

## DISQUALIFICATION

If the owner of a regulated business became the chief executive of a state agency responsible for regulating that business, then the owner's personal financial interests would conflict with his public responsibilities whenever, in the discharge of official duties, he was confronted by a matter in which his business had a substantial financial interest including action affecting his business and its competitors.

If the conflict were substantial and continually present or frequently recurring, the conflict's cure could come only from the person's divesting himself of the regulated business. Eth. Bd. 304

January 31, 1985

### Facts

This opinion is based upon these understandings:

- a. This opinion concerns a prospective appointee to a state office that regulates an industry.
- b. The person is chairman of the board of directors of a business (the business).
- c. The person is chairman of the board of directors of a holding company (the holding company). He owns 50% of that holding company, which in turn owns more than 80% of the business.
- d. The person draws salary from the holding company and owes more than \$50,000 to the business.
- e. The person's brother owns the other one-half interest in the holding company.
- f. The person is the personal representative and beneficiary of an estate which owns shares of the business and another corporation (the corporation).
- g. The person, his spouse, or dependent children are the owners of shares of the corporation, which owns and operates subsidiaries in Wisconsin.
- h. The person or his immediate family, separately or together, own, but are taking steps to divest themselves of, stock valued at more than \$50,000 in another company (the company).

## Question

The Ethics Board understands your question to be:

What obstacle, if any, would Wisconsin's Code of Ethics for Public Officials and Employees pose to the person's service as Wisconsin's regulator of the industry in which the holding company, the business, the corporation and its subsidiaries, and the company are principally engaged?

## Discussion

### BACKGROUND

To be eligible for appointment to the position in question a person must have experience in the regulated industry as an executive of a regulated business or service in a supervisory authority or combination thereof. The Legislature believed that practical experience as an officer of a regulated business or of an agency that regulates the affected industry may prove a great asset. It might be expected that a person of the caliber that might be chosen might have an ownership interest in a regulated business, but for the past 15 years, from a time predating the Ethics Code's establishment, no occupant of the pertinent office has had a direct ownership interest in an affected Wisconsin business while holding the regulatory office.

### MATERIALLY CONFLICTING INTERESTS--19.46(1)

The office in question is one to which the Ethics Code applies. "Organization" includes every business entity operating in Wisconsin. The person is associated with the holding company and the business.<sup>1</sup>

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<sup>1</sup> Sec. 19.42(2), (7), and (11), *Wisconsin Statutes*, provide:

**19.42(2)** "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity.

**19.42(7)** "Immediate family" means:

- (a) An individual's spouse; and
- (b) An individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of his or her support from the individual or from whom the individual receives, directly or indirectly, more than one-half of his or her support.

**19.42(11)** "Organization" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.

If the person were appointed to the office, his personal financial interests would materially conflict with his public responsibilities whenever, in the discharge of his official duties either:

1. His action or his failure to act could reasonably be expected to produce or assist in producing a substantial benefit, directly or indirectly, for the holding company or the business; or
2. The matter in question were one in which the the holding company or the business had a substantial financial interest.<sup>2</sup>

In that situation, the person could act officially with regard to such a matter only in accordance with this Board's advice.<sup>3</sup>

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<sup>2</sup> Sec. 19.46(1)(e), *Wisconsin Statutes*, provides:

**19.46 Action Upon Conflict. (1)(e)** A material conflict of interests on the part of a state public official is deemed to exist within the meaning of this section in regard to a matter in which he or she is involved, or is about to be involved in the discharge of his or her official duties, whenever:

1. The official's action or failure to act could reasonably be expected to produce or assist in producing a substantial benefit, directly or indirectly, for such official or his or her immediate family or an organization with which he or she is associated; or
2. The matter in question is one in which the official in his or her private capacity or a member of his or her immediate family or an organization with which he or she is associated has a substantial interest.

<sup>3</sup> Sec. 19.46(1)(a) and (c), *Wisconsin Statutes*, provides, in part:

**19.46 Action Upon Conflict. (1)(a)** Any state public official who, in the discharge of his or her official duties, is involved or about to be involved in any matter that could result in a material conflict of interests on his or her part shall:

1. Prepare a written statement describing such matter and the nature of the possible conflict of interests; and
2. Deliver copies of the statement to the board . . . ; and
3. In the case of an official who is not a legislator, justice or judge, take no further action in regard to such matter except in accordance with advice from the board under para. (c).

(c) \* \* \* If the official has no immediate superior, he or she shall be guided by written advice from the board in regard to the matter. The board shall promptly review the written statement submitted by an official who has no immediate superior, and on the basis thereof and such further investigation of the matter as the board deems advisable the board shall as promptly as practicable advise such official in writing as to the course of action he or she should follow in regard to the matter. \* \* \* \*

## POTENTIAL CONFLICTS--REASONABLY LIKELY OCCURRENCES

### In General

If a state public official has a sizeable investment in a business that the official regulates, the official's personal interest in the performance of that business may conflict with the official's responsibilities for the regulation of businesses in each of these ways:

1. Regulation of the specific businesses in which the official has an ownership interest,
2. Regulation of all businesses that are competitors of the business in which the official is financially interested, and
3. Actions that the official takes with respect to the regulation of or legislative or administrative proposals affecting the regulated businesses.

The first and second types of action are quasi-judicial, that is, concerned with the official's application of the law to specific circumstances; the third is quasi-legislative, that is, concerned with the statement of general laws or rules governing the regulated business.

### Official's Quasi-judicial Decisions

#### Actions Affecting the Prospective Appointee's Business

The occupant of the regulatory position under discussion is charged by statute with assessing annually the financial fitness of each Wisconsin business in the regulated industry and acting to remedy any weakness discovered. Statutes apart from the Ethics Code forbid the regulatory official from acting officially with respect to either a business of which he is a stockholder or a competing business in the same county as a business in which the official is a stockholder.

#### Actions Affecting Competitors of the Business

The conflict between the person's financial interests and the responsibilities of the office discussed are obvious, and attention to them may be keen. Arising with greater frequency than conflicts in which the business is directly involved are likely to be conflicts between the person's personal financial interests and the responsibilities of the office with respect to the business's competitors. Among the acts the official is likely to take is the review of business mergers.

The acquisition of businesses by others is the order of the day. This is significant on 2 counts. First, the official may be called upon to act concerning mergers, and perhaps the acquisition of businesses that historically have been and are now

competitors of the business. Secondly, mergers and acquisitions affect the number and location of the business's competitors.

In addition to consolidations, other decisions that the regulatory official might ordinarily be called upon to make include:

Approval or disapproval of a business's request to establish an office at a new location,  
Approval or denial of a charter establishing a new business,  
Whether or not to impose additional financial requirements on a business, and  
Approval or disapproval of dividends

### Treatment of Quasi-judicial Conflicts

#### In General

In preparing this reply, we have looked, in part, to the often stated authorities for guidance. They provide:

A public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or expose him to temptation of acting in any manner other than in the best interest of the public.<sup>4</sup>

A person's status as a public officer forbids him from placing himself in a position where his private interest conflicts with his public duty. His good faith is of no moment because it is the public policy of the law to keep him so far from temptation as to ensure the exercise of unselfish public interest. \* \* \* Anything that tends to weaken public confidence and to undermine the sense of security for individual rights is against public policy. The state has a substantial compelling interest in restricting unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.<sup>5</sup>

To avoid conflict between the responsibilities of the office in question and the person's financial interest in one or more businesses, the person would have to divest himself either (1) of his regulatory responsibilities by delegating them to another or (2) of his financial interests in businesses in the regulated industry.

#### Delegation of Official Duties

To avoid a material conflict between his responsibilities to regulate an industry for the benefit of the public and his personal financial interests in one or more regulated businesses, the person might, in his public capacity, avoid all matters

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<sup>4</sup> 63A Am. Jur. 2d, Public Officials and Employees, sec. 321.

<sup>5</sup> 63A Am. Jur. 2d, Public Officials and Employees, sec. 322.

directly related to the regulated businesses in which he was financially interested or related to competitors of those businesses. To do this he might delegate<sup>6</sup> full discretion over all matters affecting those businesses to a senior classified civil servant.<sup>7</sup>

### Disposal of Personal Interests in Regulated Businesses

Rather than relinquish certain regulatory responsibilities, the person could avoid conflicting interests by disposing of his interests in regulated businesses.

We have considered whether the person could sufficiently divorce himself from his interests by placing them in a trust. We have rejected that avenue. The fact of the matter is that the person could not successfully hide from himself the fact that he owns a regulated business. Even if a trustee were empowered to dispose of all of the person's shares, the sale or more importantly the sale's absence would be obvious.

### Treatment of Quasi-legislative Conflicts

In addition to the discretionary powers now held by the regulatory official, one or more proposals are now being seriously advanced in our Legislature to bestow upon the official the new powers to promulgate administrative rules affecting businesses in the regulated industry.

In the instance in which an appointed state public official is called upon to promulgate rules, to offer suggestions for legislation, or to issue an order or interpretation of law or policy of broad application, the official may do so, even when a business in which the official holds a personal financial interest will be affected, as long as:

- a. the official's action affects the whole class of similarly-situated businesses,
- b. the business's presence in the class is insignificant when compared to the number of members of the class, and

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<sup>6</sup> An officer in whom discretionary power is vested cannot delegate that power without statutory authority to do so. *Steele v. Gray*, 64 Wis. 2d 422, 430, 219 N.W. 2d 312 (1974).

See sec. 15.02(4), *Wisconsin Statutes*, concerning authority for delegation and allocation of duties. The Ethics Board does not take any position on the limits, if any, applicable to the official's ability to delegate powers to others.

<sup>7</sup> Delegation of these matters to an unclassified employe would be insufficient because the employe may reasonably be expected to act always in the interest of the employe's appointing authority.

- c. the official's action's effect on his or her own business is neither significantly greater nor less than upon other members of the class.<sup>8</sup>

We have advised a lawyer-official that he could participate in the promulgation of rules affecting lawyers of which more than 15,000 are licensed in this state. We advised an official with a financial interest in a business that he could participate in actions that affect businesses generally. Similarly, a farmer appointed to a part-time board may act on rules establishing or implementing general agricultural policy, and a revenue official may act on tax policy except in the rare instance in which a provision affects a small number of taxpayers including the official in a way that differs from its effect on a large segment of Wisconsin's residents.

If there were thousands of businesses in the regulated industry in this state, the same treatment would more clearly be available in this instance. There are thousands of lawyers, farmers, businesses, and taxpayers, but the number of regulated businesses pertinent to this opinion is small and getting smaller.

#### OTHER PERTINENT PROVISIONS OF THE ETHICS CODE

These provisions of the Ethics Code must also be taken into account: sec. 19.45(2), 19.45(4), 19.45(6), and 19.46(1), *Wisconsin Statutes*. Moreover, sec. 19.45(8), *Wisconsin Statutes*, will limit the commissioner's actions after his relinquishment of the position.

#### Use of Office for Gain--19.45(2)

Section 19.45(2), *Wisconsin Statutes*, forbids a state public official to use his or her public position to obtain financial gain or anything of substantial value for an organization with which he or she is associated.<sup>9</sup>

Thus, if the appointment were made, the prospective appointee would be foreclosed from using that position to obtain financial gain or anything of substantial value for himself, his immediate family, the holding company, or the business.

#### Use of Confidential Information--19.45(4)

Section 19.45(4), *Wisconsin Statutes*, forbids the regulatory official to use intentionally information gained by reason of his official position or activities in a way that could result in the receipt of anything of value for anyone or any business

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<sup>8</sup> 8 Op. Eth. Bd. 2 (1984), 5 Op. Eth. Bd. 65 (1981), 59 (1981).

<sup>9</sup> Sec. 19.45(2), *Wisconsin Statutes*, provides:

**19.45(2)** No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

unless the information has already been communicated to the public or is freely available to anyone.<sup>10</sup>

#### Payments from State--19.45(6)

Section 19.45(6), *Wisconsin Statutes*, would forbid the person, the holding company, or the business to enter into an agreement involving one or more payments, in whole or in part derived from state funds, whose total exceeds \$3,000 within a 12-month period unless the person first made written disclosure of the nature and extent of his relationship to the agreement or his interest in it both to the Ethics Board and to the state agency of which his office would be a part. If the person, the holding company, or the business enters into an agreement in violation of this subsection, the State of Wisconsin may void the agreement.<sup>11</sup>

#### Limitations on Former Officials' Activities--19.45(8)

Section 19.45(8), *Wisconsin Statutes*, would come into play at the conclusion of the person's tenure as a regulatory official. After leaving that post, the person would be forever barred from acting for compensation on behalf of any party other than the State of Wisconsin in connection with legal proceedings, applications, contracts, and claims in which he had personally and substantially participated as a state official. The statute would also preclude the person from acting for compensation on behalf of any non-governmental entity for 12 months after leaving that office with respect to any matter which was within the responsibilities of his office during the last 12 months he held that post. Finally, this section would foreclose the person from appearing before the state agency of which he was a part or any of the boards

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<sup>10</sup> Sec. 19.45(4), *Wisconsin Statutes*, provides:

**19.45(4)** No state public official may intentionally use or disclose information gained in the course of or by reason of his or her official position or activities in any way that could result in the receipt of anything of value for himself or herself, for his or her immediate family, or for any other person if the information has not been communicated to the public or is not public information.

<sup>11</sup> Sec. 19.45(6), *Wisconsin Statutes*, provides:

**19.45(6)** No state public official, member of a state public official's immediate family, nor any organization with which the state public official or a member of the official's immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into any contract or lease involving a payment or payments of more than \$3,000 within a 12-month period, in whole or in part derived from state funds unless the state public official has first made written disclosure of the nature and extent of such relationship or interest to the board and to the department acting for the state in regard to such contract or lease. Any contract or lease entered into in violation of this subsection may be voided by the state in an action commenced within 3 years of the date on which the ethics board, or the department or officer acting for the state in regard to the allocation of state funds from which such payment is derived, knew or should have known that a violation of this subsection had occurred. This subsection does not affect the application of s. 946.13.



attached to that office during the 12 months immediately following the conclusion of his tenure there unless he is uncompensated for the appearance or appears on his own behalf.

### Advice

Each of the State of Wisconsin Ethics Board's 6 members has authorized me to say that by unanimous agreement the Ethics Board advises you:

Standards of conduct for state officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society and those conflicts that are substantial and material. The conflict between the prospective appointee's personal, financial interests and the duties of the office in question is substantial and material.

If the appointment were made, the person's personal financial interests would conflict with his public responsibilities whenever, in the discharge of his official duties, he was confronted by a matter in which the the business had a substantial financial interest including:

Actions affecting the business,  
Actions affecting competitors of the business, and  
Promulgation of rules affecting substantial interests of the business and its competitors.

The same considerations pertain to the holding company, and, although maybe to a different degree, to the corporation and to his interest in the company prior to the final disposition of his interest in it.

If this material conflict arose only occasionally it might be satisfactorily addressed by the person's delegation of certain of his official responsibilities to a senior civil servant, if the Statutes permit and with the recognition that an employe would be placed in the awkward position of acting without regard to the interests of his or her boss with whom the employe would continue to work.

Withdrawal from the exercise of official duties is a result of conflicting interests, not a cure for the conflict. When the conflict is continually present or regularly recurring and substantial, as in this case, the conflict's cure can come only from the person's divesting himself of all ownership interests in businesses regulated by the office to which the appointment would be made.

**NOTE: Because the recipient made it public, the full text of this opinion is open to public inspection and may be obtained from the Ethics Board.**