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July 22, 2009 Informal Opinion 2009-INF-0722

Mary Lynn Readey
Deputy General Counsel
The Ohio State University
[redacted]

Dear Ms. Readey:

On January 9, 2009, the Ohio Ethics Commission received your request for an advisory opinion on behalf of The Ohio State University (University) Board of Trustees (Board of Trustees) regarding the University's proposed method for funding the compensation of its President. As background to the request, you provided information regarding the current University President's compensation package. You explained that the Board intends to establish a permanent Endowed Presidential Chair, within the University's Academic Excellence Fund, which will be used to support the compensation of the President. You asked if the use of an endowment, funded by private contributions, to support the President's compensation raises any issues under the Ethics Law.

Brief Answer

The amount and terms of the public compensation the University provides to its President are not matters within the purview of the Ethics Commission. These matters are properly reserved to the Trustees of the University as stewards of the public trust and under their statutory authority as delegated or limited by the Ohio Revised Code.

Provided that the Board of Trustees undertake and retain full authority and accountability regarding the use of all public funds for the selection, compensation, and retention of the University President, the Ethics Law and related statutes do not prohibit the University from using endowment funds to support the University President's compensation. However, both the Board and the President will be subject to limitations under the Ethics Law and other statutes on solicitations and activities related to the endowment fund should the Board of Trustees decide to use it to support the President's compensation.

Facts

The Academic Excellence Fund is a permanent endowment fund that was established on September 21, 2007, by the Board of Trustees with an initial gift from G. Gilbert Cloyd, the Chairman of the Board. The endowment description states that the earnings of the fund are to be used to encourage academic excellence through programmatic initiatives or support for programs led by key University personnel, including but not limited to, start-up and continuing costs for research or support for compensation for key personnel. The Board of Trustees has determined that the President will control the general use of the fund.

In a November 7, 2008, board meeting report, which you provided, Chairman Cloyd discussed the President's contract, evaluation, and compensation. The Chairman explained that the Board of Trustees plans to fund the President's retirement package through private donations to the University endowment fund. The Chairman explained that the Trustees intend to restructure the Academic Excellence Fund to accommodate the collection of investment funds and private contributions for a separate endowment fund, the Endowed Presidential Chair, that will be used to support the compensation of the current and future University presidents and to provide for other separate funds that would be dedicated to the strategic advancement of the University's academic and operational needs. The Chairman envisions that one-third of the President's compensation would be funded through earnings on donations made to the Presidential Chair fund.

You and Joseph Irvine, Development and Tax Counsel for the University, attended the Commission's January 23, 2009, meeting representing the University. At that meeting, you and Mr. Irvine explained that the amount of money in the endowment fund will not determine the total amount or affect the structure of the President's compensation. Mr. Irvine also explained that the University's Development Staff has the primary responsibility of soliciting funds for endowments. In response to questions from the Commission, Mr. Irvine further explained that the President engages in development and fundraising for the University and that it is also common practice for department chairs to engage in fundraising activities for their departments. However, Mr. Irvine pointed out that federal tax laws prohibit a charitable deduction for donations to an endowment that would be earmarked for a specific individual because the funds would be considered a gift to the individual; therefore, the University does not accept such donations. As explained in this opinion, the Ethics Law would also prohibit such a targeted donation.

In your letter, you stated that, once received by the University, endowment funds cease to be private and are public funds. The endowed gifts to the University and the University's Foundation are pooled together to form the long-term investment pool that is managed by the Office of the Vice President and Chief Investment Officer under the direct oversight of the Board of Trustees and the Board's Development and Investment Committee. The long-term investment pool is managed similarly to a mutual fund. Gifts are invested in perpetuity and annual distributions are used to further the purposes of the gift.

You explained that the endowment investment and distributions are governed by the Board of Trustees' Endowment Fund Investment Policy. Endowment spending is also governed by the Uniform Management of Institutional Funds Act (UMIFA).[1] The University's endowments are intended to fund important programs and enhancements to the University such as academic chairs and professorships, research, scholarship programs, and athletic program support. Based on the University's current distribution policy, a $2 million academic chair endowment would distribute approximately $80,000 per year to provide support for whomever the Trustees appoint to fill that position.

You stated that the Endowed Presidential Chair will operate similar to and carry all of the restrictions of the University's other endowed chairs. The Presidential Chair will be established through the sole authority of the Board of Trustees, donations will be made to the fund in the name of the University Foundation, and no donations can or will be made to specific individuals. You explained that one of the essential characteristics of an endowment is that the donor gives up control of the endowed funds, which means that a donor cannot decide who fills an endowed chair or how much the person will be compensated from the endowment. In the case of the Presidential Chair, the Board retains the statutory authority to select and fix the compensation of the President pursuant to R.C. 3335.09. Finally, in conversations with Commission staff, Christopher Culley, Vice-President and General Counsel for the University, has explained that, as a practical matter, the University is committed to assuring that no donations for the Endowed Presidential Chair will be solicited or accepted from individuals or corporations in any manner as to even suggest a quid pro quo.

Issues Outside the Ethics Commission's Jurisdiction

The Commission notes that its authority to review the issue you have described is limited to the application of the Ohio Ethics Law and related statutes to the question of the use of endowment funds to support the President's salary. The amount and terms of the public compensation the University provides to its President are not matters within the Commission's purview. These matters are properly reserved to the Trustees of the University as stewards of the public trust and under their statutory authority as delegated or limited by the Ohio Revised Code.

Supplemental Compensation Prohibitions—R.C. 2921.43(A)

Ohio's supplemental compensation law governing all public officials and employees, R.C. 2921.43(A), applies to any "public servant," which includes officials and employees of any public college, such as a university president. R.C. 2921.01(A) and (B); Ohio Ethics Commission Advisory Opinion No. 2003-03. R.C. 2921.43(A) provides:

> (A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:

[1] R.C. 1715.51 *et seq*. Effective June 1, 2009, a new state law, the Uniform Prudent Management of Institutional Funds Act (UPMIFA), will replace UMIFA. The changes do not affect this opinion, however.

> (1) Any compensation, other than as allowed by . . . law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
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> (2) Additional or greater fees or costs than are allowed by law to perform the public servant's official duties.[2]

In enacting the supplemental compensation law, the General Assembly intended to protect the public by ensuring that public servants would serve **only** the public, and the performance of their job duties would not be influenced by their dual or simultaneous obligation to any sources of compensation other than their public agencies. Adv. Op. No. 93-013 ("R.C. 2921.43(A) is . . . intended to prevent situations where a public servant is answering to <u>both</u> a public and a private master in the performance of his public duties.") (Emphasis added.) Adv. Op. No. 2008-01. As explained by the Supreme Court of Ohio, in *Somerset Bank v. Edmund* (1907), 76 Ohio St. 396, 403 and 405:

> [I]t is contrary to public policy and sound morals, and a violation of well established legal principles, to permit a public officer to accept an offer of reward for the performance of a service which the law enjoins upon him as a duty. . . . *[B]oth public policy and sound morals forbid that he should be permitted to demand or receive for the performance of a purely legal duty any fee or reward other than that established and allowed by law as compensation for the services rendered.*

(Emphasis added.)

The Commission has explained that, in order for the supplemental compensation law, R.C. 2921.43(A), to apply to a situation and bar a public servant from being offered or given compensation, two elements must be established. First, it must be determined whether the thing offered or given is compensation. The Commission has held that "compensation" is any thing of value that is given for services, whether it is in the form of cash, tangible goods or chattels, or other financial gains or benefits that accrue to the public servant. Adv. Op. No. 2008-01. The services performed by the public servant may result in a specific benefit to an individual offering the compensation or in a more general benefit for the public agency and those served by the agency. In the situation you have described, the payments to be made to the President are "compensation."

Second, it must be determined whether the compensation is being promised or given to the public servant for any of the following purposes:

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[2] There are three specific exceptions to this provision, set forth in R.C. 102.03(G), (H), and (I). These Ethics Law exceptions apply to campaign contributions, honoraria, and travel expenses and are not relevant to your question.

(a) To perform his or her official duties;
(b) To perform any other act or service in his or her public capacity;
(c) For the general performance of the duties of public office or employment; or
(d) As a supplement to public compensation.

Compensation provided to a public university president for the services he or she performs for the university, from any source other than the university, would be provided for any or all of these purposes. The supplemental compensation statute, therefore, prohibits a public university president from soliciting or accepting compensation other than as allowed by law to perform his or her duties related to the university.

The supplemental compensation restriction, R.C. 2921.43(A), does not, however, prohibit compensation to a public official or employee where such compensation is *allowed by other provisions of law*. When a statute within the Ohio Revised Code recognizes a public agency's ability to establish alternate sources of compensation for its officials and employees, R.C. 2921.43(A) does not, therefore, prohibit the public servants from accepting the compensation.

<u>Provisions of Law Authorizing University Compensation</u>

Several Ohio laws recognize a state university's ability to receive monetary donations and bequests. R.C. 3345.16 provides:

> The board of trustees of a state college or university may receive, and hold in trust, for the use and benefit of the college or university any grant or devise of land, and donation or bequest of money or other personal property, to be applied to the general or special use of the college or university, including use for student loan and scholarship purposes, unless otherwise directed in the donation or bequest.

See also R.C. 3335.13 (Title of real and personal property purchased by the University as an investment and held in the University's endowment fund shall not be vested in the State but are held in trust by the board). R.C. 9.20 authorizes an educational institution under control of the state to receive "by gift, devise, or bequest moneys, lands, or other properties" and "hold and apply the moneys lands or properties according to the terms of the gift, devise, or bequest." *See* Adv. Op. No. 89-002.

The statutes above permit a university to receive a donation or bequest and recognize the university's use of funds for the general benefit of the university or for a "special" use. In the specific case of the Board of Trustees of the Ohio State University, R.C. 3335.09 states that the Board shall:

> [E]lect, fix the compensation of, and remove, the president and such number of professors, teachers and other employees as are necessary; but no trustee, or his relation by blood or marriage, shall be eligible to a professorship or position in the

> university, the compensation for which is payable out of the state treasury *or a university fund.*

(Emphasis added.) Because the General Assembly specifically excluded trustees and certain relatives from serving as professors or in other University positions compensated from the state treasury "or a university fund," R.C. 3335.09 supports the notion that other qualified individuals can be employed by the University and properly paid from either the state treasury or a university fund.[3] *See generally State v. Droste* (1998), 83 Ohio St.3d 36, 39 ("Under [a] general rule of statutory construction . . . the expression of one or more items of a class implies that those not identified are to be excluded."). The General Assembly has recognized that university or college employees can be compensated using public money retained in separate university funds, including endowment funds supporting chairs or professorships at the institution.

Therefore, provided that endowment funds are donated, received, and administered as required in Ohio law, including the Ethics Law and related statutes, and that the Board of Trustees retain exclusive control and independent determination, on behalf of the University, over the selection, hiring, direction, setting of compensation for, evaluation, management, retention, or termination of University officials and employees, R.C. 2921.43(A) would <u>not</u> prohibit the Trustees from deciding that a University official or employee, including the President, could receive part or all of his or her compensation from a University endowment fund. *See* Adv. Op. No. 2008-01.

<u>Controls on the Board and President in the Use of Endowment Funds</u>

When a donor makes a gift to an endowment of the University that the Board of Trustees independently decides to use to support the compensation of any University employee, including the President, the donor cannot designate a specific individual to receive the funds. You have explained donors give up control of the donated funds and cannot decide how much the person selected for the position will be compensated from the endowment. Further, unless serving as a member of the Board, the donor cannot have any role relative to the: (1) selection, retention, or termination of any particular individual to hold the endowed position; or (2) the direction of the specific duties and authority of the official or employee. In other words, donations can be provided to a fund that supports a specific position, but cannot be provided to support a specific individual holding that position. For example, in Advisory Opinion No. 2008-01, the Commission stated that R.C. 2921.43(A) does <u>not</u> prohibit an organization that supports the activities of a school district from making a *voluntary* gift or endowment to the district for any use the board determines is appropriate, including the support of district employees, provided that the district retains all control over the use and distribution of the funds.

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[3] Also relevant is R.C. 141.01, which limits salary amounts for state officers and employees, specifically excludes "individuals holding or appointed to *endowed academic chairs* or *endowed academic professorships* at a state-supported institution of higher education." (Emphasis added.)

In your letter, you stated that the creation of the Endowed Presidential Chair, within the Academic Excellence Fund, will ensure that no compensation from outside the University is provided directly to or directed to be paid to any specific University employee. In other words, donations can be provided to a fund that supports a specific position, but cannot be provided to support a specific individual holding that position. Donations will be made to the fund in the name of the University Foundation and the Board of Trustees will retain its statutory authority and uphold its accountability to the public to select and fix the compensation of the President, with full control of how the donations are used. Provided that the Board of Trustees retains full authority and sole responsibility regarding the use of any donations to the Presidential Chair, and the selection, compensation, and retention of the President, R.C. 2921.43(A) does not prohibit the University from using the endowment fund to support the current and future President's compensation.

However, if any donor were to make a gift or endowment to the University subject to conditions or stipulations that would hamper any aspect of the Board's control of the President, the gift or endowment would no longer be allowed by law because R.C. 3335.09 requires the Board of Trustees to make decisions about the selection, compensation, and retention of the University President. In that instance, the supplemental compensation law, R.C. 2921.43(A), would prohibit the University from using the money for the President's compensation.

The Ethics Commission recommends that the description of the Academic Excellence Fund include language that acknowledges the prohibitions of R.C. 2921.43(A), 102.03(F), and 3335.09 and the University's responsibility and intent to abide by those laws. This language reminds both those executing the University's endowment process and fund donors of the requirements and prohibitions in the Ethics laws and of the public duties of the University. Additionally, all who review endowment descriptions and other information from the University are assured that the University President serves and owes allegiance solely to the University rather than to any outside source of compensation.

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

In addition to the restrictions in R.C. 2921.43(A) (supplemental compensation), the conflict of interest laws restrict the actions of the Board and the President in connection with the fund.

The members of the University board of trustees and the University President are "public officials" subject to the prohibitions of R.C. Chapter 102. R.C. 102.01(B) and (C); 3345.011, 3335.02, 3335.09; Adv. Op. No. 2003-03. The conflict of interest provisions in R.C. 102.03(D), (E), and (F) state:

> (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;

(F) No person shall promise or give to a public official or employee 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.

"Anything of value" includes money, goods and chattels, and every other thing of value. *See* R.C. 1.03 and 102.01(G). A definite financial benefit, such as a contribution to a fundraising campaign and compensation for a public official or employee, is a thing of value under R.C. 102.03. *See* Adv. Op. No. 2006-03 and 96-004. In addition, the beneficial or detrimental economic impact of a decision by a public decision-making body is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012. Any contribution made to the University Foundation or a particular endowment fund, and any decisions of the Board of Trustees regarding the use of the contributions, would be within the definition of "anything of value."

A "thing of value" will have a substantial and improper influence on a public official if it could impair the official's objectivity and independence of judgment because: (1) it is of a substantial nature or value; <u>and</u> (2) it is from a source that is doing or seeking to do business with, regulated by, or interested in matters before the agency the official serves. Adv. Ops. No. 2001-03 and 2004-03. Because compensation provided by any of these "improper sources" is of such a nature as to have a substantial and improper influence on a public official, R.C. 102.03(D) prohibits public officials from using their positions to secure compensation from these sources. R.C. 102.03(E) also prohibits public officials from soliciting or accepting compensation from these sources.

Many entities and individuals who give, or are solicited for, donations to the University, such as alumni, local businesses, former staff members and faculty, and repeat donors, are interested in matters before the University. These individuals would be improper sources of anything of substantial value provided directly to benefit a University official or employee or given to someone else for the benefit of the official or employee. This is why such donations must be provided to the University for the University's benefit, rather than any specific individual's benefit. *See e.g.* Adv. Op. No. 88-002.

The Ethics Commission has held that R.C. 102.03(D) and (E) prohibit public officials or employees from accepting, soliciting, or using their positions to secure anything of value that would directly benefit their personal financial interests, where the things of value could manifest a substantial and improper influence upon the public officials or employees with respect to their duties. *See* Adv. Ops. No. 2001-03 and 2001-04. Private contributions made to an endowment that will be used for the President's compensation could accrue to the financial benefit of the President, if the Board of Trustees elects to use the funds. Therefore, R.C. 102.03(D) and (E) prohibit the President from personally soliciting contributions to an endowment fund that will directly support his or her own compensation because the contributions could have a substantial and improper influence on him or her with respect to his or her public duties, including fundraising priorities. The President must be able to separate his or her fundraising responsibilities for the University from any activities that will be directed toward the Endowed Presidential Chair.

Further, because of the application of R.C. 102.03(D) and (E) on individual University officials and employees, the University is prohibited from accepting any contribution that is designated to benefit a particular public official or employee. The Ethics Law would also prohibit the University from accepting any contribution or donation that attempts to limit or direct the performance of any public official's or employee's specific public duties.

Based on the information you provided, it appears that the Endowed Presidential Chair will be one component of the larger Academic Excellence Fund. Funds not used for the President's salary will be used by the President for other University programs.

Because the President will exercise significant control and authority regarding the use of distributions from the other assets in the Academic Excellence Fund, it is the duty of the Board of Trustees to establish specific guidelines on how contributions to the Fund will be managed and allocated between the Fund as a whole and the Endowed Presidential Chair.[4] The guidelines will also ensure overall compliance by the Trustees, the President, and other University staff with the Ethics Law and the conclusions reached in this opinion.

If the intent is that contributions can be made to the Fund and allocated by the University to the Endowed Presidential Chair, the Board of Trustees must establish clear and direct procedures to assure that the President or his or her direct designees are removed from any role in allocations to the Presidential Chair. If funds will be solicited or can be earmarked specifically for the Endowed Presidential Chair, Trustees must ensure that the President has no involvement or duties regarding the Presidential Chair and that all reports concerning the Presidential Chair are made directly to the Board. University rules, procedures, and policies regarding the use of the Fund and the Presidential Chair must set forth the limits on the President's authority over the use and distributions from the Endowed Presidential Chair fund.

The requirements regarding how the endowment supporting the President's compensation will be managed will be important in assisting and protecting the President, the Board of Trustees, and the University in complying with the Ethics Laws.

[4] The Ethics Law requires that the Board of Trustees retain control and direction over the amount and source of the compensation provided to the President. It must be clear that the President's compensation is not, in any way, dependent on the amount of money in the fund.

<u>Solicitations of Endowed Gifts to the University</u>

One final issue is the question of limits on the sources of donations for the Endowed Presidential Chair and the activities of those University employees whose jobs involve solicitations. The Ethics Commission has held that "the Ohio Ethics Law and related statutes do not prohibit private companies from donating . . . equipment to [a public agency], *so long as* no official or employee of the [agency] benefits personally from the equipment,[5] and *so long as* the donation is voluntary." Adv. Op. No. 89-002 (emphasis added). The Commission has further held that the officials and employees of the agency were not prohibited from soliciting such donations to the agency.

The University's financial policy on gifts provides:

> The Office of University Development has the responsibility for soliciting and administering all gifts and grants from individuals as well as gifts to the University's endowment. Gifts and donations are voluntary and irrevocable transfers of money or property made by the donor without expectation of or receipt of direct economic benefit or any other tangible compensation from the donor.

As noted above, R.C. 102.03(D) and (E) do not prohibit the University President from accepting or soliciting donations on behalf of the University, even if a donor falls within the category of "improper sources" (individuals or companies doing or seeking to do business with, regulated by, or interested in matters before the University), <u>provided that</u> donations are not accruing to his or her personal benefit or to the benefit of anyone with whom he or she is connected in a personal capacity.

The Ethics Law does not prohibit any member of the University development staff from soliciting gifts or donations to the Endowed Presidential Chair to support the compensation of the President provided that the donations do not accrue to the staff member's personal benefit or to the benefit of anyone with whom he or she is connected in his or her personal capacity.

The additional restriction in the conflicts of interest law, R.C. 102.03(F), set forth above, applies to the potential donors rather than the University officials and employees. R.C. 102.03(F) prohibits companies and individuals doing or seeking to do business with the University from making a contribution that benefits a particular public official or employee or limits the performance of a public official's or employee's specific public duties.[6] Potential donors should understand that public officials and employees will not be influenced, in the objective performance of their public duties regarding a company or individual, by the company's or individual's decision to contribute or refrain from contributing to the Endowed Presidential Chair. To that end, potential donors must be informed that contributions to the

[5] However, as explained above, Ohio law recognizes a public university's ability to create endowed chairs.
[6] University officials and employees are reminded that, if any person or entity were to make a contribution with the intent to influence decisions of University officials or employees, or as otherwise prohibited under the Ethics Law, the Ethics Law and other related provisions of the criminal law (e.g., R.C. 2921.02 - Bribery) would apply.

Endowed Presidential Chair are voluntary and are not being made in connection with or return for any University contracts, grants, or other financial benefits.

However, the law does not prohibit an individual or organization from making a voluntary contribution to an Endowed Chair, as described above, and provided that: (1) the donor, by making the contribution, gains no control over the selection, hiring, management, retention, or level of compensation of individuals holding or serving in the Chair; and (2) the donation does not benefit a specific official or employee.

All development activities of the University must comply with the Ethics Law and this advisory opinion. In addition, while not required by the Ethics Law, the Commission strongly recommends that, to avoid any appearance of unethical conduct, the University should establish best ethical policies and practices to guide fundraising activities of University officials and employees. While established guidelines may be tailored to fit the University, they should, at a minimum, include these provisions:

(1) The University will not accept a contribution for the Endowed Presidential Chair from a company or individual while a specific contract involving the company or individual is being solicited or is under negotiation or at a time the University has clear reason to know that a matter involving the company or individual will come before the University;[7]

(2) Any individual acting on behalf of the University shall inform companies or individuals that are doing or seeking to do business with the University that the University will not accept a contribution under the circumstances described above; and

(3) A company or individual making a contribution to the Endowed Presidential Chair will not be given any ability, in a manner not afforded to other companies or the general public, to lobby or promote its activities with public officials and employees of the University.

Conclusion

The amount and terms of the public compensation the University provides to its President are not matters within the purview of the Ethics Commission. These matters are properly reserved to the Trustees of the University as stewards of the public trust and under their statutory authority as delegated or limited by the Ohio Revised Code.

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[7] The University should use its own institutional and internal control systems prior to the acceptance of a contribution, and whenever possible, prior to the solicitation of a contribution, to determine that there are no pending contracts or contested matters involving the potential donor in order to avoid any suggestion that the contribution is related to those contracts or matters.

Provided that the Board of Trustees undertake and retain full authority and accountability regarding the use of all public funds for the selection, compensation, and retention of the University President, the Ethics Law and related statutes do not prohibit the University from using endowment funds to support the University President's compensation. However, both the Board of Trustees and the President will be subject to limitations under the Ethics Law and other statutes on solicitations and activities related to the endowment fund should the Board decide to use it to support the President's compensation.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 14, 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

cc: David O. Frantz, Secretary of the Board of Trustees
The Ohio State University

Office of Attorney General Richard Cordray
Education Section

Members of the Ethics Commission

David E. Freel, Executive Director