

**42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)**  
**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**

An IFA General Counsel was offered a position by a health-care organization. During the General Counsel's tenure at the IFA, the organization entered into conduit bond agreements with the IFA. While the General Counsel was involved in the bond document review process, SEC determined that he was not in a position to make discretionary decisions affecting the outcome of the negotiations of the bond agreements between the IFA and his prospective employer. Consequently, SEC found that the General Counsel would not violate the post-employment rule's cooling off restrictions found in IC 4-2-6-11, if he accepted employment with the organization, but that he is prohibited by the post-employment rule's particular matters restriction from representing or assisting the employer on any matters he personally and substantially participated in while a state employee.

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No. 15-I-8

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

**BACKGROUND**

A state employee is the General Counsel and Ethics Officer for the Indiana Finance Authority ("IFA"). The General Counsel began his employment with the IFA on August 3, 2008, as a legal assistant before being promoted to Legal Counsel. He has served in his current capacity as General Counsel since September 30, 2013. The General Counsel recently accepted an offer of employment from Indiana University Health, Inc. ("IU Health") for the position of Program Director & Legal Associate of Payer Operational Performance. In this position, the General Counsel would work under the Vice President of Revenue Cycle Services and would be responsible for handling high dollar value problem payment claims with payers.

The General Counsel applied for the IU Health position on January 20, 2015. The next day he informed the former Public Finance Director, the IFA's appointing authority at the time, of his application and his intent to initiate discussions and negotiations with IU Health for potential employment. The former Public Finance Director implemented an internal screen that excluded the General Counsel from any responsibility and involvement associated with IU Health. Further, the screen provided that should a matter arise regarding IU Health, any responsibilities the General Counsel may have had would be performed by the IFA's Chief Financial Officer and his Legal Assistant. Additionally, the screen provided that the state employee would continue to serve as General Counsel for the IFA, and continue to perform all of his normal responsibilities and duties.

At the time, the General Counsel and IU Health began employment discussions and negotiations, there were no open matters with IU Health before the IFA. Further, no matters involving IU Health were expected until after the first quarter of 2015, before which the General Counsel expected he would leave his IFA position. Since his acceptance of the IU Health position, it has come to the IFA's attention that IU Health intends to submit an application for approval at the

March 27, 2015 meeting. Therefore, the General Counsel is now seeking formal approval of the IFA's screening mechanism.

The IFA has a conduit bond ("Bond") program that allows certain entities, like nonprofit health care entities, including IU Health, to apply to the IFA for the issuance of tax-exempt bonds and loan the proceeds of the bonds to borrowers to use on projects and purchases that are allowed under the Federal Internal Revenue Tax Code ("Tax Code"). The issuance of the Bonds is done through a resolution approved by the IFA Board ("Board") and the transaction entails multiple form documents and contracts between the IFA and the applicant. During the General Counsel's tenure at the IFA, IU Health applied for and sought approval from the IFA for the issuance of Bonds in January 2010, February 2011, November 2011, and September 2014.

The Bonds and the associated conduit bond programs issued by the IFA are governed by the federal Tax Code, the Indiana Code, and the IFA's application and procedures. The Bonds are not debts of the IFA, but are debts solely of the borrower, and allow certain types of entities to access tax exempt bond markets. The IFA's application and procedures are created and approved by the Board. To obtain approval from the IFA for the issuance of Bonds, an authorized entity submits an application to the IFA's program manager and submits standard documentation consistent with the approved application and procedures.

The process for applicants to be submitted to the Board is non-competitive and form documents govern the transaction. A member of the IFA legal staff or outside counsel reviews the form documents to ensure compliance with IFA policies and procedures. If all the forms and documents are complete, and correct and consistent with requirements of the IFA procedures, the application would be included in a board packet for the approval of the Board.

Outside counsel was used to perform the review for the deals involving IU Health that were approved in January 2010, February 2011, and September 2014. When the IFA uses outside counsel to review the form documents associated with an application, they perform the review of those documents without the involvement of the IFA. The IFA legal department then collects certain documentation for the Board packet when Board approval is requested. If approved, the IFA legal department collects final documentation for execution and reviews to assure the names, titles, and signature blocks are correct. .

Additionally, for all Bond transactions that are approved by the Board, the IFA General Counsel provides a certificate at closing that represents that the documents were provided to the Board Chair and the IFA's Public Finance Director, that they directed the General Counsel to use a signature stamp on the Bond documents, and that the General Counsel or their designee is in sole possession of the stamp. According to the General Counsel, this is a ministerial function associated with the transaction and he provided this certificate for the September 2014 Bond issued to IU Health.

Regarding the November 2011 application submitted by IU Health, the General Counsel assisted internally as part of the IFA's legal department in reviewing the documents for form language and compliance with IFA requirements. The types of form documents that would be reviewed to make sure a borrower's documents were consistent are available on the IFA website (<http://www.in.gov/ifa/2340.htm>). The IFA legal department reviews other documents that are

primarily the responsibilities of the borrowers and their financial team to assure that they contain the specific provisions that the IFA requires, like Indemnification of the IFA and State, a statement that the bonds are a limited obligation, IFA remedies, assignment of rights to the bond trustee, etc. If form language is used there are no further discussions necessary between the IFA and applicant. To the best of the General Counsel's knowledge the November 2011 Bond documents complied with the IFA forms and contained language consistent with language required for all IFA Bonds, without any special exceptions.

Once it is confirmed that the documents are consistent, the Bond application and resolution are compiled in the Board packet and sent to the IFA Board for consideration and approval. Once the application is approved the deal can be closed and all documents are executed by the Board Chair and the IFA's Public Finance Director. Once the Bonds are closed the ongoing administration becomes the responsibility of the borrower and the bond trustee, as the IFA assigns its rights and responsibilities to the bond trustee. Therefore, in most situations, no further discussions are necessary for the creation and administration of the Bond contracts. The only time additional discussions would be required for the administration of the Bond contracts were if an amendment was necessary.

Amendments usually come up for Bonds when the borrower desires to amend or make changes to documents that would cause what is referred to as a reissuance for tax purposes under the Tax Code. A reissuance is not a new issue but the IRS views the taking of certain action as a reissuance. When a reissuance occurs the IRS requires new approval from the conduit issuer, which, in these circumstances, is the IFA. When amendments occur the borrower will contact the IFA and ask to be put in front of the IFA Board. During the General Counsel's time at the IFA, IU Health requested and was given approval of two such amendments.

The first was in 2013 to amend the 2010 Bonds. The amendment was necessary because the borrower had negotiated a lower interest rate with the lender/bank on the Bonds. As IU Health, like any Bond borrower, is solely responsible for the financial management and structuring of the bonds, the IFA had no involvement in these negotiations. This decrease in interest rate caused the reissuance for tax purposes. The second amendment occurred in 2014 and was associated with two series of the 2011 Bonds. In this instance the holder of the Bonds, again in negotiation solely with IU Health, agreed to hold the Bonds for a longer period and shorten the amortization. This triggered a reissuance and necessitated new Board approval. Both amendments were approved. The original Bond documents, including the standard provisions, were left in place and only those elements fully within the province and responsibility of IU Health were amended. There were no special provisions in these amendments. For both amendments, the state employee executed a General Counsel certificate that the documents were provided to the Board Chair and the IFA's Public Finance Director, that they directed the General Counsel to use a signature stamp on the bond documents and that the General Counsel or their designee is in sole possession of the stamp. Had a reissuance not been triggered the IFA would have been able to amend these documents without Board approval but only consistent with the specific amendment provisions of the documents and only at the express direction of the borrower, IU Health.

Beyond these periodic applications for Bonds, the IFA has not, to the best of the General Counsel's knowledge, ever contracted with IU Health for any product, service or other item. The

General Counsel would not be required to register as an executive branch lobbyist to fulfill this role. In addition, the IFA does not have any regulatory or licensing function associated with IU Health or any of its parent or subsidiary entities.

### **ISSUE**

What rules in the Code apply to the General Counsel's post-employment opportunity with IU Health? Would the General Counsel be prohibited from working for IU Health immediately upon leaving state employment?

### **RELEVANT LAW**

#### **IC 4-2-6-6 Present or former state officers, employees, and special state appointees; compensation resulting from confidential information**

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

#### **IC 4-2-6-9 (42 IAC 1-5-6) Conflict of economic interests**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

**IC 4-2-6-11 (42 IAC 1-5-14) One year restriction on certain employment or representation; advisory opinion; exceptions**

Sec. 11. (a) As used in this section, "particular matter" means:

- (1) an application;
- (2) a business transaction;
- (3) a claim;
- (4) a contract;
- (5) a determination;
- (6) an enforcement proceeding;
- (7) an investigation;
- (8) a judicial proceeding;
- (9) a lawsuit;
- (10) a license;
- (11) an economic development project; or
- (12) a public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
  - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
  - (B) in a position to make a discretionary decision affecting the:
    - (i) outcome of the negotiation; or
    - (ii) nature of the administration; or
- (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;  
before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of his or her duties or responsibilities while a state

officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) representation by; or
- (3) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to a special state appointee who serves only as a member of an advisory body.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under I.C. 4-22-2 to establish criteria for post employment waivers.

## ANALYSIS

The General Counsel's post-employment opportunity with IU Health implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the General Counsel's prospective employment with IU Health is analyzed below.

### *A. Confidential Information*

IC 4-2-6-6 prohibits the General Counsel from accepting any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature. Based on the information provided, it does not appear that the General Counsel would utilize confidential information in his potential employment with IU Health. So long as any compensation the General Counsel receives does not result from confidential information, his potential employment with IU Health would not appear to violate IC 4-2-6-6.

### *B. Conflicts of Interest*

IC 4-2-6-9(a)(1) prohibits the General Counsel from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits the General Counsel from participating in any decision or vote in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, "an interest arising from employment or prospective employment for which negotiations have begun."

In this case employment negotiations have already begun and the General Counsel has accepted an employment offer from IU Health. Accordingly, a conflict of interest would arise for the General Counsel if he participates in a decision or vote in which either he, by virtue of his employment negotiations with IU Health, or IU Health would have a financial interest.

IC 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the Commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. In this case, the General Counsel requested an advisory opinion from the Commission as provided in the rule and had disclosed the potential conflict to his former appointing authority. So long as the General Counsel has notified his current appointing authority of his potential conflict of interest, he would be in compliance with this part of the rule.

IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, the IFA proposes the implementation of a screening procedure that excludes the General Counsel from any responsibility and involvement associated with IU Health. The screen provides that should a matter arise regarding IU Health, any responsibilities the General Counsel has would be performed by the IFA's Chief Financial Officer and his Legal Assistant.

Because a conflict of interest would arise for the General Counsel if he were to participate in a decision or vote in which IU Health has a financial interest, the Commission advises that the proposed screen be implemented and remain in place for the remainder of the General Counsel's state employment.

### *C. Post-Employment*

IC 4-2-6-11 consists of two separate limitations: a "cooling off" period and a "particular matter" restriction. The first prohibition commonly referred to as the cooling off or revolving door period prevents the General Counsel from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, the General Counsel is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration. The information provided by the General Counsel indicates that his intended work with IU Health would not require him to engage in lobbying activities or register as an executive branch lobbyist. To the extent that the General Counsel does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with IU Health would not violate this provision of the post-employment rule.

Second, the General Counsel is prohibited from accepting employment for 365 days from the last day of his state employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. This provision does not appear to apply to the General Counsel as he has not made regulatory or licensing decisions that would affect IU Health due to the IFA not having regulatory or licensing authority related to IU Health.

Third, the General Counsel is prohibited from accepting employment for 365 days from the last day of his state employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of a state agency *and* 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract.

In this case, the General Counsel indicates that the IFA legal staff is not involved in the administration of the Bond contracts (this is the responsibility of the borrower and bond trustee after the transaction is completed). However, he did have some involvement in the Bond application/transaction and related contracts between the IFA and IU Health.

The term “negotiation” referenced to in the Code is not defined. In Advisory Opinions 11-I-2 and 10-I-10, the Commission examined the roles of former IFA employees in the IFA Bond process to determine if their involvement amounted to the negotiation of a contract and implicated the post-employment rule’s cooling off restriction. In 10-I-10 the Commission determined that the one-year cooling off period did not apply to a former Director of the OMB who had previously participated in Bond agreements with his prospective employer while serving as the State Public Finance Director and the IFA Chair because the former Director’s actions in voting on these matters and signing the related agreements were statutorily outlined requirements. The Commission determined that it was the IFA staff who had interacted and worked directly with the applicants and, therefore, the former Director did not negotiate such agreements. In 11-I-2, the Commission opined that a former Public Finance Director did not negotiate a contract with her prospective employer because she supervised the program manager, who accepted the related applications, and the General Counsel, who reviewed the form documents to ensure compliance with the IFA’s policies and procedures, and only supplied her signature to the agreements to fulfill a statutory requirement.

The General Counsel has provided detailed information detailing his involvement as part of the IFA legal department, including his service as the IFA’s General Counsel, in regards to the Bonds. Specifically, the General Counsel discloses that his involvement in the Bonds issued to IU Health during his tenure at the IFA was limited to reviewing the documentation for form language and compliance with all requirements for the 2011 Bond, and applying his General Counsel signature stamp to signify that all required documentation for the 2014 Bond and the 2011 and 2014 Bond amendments was presented to the IFA Board Chair and the Indiana Public Finance Director. According to the General Counsel, the entire Bond process was non-competitive and his responsibilities did not involve the evaluation of applications or the selection of applicants to be issued Bonds, because all applications that met all of the requirements were presented to the IFA Board. The approval of all applications and issuance of the Bonds is carried out by the IFA Board and the agreements are executed by the Board Chair and the Public Finance Director. Based on the information provided, the Commission finds that the General Counsel was not in a position to make discretionary decisions affecting the outcome of the negotiations of the Bond agreements between the IFA and IU Health.

Fourth, the General Counsel is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer’s purpose is to influence him in his official capacity as a state employee. The information presented to the Commission does not



suggest that the offer of employment from IU Health was extended to the General Counsel in an attempt to influence him in his capacity as a state employee.

Finally, the General Counsel is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

The General Counsel has been involved in the applications and contracts related to the four Bonds that IU Health was issued during his tenure at the IFA. These four applications and contracts would qualify as particular matters. The General Counsel was not certain that his involvement in the identified particular matters was personal and substantial. Therefore, the Commission advises that he refrain from assisting IU Health on those matters in order to avoid a violation or a perceived violation of the particular matters provision of the post-employment rule.

In addition, the General Counsel should keep in mind that he is prohibited from assisting IU Health or any other employer on any of the particular matters listed above that he may have personally and substantially worked on during his state employment regardless of whether it involves IU Health.

### **CONCLUSION**

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the General Counsel's acceptance of an employment offer by IU Health would not violate the post-employment restrictions found in IC 4-2-6-11.