



Oregon

Kate Brown, Governor

Government Ethics Commission

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Wendy McGrane, Board Member
Oregon Growth Board
775 Summer Street NE #200
Salem, Oregon 97301

Steven Marlowe, Assistant Attorney General
Oregon Department of Justice
General Counsel Division - Tax & Finance Section
1162 Court Street NE
Salem, Oregon 97301

Dear Ms. McGrane & Mr. Marlowe:

This opinion is issued in response to your correspondence received by the Oregon Government Ethics Commission (Commission) on June 9, 2019, regarding the provisions of ORS Chapter 244 concerning conflicts of interest.

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 19-136S

STATED FACTS: The following factual information is derived from a letter to the Commission from Assistant Attorney General (AAG), Steven Marlowe and Oregon Growth Board (OGB) staff member, Nate Wildfire and subsequent information each of them provided. Mr. Marlowe is the AAG assigned to the OGB and submitted the opinion request on behalf of Wendy McGrane, who was appointed on April 1, 2019, to the OGB.

The OGB has the duties, functions and powers to invest and re-invest moneys in the Oregon Growth Fund (OGF) and Oregon Growth Account (OGA) for the benefit of qualified businesses and for the purpose of earning returns for the Education Stability Fund. In addition, they enter into contracts, agreements or arrangements for the investment and management in OGF & OGA as well as other services to satisfy necessary Board duties and functions. The Board collaborates, cooperates and enters into agreements with local governments, state agencies, financial institutions and other entities for economic development.

The OGF is formed in the State Treasury and is separate and distinct from the General Fund. Interest earned by the OGF must be credited to the fund. Moneys in the fund are continuously appropriated to the Oregon Business Development Department (OBDD) for the use of the OGB for purposes set forth in statute. The OBDD may use moneys in the



fund to pay the administrative costs associated with the fund and with administering the program.

Pursuant, in part, to ORS 348.702(6), which says, "The investment of funds in the Oregon Growth Account shall be governed by the Oregon Growth Board", the OGB votes to invest money from the OGA with investment managers. These investment managers are mainly limited partnerships or limited liability companies but they may be existing customers of financial institutions, such as: U.S. Bank National Association, AKA US Bank, when they ask for an investment from the OGB.

Board member Wendy McGrane, is a Vice President at US Bank. Among the members appointed to the OGB by the Governor, there must be one (1) member with experience in banking. Ms. McGrane was appointed to fulfill the requirement that the board have one member with experience in banking. [ORS 284.883]

The following LLC and LP entities apply to the Oregon Growth Board for funding: venture capital funds, equity funds, angel funds, and non-traditional lenders, etc. These entities presumably have a bank account with some form of bank, and the entity could be a customer of U.S. Bank.

The OGB considers investing state funds with such investors. If a customer of U.S. Bank, the LLC or LP would be expected to receive the OGB investment as a deposit. While the investment fund would then be in control of the money, the OGB investment would be expected to stay in the LLC or LP bank account until the investment fund decides to invest in some company. When the OGB considers investing in a fund that is a customer of U.S. Bank, Ms. McGrane's employer, U.S. Bank, would be financially impacted by the actions of OGB Board members.

QUESTION: Would the Oregon Growth Board's (OGB) investment of moneys present a conflict of interest for Wendy McGrane if the investments are made to account holders in a business which she is associated?

ANSWER: Yes.

Under Oregon Government Ethics law, appointed members of boards and commissions are public officials and must comply with the provisions of ORS Chapter 244. [ORS 244.020(15)]

A conflict of interest is defined as any action, decision, or recommendation that a public official makes in their official capacity, the effect of which would or could be to the private financial benefit or detriment of the public official, their relative, or a business with which they or a relative are associated. An actual conflict of interest occurs when the effect of the official action, decision, or recommendation would have a certain private financial impact. A potential conflict occurs when the effect of the official action, decision, or recommendation could have a private financial impact. [ORS 244.020(1) and (13)]

ORS 244.020(13)(a) states that a public official does not have a conflict of interest if the financial benefit or detriment arises out of an interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position. The Oregon Government Ethics Guide for Public Officials gives the following example of when the exception applies: “[I]f a member of a state board is required by law to be employed in a specific occupation, such as an accountant or a doctor, then the official actions taken by the board member that affect all accountants or doctors to the same degree would be exempt from the conflict of interest disclosure requirements and participation restrictions.

When an appointed member of a board or commission is met with either an actual or potential conflict of interest, they must publicly announce the nature of their conflict on each occasion that the issue giving rise to the conflict occurs. If met with a potential conflict, following their public announcement, they may continue to participate in their official capacity in any discussion, debate, or vote on the issue. If met with an actual conflict, following their public announcement, they must refrain from discussion, debate, or vote on the issue. [ORS 244.120(2)] If a public official is met with an actual conflict of interest and the public official’s vote is necessary to meet the minimum number of votes required for official action, the public official may vote. The public official must make the required announcement and refrain from any discussion, but may participate in the vote required for official action by the governing body. [ORS 244.120(2)(b)(B)].

Public officials are met with a conflict of interest when taking actions in their official capacity that would or could financially affect a business with which they or their relative is associated, unless an exception applies. Ms. McGrane, in her capacity as an OGB member would be met with taking official actions that could or would financially impact U.S. Bank.

As a member of the OGB, Ms. McGrane is required to file an annual Verified Statement of Economic Interest (SEI), and any business required to be listed on one’s SEI as a source of income is a “business with which the person is associated”. [ORS 244.050(1)(q)(DD) and 244.020(3)(d)] Therefore, if U.S. Bank provides 10% or more of Ms. McGrane’s annual household income, it qualifies as a “source of income” required to be listed on her SEI, making U.S. Bank a “business with which she is associated” for purposes of the application of the conflict of interest provisions of ORS Chapter 244. [ORS 244.060(3)]

Typically, any action that a public official takes in their official capacity that would or could financially impact a business with which they are associated would present a conflict of interest for that official, however, an exception to the conflict of interest provisions apply if the financial impact arises from the public official’s membership in a particular industry that is a prerequisite for holding the official position. [ORS 244.020(13)(a)]

Although the statute forming the OGB's governing body requires that one position be held by a person with banking experience, this exception would only apply to Ms. McGrane's decisions that could or would affect members of the banking industry as a whole. For example, although any decision to invest funds potentially could affect all members of the banking industry as the money presumably would be put into some bank, the exception would apply because the conflict would arise from membership in the banking industry.

But any official decisions she were to make that would or could financially affect U.S. Bank, in particular, rather than the banking industry as a whole, would present a conflict for her. Therefore, Ms. McGrane would be faced with a conflict of interest if the OGB were to consider investments made to account holders of U.S. Bank, a business with which she is associated.

The request also raised a question regarding how a banker, who is met with conflicts of interest under ethics laws, would disclose a conflict and still comply with federal bank secrecy laws concerning identification of account holders. Although state law requires disclosure of the nature of one's conflict of interest, and then refraining from further participation if the conflict is actual, we are informed in the request that federal banking law prohibits bankers from disclosing the identity of account holders. Assuming that is so, to comply with both federal and state law, if Ms. McGrane is met with a conflict arising from the applicant's client relationship with U.S. Bank, she should publicly announce that she has a conflict of interest without providing detail, and then refrain from further discussion, debate, or vote on the issue.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT ETHICS COMMISSION.

Please contact this office again if you would like this opinion submitted to the Oregon Government Ethics Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,



Ronald A. Bersin
Executive Director

ADDENDUM

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

244.020 Definitions. As used in this chapter, unless the context requires otherwise:

(1) "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (13) of this section.

(2) "Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official or a relative of the public official is associated only as a member or board director or in a non-remunerative capacity.

(3) "Business with which the person is associated" means:

(a) Any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth \$1,000 or more at any point in the preceding calendar year;

(b) Any publicly held corporation in which the person or the person's relative owns or has owned \$100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;

(c) Any publicly held corporation of which the person or the person's relative is a director or officer; or

(d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).

(13) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged.

(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

(15) "Public official" means the First Partner and any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

244.120 244.120 Methods of handling conflicts; Legislative Assembly; judges; appointed officials; other elected officials or members of boards.

(1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall...

(2) An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

(3) Nothing in subsection (1) or (2) of this section requires any public official to announce a conflict of interest more than once on the occasion which the matter out of which the conflict arises is discussed or debated.

(4) Nothing in this section authorizes a public official to vote if the official is otherwise prohibited from doing so.