

# ARKANSAS ETHICS COMMISSION

910 West Second Street, Suite 100  
Post Office Box 1917  
Little Rock, Arkansas 72203-1917  
(501) 324-9600 Fax (501) 324-9606  
Toll Free (800) 422-7773

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## ADVISORY OPINION NO. 2005-EC-014 Issued November 18, 2005

The Arkansas Ethics Commission has received a written advisory opinion request from J. Chris Bradley, an attorney with the Arkansas Municipal League ("the League"). The request poses several questions regarding the permissibility of municipal elected officials and other public servants investing in a proposed reinsurance company which would do business with the League. As background and to put the question presented in context, Mr. Bradley described the mission of the League, including service to its members through optional benefit programs which are governed by a board or committee comprised of local elected officials and employees. According to the request, the optional benefit programs have traditionally obtained reinsurance from the private sector and by self-funding.

However, because of concerns regarding the pricing stability in the private market and "the need to more effectively underwrite reinsurance coverage given the potential for extraordinary loss," the request states that the League is considering its options, one of which would be investment in a limited private company such as an Arkansas-based reinsurer. The request states that "[g]iven the nature of the proposed reinsurance company, municipal elected officials and other public servants, including employees, would be allowed, if they were so inclined, to invest in the proposed reinsurance company." The League seeks answers to seven questions which are set forth and answered as follows:

**Question 1:** May an individual who is a municipal elected official and who also serves as a trustee or who otherwise participates in the governance of these optional programs invest in the proposed reinsurance company?

**Answer:** Not without running a significant risk of violating Ark. Code Ann. § 21-8-304(a). There is no statute under the Ethics Commission's jurisdiction which expressly prohibits the described situation. However, it is the Commission's opinion that an individual who is an elected official of a municipality which is a member of the League and who, by virtue of such membership, serves on a

League board or committee which governs the purchase of insurance would be acting in his or her official capacity as an elected official in connection with the purchase of such insurance. In that regard, it is noted that a "municipal elected official" is a "public official," which is defined in Ark. Code Ann. § 21-8-402 (17) as a legislator or any other person holding an elective office of any governmental body.

Pursuant to Ark. Code Ann. § 21-8-304(a), a public official is prohibited from using or attempting to use his or her official position to secure special privileges or exemption for himself or herself or for those with whom he or she has a substantial financial relationship that is not available to others except as may be otherwise provided by law. The potential for creating a conflict of interest would be significant in the situation where a public official is deciding in his or her official capacity to purchase insurance from a company in which he or she is an investor.

It bears noting that a public official is required to annually file a Statement of Financial Interest ("SFI"), pursuant to Ark. Code Ann. § 21-8-701(a)(1). The annual SFI filing would require disclosure of any investment or holding which exceeds \$1,000.00 and disclosure of nongovernmental offices and directorships held in any business, corporation, firm or enterprise subject to the jurisdiction of a regulatory agency of the State, or any of its political subdivisions.

Question 2: May an individual who is a municipal public servant but who is not an elected official, such as employees of participating cities or towns, invest in the proposed reinsurance company?

Answer: Yes, as long as he or she does not sit on the League board or committee which governs the purchase of insurance on behalf of League members. There is no statute under the Commission's jurisdiction which expressly prohibits a municipal employee from investing in a company which does business with the municipality, either directly or through a league in which the municipality is a member. Accordingly, it appears that such an investment would be permissible.

Question 3: May a municipal elected official or public servant serve on the board of the proposed reinsurance company?

Answer: Yes, provided he or she is not on the League board or committee which governs the purchase of insurance on behalf of League members. There is nothing in the statutes under the Commission's

jurisdiction which would prohibit a public servant<sup>1</sup> from serving on the board of an insurance company. Moreover, it does not appear there would be a conflict of interest as long as the governmental body served by the public servant does not purchase insurance from the insurance company of which the public servant is a board member. However, a public servant does not lose his or her identity as a public servant when serving on a private board. The public servant must make decisions in a manner so as not to secure special privileges or exemption for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, or for those with whom he or she has a substantial financial relationship that is not available to others except as may be otherwise provided by law. Ark. Code Ann. § 21-8-304(a).

Question 4: If the above questions receive an affirmative response, then suppose all board members of a particular optional program or trust are also investors in the proposed reinsurance company so as to have a pecuniary interest. May these persons then vote in regard to doing business with the proposed reinsurance company rather than some other reinsurance company? Would your response differ depending on the timing of the vote, i.e., the beginning days of the proposed reinsurance company?

Answer: Any member of a League board or committee which governs the purchase of insurance on behalf of League members would run a significant risk of violating Ark. Code Ann. § 21-8-304(a) by voting to purchase insurance from a company in which he or she was an investor. One possible scenario which might withstand scrutiny would be for the League to solicit bids and the members of the board or committee which governs the purchase of insurance to vote for the lowest responsible bidder.

Question 5: Arkansas cities and towns receive state funds in the form of a "general turnback." The Arkansas Municipal League receives no state funds. As such, would Ark. Code Ann. § 21-8-1001, *et seq.* have any application to investors in the proposed reinsurance company who are also municipal elected officials or municipal public servants?

Answer: No. Ark. Code Ann § 21-8-1001, *et seq.* prohibits members of **boards or entities which receive state funds** from participating in official decisions if the member has a pecuniary interest in the matter to be decided. This conflicts of interest statute does not govern private boards or its members who may also be public servants.

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<sup>1</sup> A public official is a public servant within the meaning of Ark. Code Ann. § 21-8-402(18).

Question 6: Is an elected municipal official, when serving on the governing body of a League optional benefit program, acting as a municipal legislator discharging official duties of his office? See, Ark. Code Ann. § 21-8-803.

Answer: No. An elected municipal official is a “legislator” if he or she is a member of the city council or board of directors of any municipality. See Ark. Code Ann. § 21-8-402(9). When serving on the board of a non-governmental body such as the League optional benefit program, the official is not discharging the official duties of a municipal legislator.

As previously explained, however, an individual who is an elected official of a municipality which is a member of the League and who, by virtue of such membership, serves on a League board or committee which governs the purchase of insurance on behalf of League members would be acting in his or her official capacity as a public official in connection with the purchase of such insurance.

It is difficult to imagine that League members take personal leave or vacation time to participate in League meetings, etc. Accordingly, if League members participate in League meetings while on “city time”, the reporting requirement of Ark. Code Ann. § 21-8-803 would appear to be applicable to the decisions made when serving on the governing body of the League optional benefit program.

When a legislator is required to take an action in the discharge of his or her official duties on the city council or city board of directors that may affect his or her financial interest or cause financial benefit or detriment to him, the legislator is required to prepare a written statement describing the matter requiring action and stating the potential conflict and deliver a copy to be filed with the statement of financial interest. Ark. Code Ann. § 21-8-803(a). The obligation to report such potential conflict of interest arises as soon as the legislator is aware of the conflict, but if the statement of financial interest filed by the legislator makes the conflict readily apparent, then no report need be filed. Ark. Code Ann. § 21-8-803(b) and (c).

Question 7: Suppose that the prospective investors in the proposed reinsurance company are not obtained by general solicitation or general advertising, but are limited to those persons having an involvement or interest in municipal government. Would such a solicitation



constitute a special privilege for an elected official or public servant?

Answer: No. Ark. Code Ann. § 21-8-304(a) contains a general prohibition against a public official or state employee using or attempting to use his or her official position to secure special privileges or exemption for himself or herself or his or her spouse, child, parent, or other person standing in the first degree of relationship, or for those with whom he or she has a substantial financial relationship that is not available to others except as may be otherwise provided by law. The term "special privileges or exemption" is defined in § 400(p) of the Commission's Rules on Conflicts to mean: a particular benefit or advantage unfairly extended to a person beyond the common advantages of others or the unjustified release of a person from a duty or obligation required of others. The fact that the reinsurance company may have a specific profile for its investors does not cause the public servant recipient of the invitation to be in violation of this "special privileges" provision. However, the public servant's conduct will be subject to the § 21-8-304 prohibition as discussed above.

While the generic answer to the above-referenced questions is that the laws under the jurisdiction of the Commission do not specifically prohibit the arrangement described herein, any public servant involved in the governing body of an optional benefit program as described herein should be mindful of the referenced provisions and use caution in his or her investments and decisions while serving on such board.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

**ARKANSAS ETHICS COMMISSION**

By: 

Rita S. Looney, Chief Counsel