from participating in OHFA decisions to award loans and funding to a limited partnership if another subsidiary of the Corporation is a small limited partner within the partnership.

Brief Answer

As explained below, based on the specific facts you have set forth, R.C. 2921.42(A)(1) does not prohibit the OHFA board member who is employed by a corporation's subsidiary from participating in OHFA decisions to award loans and funding to a limited partnership if another subsidiary of the corporation is a small limited partner within the partnership.

Facts—The Corporation and its Subsidiaries

You state that the lender representative on the OHFA board is employed as an officer by National City Bank (Bank). The Bank is a subsidiary of the National City Corporation (Corporation). The National City Community Development Corporation (CDC) is another subsidiary of the Corporation. You have provided an organization chart of the Corporation that shows that both the Bank and CDC are wholly owned by the Corporation.

You have explained that CDC is a small limited partner investor in Ohio Capital Corporation's Ohio Equity Fund XI (OEF).

Facts—OEF Projects and OHFA Funding

In many of the housing credit projects that OHFA approves, OEF is an upper tier limited partner investor. You have explained that OEF is an upper tier limited partner in many housing credit projects approved by OHFA, and that OEF is usually the owner of ninety-nine percent of the project. Most OEF projects seek development loans and Housing Development Assistance Program (HDAP) funding from OHFA. The OHFA board must approve development loans and HDAP funding in all cases. In almost all instances, the OEF projects that seek development loans and HDAP funding from OHFA have already received housing tax credits. The OHFA board does not approve housing tax credits, however, the OHFA board approves the annual Qualified Allocation Plan, which determines the selection criteria for housing tax credits.

Facts—Composition, Duties, and Responsibilities of OHFA

OHFA consists of eleven members. R.C. 175.03(A)(1). The director of commerce and the director of development, or their respective designees, are voting members of OHFA. *Id.* Nine members are appointed by the governor with the advice and consent of the senate. *Id.* Of the appointed members, at least one must have experience in residential housing mortgage lending, loan servicing, or brokering. *Id.*

Securing Authorization of a Contract—R.C. 2921.42(A)(1)

A member of OHFA must adhere to the restriction imposed by R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

R.C. 2921.42(A)(1) prohibits an OHFA member from either authorizing or, from employing the authority or influence of her office to secure authorization of any public contract in which she, a member of her family, or any of her business associates has an interest. An “interest” in a public contract can be either pecuniary or fiduciary, but must be definite and direct. Ohio Ethics Commission Advisory Opinion No. 81-008.

The term “public contract” includes any purchase or acquisition of property or services by or for the use of any political subdivision. R.C. 2921.42(G)(1). The Ethics Commission has stated that a public agency’s acquisition of property or services through its issuance of a grant or a loan is a public contract. Adv. Ops. No. 85-002, 89-006, and 92-014. Through its issuance of HDAP funds, and funds for affordable housing loans, OHFA acquires the services of the fund recipients towards the development of housing in the state and the facilitation of home ownership by Ohio’s citizens. These loans are, therefore, public contracts for purposes of R.C. 2921.42(G)(1).

A public official's "business associate," for purposes of R.C. 2921.42(A)(1), is any person or entity with whom the official is engaged in an ongoing business enterprise. Adv. Op. No. 86-002. A public official is engaged in an ongoing business endeavor with her employer, and her employer is her "business associate." Adv. Op. No. 78-006. Accordingly, the Commission has advised that a public official is prohibited from authorizing a contract in which her private employer has a definite and direct interest. Adv. Op. No. 89-008.

As stated above, the OHFA board member is employed as an officer of the Bank. For purposes of R.C. 2921.42(A)(1), the Bank is the board member's business associate, and whenever the Bank has a definite and direct interest in a matter before OHFA, the board member would be prohibited from participating in the matter. The Bank is a subsidiary of the Corporation. Therefore, the Corporation is also the board member's business associate for purposes of R.C. 2921.42(A)(1). See, generally, Adv. Op. No. 85-004 (Section 2921.42 of the Revised Code does not recognize a threshold interest below which a person ceases to be an associate). If the Corporation has a definite and direct interest in a matter before OHFA, the board member would be prohibited from participating in that matter.

The question, then, is whether the Corporation has a definite and direct interest in the matter before OHFA that affects CDC, one of its subsidiaries. CDC is a small limited partner investor in OEF. OEF would have a definite and direct interest in its projects funded by OHFA. CDC, as a small limited party investor in OEF, would also have an interest in the OEF projects funded by OHFA. However, while CDC, as a limited party investor in OEF, has a definite and direct, albeit limited, interest in the matter affecting OEF before OHFA, the interest of its parent corporation is not definite and direct.

Therefore, given the facts and circumstances you have presented, because her business associate (the Corporation) does not have a definite and direct interest in the matter, R.C. 2921.42(A)(1) does not prohibit the OHFA board member from participating in OHFA decisions to award loans and funding to a partnership in which a subsidiary of the Corporation is a small limited partner. The board member is not prohibited from taking any action, including voting, discussing, and deliberating on, these projects.

If, however, CDC were to be a more significant partner on a project for funding by OHFA, the Corporation could be considered to have a definite and direct interest in the matter before OHFA. Also, if the board member were to assume a role as an officer of the Corporation, the relationship between the board member, the Corporation, and CDC would be significantly changed, which could alter the application of the law. Further, R.C. 102.03(D), which prohibits a public official from using her position to secure anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon her with respect to her duties, may also apply given different facts. Finally, the board member cannot be assigned any duties by the Corporation or the Bank that involve the interests of CDC or OEF. If she were to be assigned any duties involving CDC or OEF, she could be considered to have a personal interest in matters before the OHFA Board, in contravention of the Ethics Law and related statutes. If any of these situations should arise, the board member should seek further guidance from the Commission.

Lending Institution Exception—R.C. 175.03(B)

You have explained that the Board member in question is the lender representative on the Board. R.C. 175.03(B) provides an exception for the Board members with reference to Board loans to lending institutions or contracts between the agency and lending institutions for the purchase, administration, or servicing of loans. However, that exception applies only to loans and contracts to lending institutions. The term "lending institution" in R.C. 175.03(B) is defined for purposes of R.C. Chapter 175. in R.C. 175.01(E) to include, "a bank which has its principal place of business in this state, or a bank subsidiary corporation that is wholly owned by a bank having its principal place of business located in this state."

In the instance you have set forth, the loans are to CDC, which is a wholly owned subsidiary of the National City Corporation, which also owns a number of banks. However, it does not appear, from the facts you have provided, that National City Corporation is, itself, a "bank." Therefore, the exception set forth in R.C. 175.03(B) is not applicable to the situation you have set forth.

Conclusion

As explained above, based on the specific facts you have set forth, R.C. 2921.42(A)(1) does not prohibit the OHFA board member who is employed by a corporation's subsidiary from participating in OHFA decisions to award loans and funding to a limited partnership if another subsidiary of the corporation is a small limited partner within the partnership.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 13, 2002. The Commission commends you and the board member for requesting guidance before any actions that could be prohibited by law are taken.

The opinion is based on the facts presented and 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 contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney