

MEMORANDUM

State of Alaska

Department of Law

TO: Designated Ethics Supervisor DATE: April 3, 2007
FROM: Judy Bockmon FILE NO.: 661-07-XXXX
Assistant Attorney General TEL. NO.: 269-5216
Opinions, Appeals & Ethics Section SUBJECT: Ethics Disclosure of Director Re
Stock Interest in Parent Company
of Company Under Contract with
Division.

You requested an advisory opinion under AS 39.52.240 addressing the ethics disclosure of a new division director in your agency. In this opinion, we address the information provided in the director's March 18, 2007 Request for Ethics Determination in which he disclosed that he owns stock in the second tier parent company (also referred to here as Company C) of his former employer, Company A. Company A has a contract with the State of Alaska administered by the director's division.

As addressed below, we conclude that the small amount of the stock in Company C held by the director represents an insignificant interest in Company A. Also, the possibility that the director could take some action that would affect his disclosed stock interest generally or affect its value in any significant way is remote and speculative. Therefore, he may participate in the ongoing management of Company A's existing contract, even though owning the stock, without violating the Executive Branch Ethics Act, AS 39.52.010 *et seq.*

I. POTENTIAL CONFLICT AND OTHER BACKGROUND

Prior to his appointment, the director had served as a senior manager in Alaska for Company A since 2003. Company A manages a state system under a contract awarded through a competitive process.¹ The director will supervise management of Company A's contract.

¹ Company A has been operating Alaska's system and providing other services for many years.

Company A provides management and information services to a particular public sector market, and, in part, state agencies. It is a subsidiary of Company B, a national company offering related services throughout the United States to various clients. In 2005, Company B was acquired by, and is now a wholly-owned subsidiary of, Company C, a publicly traded company. Company C operates numerous companies that provide products and services to employer and government-funded groups, government agencies, insurance carriers and administrators in all 50 states. It is one of the largest companies in the nation in its field and has been highly rated in the last several years by business publications, such as *Barron's*, *Forbes*, and *Fortune*.

The director's ethics disclosure reflects that he has an individual account with an online securities trading firm in which he holds 58 shares of Company C stock, valued at \$2,902.90 as of December 31, 2006. He also holds Company C stock valued at \$5,531.20 as of December 31, 2006 in a 401(k) account. The account summary provided by him shows that there were to be no further allocations to Company C stock as of January 19, 2007. Based on the value of the individually held shares, there appears to be 110.5 shares of stock in this 401(k) account.

A recent MarketWatch, Inc. stock quote reflects that Company C's stock was selling at \$56.27 per share and the company has 159,475,000 outstanding shares. At the noted price, the total share value is \$8.973 billion. The value of 168.5 shares at this price is \$9,481.49. This stock represents a .00000105 interest in Company C.

You also reported that following award of a new contract to develop a new system in 2002, Company A's efforts did not proceed as expected and led to a work stoppage in 2005. When the dispute did not resolve, the state found Company A in default. Company C stepped in to attempt to resolve the dispute in mid-2006. The state and Company A recently agreed to a settlement. The director did not participate in the settlement negotiations. Company C is not a signatory to the settlement agreement. Under the settlement, Company A will continue its role as operator of the state system for at least two years. The state has issued a request for proposals for subsequent services, but under the settlement, Company A was prohibited from bidding as the prime or sole contractor. It may be listed as a subcontractor. The director's division will continue to manage the existing contract. It will not be involved in the selection of a new contractor.

II. GENERAL PRINCIPLES FOR APPLYING THE ETHICS ACT

The Executive Branch Ethics Act is intended to ensure that public officers will not base their official decisions and actions upon their own personal or financial interests.² A

² AS 39.52.010.

purpose of the Act is to ensure that “public officers conduct the public’s business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest.”³ The Act also acknowledges that public officers should be free to pursue personal and financial interests, and are valued for those interests, as long as the interests do not interfere or conflict with the officers’ public responsibilities. Alaska Statute 39.52.110 addresses the scope of the ethics code established by the Act as follows:

- (a) The legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust. In addition, the legislature finds that, so long as it does not interfere with the full and faithful discharge of an officer's public duties and responsibilities, this chapter does not prevent an officer from following other independent pursuits. The legislature further recognizes that
 - (1) in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without personal and financial interests in the decisions and policies of government;
 - (2) people who serve as public officers retain their rights to interests of a personal or financial nature; and
 - (3) standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.
- (b) Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's
 - (1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or
 - (2) action or influence would have insignificant or conjectural effect on the matter.

The Ethics Act requires that we be guided by these statements defining the scope of the ethics code when evaluating a potential conflict of interest.⁴ The Act speaks principally to actual substantial conflicts of interest, not the appearance of conflict alone.⁵ It requires

³ AS 39.52.010(a)(4).

⁴ AS 39.52.110(c).

⁵ 9 AAC 52.010; 1993 *Inf. Op. Att'y Gen.* (Jan. 1; 663-93-0113), 1993 WL 595769 (Alaska A.G.) at *2-3, 5.

individual determinations regarding potential conflicts of interest on a case by case basis.⁶ Under AS 39.52.110(b), set out above, if a particular circumstance may result in a violation, we also consider whether there would be no substantial impropriety if the public officer participated in the matter. Where a potential conflict exists and the terms of AS 39.52.110(b) do not permit participation, steps must be taken to avoid the conflict.

III. APPLICABLE ETHICS ACT STANDARDS

In this section of this opinion, we address the sections of the Ethics Act suggesting potential violations of the Act arising from the director's stock interest in Company C. In the next section, we analyze the significance of his interest and whether under AS 39.52.110(b) he may participate in matters relating to Company A despite his financial interest in Company C.

As a preliminary comment, we advise that the Ethics Act does not address relationships and interests pre-dating a public officer's state service that do not survive after the official's state service begins. The Act governs the director's official actions during his tenure in state service, the scope of employment for two years after he leaves state service, and the use of information gained in state service without limitation.⁷ We consider how his actions may affect his current personal and financial interests.⁸

Under the Ethics Act, "financial interest" means "an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, ...that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit."⁹ Since the director owns stock in Company C, the parent company of Company A, from which he would expect a financial benefit, he has a "financial interest" that may be potentially affected by his official actions, albeit an indirect and arguably remote interest.

⁶ *1999 Inf. Op. Att'y Gen.* (Sept. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G.).

⁷ *2004 Inf. Op. Att'y Gen.* (Nov. 8; 665-05-0090).

⁸ "Personal interest" is defined as "an interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership, in any organization ... from which, or as a result of which, a person or organization receives a benefit." AS 39.52.960(18).

⁹ AS 39.52.960(9)(A).

A. Improper Influence in State Grants, Contracts, Leases or Loans

Under AS 39.52.150(a), a public officer may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a state grant, contract, lease or loan “if the public officer may take or withhold official action that affects the award, execution, or administration of the state grant, contract, lease or loan.” “Official action” is “a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.”¹⁰ The purpose of AS 39.52.150(a) is to prevent public officials from using their public positions for personal gain where the gain is from state grants, contracts, leases, loans that those same officials have discretionary authority to approve or take other action.¹¹

However, the current Company A contract was awarded by competitive process. AS 39.52.150(b) states an exception to the prohibition in subsection (a) for competitively solicited contracts. The strict bar to interests in contracts does not apply to contracts awarded by competitive sealed bidding or substantially similar procedures, unless the public officer is employed by the administrative unit awarding the contract at the time of the award¹² or actually takes official action regarding the contract. Therefore, so long as the director continues to own Company C stock, he would be required to refrain from official action with respect to Company A’s contract, unless AS 39.52.110(b) permits participation.

AS 39.52.150(d) requires disclosure of personal or financial interests held by a public officer in a state contract awarded, executed, or administered by the agency the officer serves. There is an ethics disclosure form to report such interests. The director should submit a signed disclosure form for the record.

B. Misuse of Official Position

Most matters relating to Company A likely involve application of AS 39.52.150 as discussed in the previous section. However, AS 39.52.120 lists other types of action that are not permissible under the Ethics Act. Where a potential violation of AS 39.52.120 arises, a public officer must refrain from participating in the matter that is the subject of the potential violation.¹³

¹⁰ AS 39.52.960(14). .

¹¹ 1986 *Inf. Op. Att'y Gen.* (Nov. 13; 663-87-0150), 1986 WL 81216 (Alaska A.G.).

¹² 1987 *Inf. Op. Att'y Gen.* (Sept. 2, 1987; 663-88-0074).

¹³ 1999 *Inf. Op. Att'y Gen.* (Sept. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G.) at *2.

We recommend that the director review all subsections of AS 39.52.120(b). The subsections that may relate to his stock interest and prior relationship with Company A include subsection (a), which states that “a public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person.”¹⁴ Matters that may result in a benefit to Company A must be handled in a manner consistent with normal procedures for award of the benefit. Other provisions of the Ethics Act would prohibit the director from taking action with respect to any matter benefiting Company A in a way that would significantly affect his stock interest. In particular, subsection (b)(4) states that a public officer may not “take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest.” As discussed above, the director’s stock interest is a financial interest under the Ethics Act. Therefore he must refrain from taking “official action” that may affect that interest, unless AS 39.52.110(b) permits participation.

IV. ANALYSIS OF THE SIGNIFICANCE OF POTENTIAL CONFLICTS

The director’s stock interest is by definition a “financial interest” under the Ethics Act. Therefore, ordinarily, he would be required to refrain from taking action on matters that may affect that interest. However, the Ethics Act distinguishes between “minor and inconsequential” conflicts that are unavoidable in a free society and conflicts of interests that are substantial and material.¹⁵ Where a potential violation of the Ethics Act exists, you must also consider whether the standards in AS 39.52.110(b), set out above, indicate that there would be no substantial impropriety, if the public officer participated in the matter.

Under AS 39.52.110(b), we undertake a two-part analysis to evaluate whether an interest is “insignificant” or the effect of an official action would be “insignificant or conjectural.” We consider both the value of the interest and whether the official action will likely increase or decrease that value or otherwise materially and substantially affect

¹⁴ “Gain” includes “actual or anticipated gain, benefit, profit or compensation.” AS 39.52.960(10). “Benefit” is anything that is to a person’s advantage or self-interest, or from which the person profits regardless of financial gain, including transfer of money, contracts, patronage, or advantage, among other things. AS 39.52.960(3). The phrase “unwarranted benefits or treatment” means “a deviation from normal procedures for the award of a benefit, regardless of whether the procedures were established formally or informally, if the deviation is based on improper motivation.” 9 AAC 52.040(a)(1). “Improper motivation” means “a motivation not related to the best interests of the state, and includes giving primary consideration to a “financial association with a public officer.” 9 AAC 52.990(b)(4)(A)-(B).

¹⁵ AS 39.52.110(a)(3).

the public officer's interest.¹⁶ The specific facts and circumstances involved in a matter determine whether or not there is a significant financial interest at stake. We caution that the application of the standards in AS 39.52.110(b) is specific to the circumstances.¹⁷

The director's financial interest in Company A is indirect as it is a subsidiary of Company B which is owned by Company C, whose stock he owns. The amount and value of that stock represent an insignificant ownership interest in Company C given the outstanding number of shares issued by this national company. We have previously held that a public official's interest in a matter is *de minimus* when the shares of stock he owned equaled .0735 percent of the issued and outstanding common stock of the company and the transaction at issue would likely not impact the value of those shares.¹⁸ Given the broad and diversified holdings of Company C and Company B and current financial health of both, it would be entirely conjecture to conclude that any action taken by the director regarding Company A's contract could affect his stock in Company C by any significant amount, if at all. Therefore, absent other information you may have impacting this conclusion or a change in the director's holdings, under AS 39.52.110(b), there would be no impropriety in his taking action regarding Company A's contract. Any conflict between the director's very small indirect ownership interest in Company A based on his Company C stock and any official action he may take in managing the Company A contract is "minor and inconsequential" as contemplated by AS 39.52.110(a)(3).

V. PROCEDURE TO SEEK FURTHER GUIDANCE

Please be sure to advise the director that when new matters come to him for review or action, he should guard against providing unwarranted benefits to Company A based on his prior relationship. If his stock interest significantly increases, he should consider whether his actions could significantly affect his financial interest and, if so, he should refrain from involvement and seek further advice from you on what action, if any, must be taken to avoid the potential conflict and violation of the Ethics Act.¹⁹

If you have any question regarding this advice, please do not hesitate to call.

¹⁶ 2005 *Inf. Op. Att'y Gen.* (Mar. 24; 663-05-0191), 2005 WL 1198705 (Alaska A.G.) at *5 and opinions discussed therein.

¹⁷ We anticipate that the legislature will amend this standard during the current session so further review may be necessary if Mr. Streur continues to hold the Coventry stock.

¹⁸ 1989 *Inf. Op. Att'y Gen.* (July 1; 663-89-0526), 1989 WL 266908 (Alaska A.G.).

¹⁹ AS 39.52.210.