

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

The BFD sought guidance regarding its appointed board members, who are statutorily required to be chief executive officers of public depositories, and whether they would have a conflict of interests if they were to discuss or vote on assessments on public funds accounts. Because the assessments would apply to all banking institutions in the State, a conflict of interests would not arise for the special state appointees if they participate in discussions and votes regarding the assessments, because they do not have a financial interest in the outcome of the matter that is greater than that of the general public.

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No. 16-I-4

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**

The Indiana Board for Depositories (“BFD”) consists of nine board members. IC 5-13-12-2 dictates that the nine members include five government ex officio members and four appointed members. The five government ex officio members are the Governor's Designee (Chairman), the Indiana State Auditor (Vice-Chair), the Indiana State Treasurer (Secretary-Investment Manager), the Chief Examiner of the Indiana Board of Accounts, and the Chairman of the Indiana Department of Financial Institutions. The four appointed members are appointed as follows: one is appointed by the speaker of the House of Representatives, one is appointed by the president pro tempore of the Senate and two are appointed by the Governor. All of these appointees must represent chief executive officers of public depositories (banking institutions) in Indiana at various sizes.

The State, through the BFD, ensures the safety of public funds by holding monetary reserves in the Public Deposit Insurance Fund (“PDIF”) and also by maintaining a system of collateralization in which all of the depositories are required to participate. According to IC 5-13-12-5, the BFD can choose to levy assessments up to 2% on public funds accounts if it feels it needs to raise revenue. The assessments would affect all public depositories (banks and credit unions) holding public funds. The assessments are the same industry-wide.

The BFD currently votes on assessments twice a year, on or around July 1 and January 1. Currently, the PDIF holds over \$300 million in reserves and gains interest from investments of that money. Assessments have not been levied since 1985 when it was determined the PDIF had sufficient reserves for losses. In addition to the PDIF, the BFD also has a collateral program in which all public depositories are required to participate. Depositories’ credit ratings are reviewed each quarter and depositories who have a credit rating that falls in to a low pre-determined category are required to collateralize a percentage, or all, of their public funds depending on their rating.

The BFD discusses the “health” of institutions holding public funds, including the collateral levels, credit ratings, etc. during their meetings. This discussion includes all board members and

is important information for determining the health of the public depository institutions as a whole and is a factor when determining whether or not assessments are needed. The appointed members of the BFD, who are required to work in the banking industry, serve an important role during these discussions.

Implicit in the discussion of the health of the banks each quarter is the need to determine if the collateral program is effective for the health of the banks at the time of voting on assessments. Assessments are needed if the health of the banks is deemed to be too risky to rely solely on the PDIF and the BFD decides that the funds in the PDIF need to increase to cover possible losses. The banking members of the BFD are invaluable in this discussion. The BFD relies on their expertise to evaluate the effectiveness of the credit ratings gathered, suggest possible changes in data gathered (if needed), consider financial ratings companies to use for gathering the data, and the possible reasons for institutions dipping into the lower credit categories.

Currently, all BFD members are present for all board meeting discussions including the health of financial institutions; however, the four appointed members, who are chief executive officers of depositories, abstain from voting on assessments - leaving only the five ex officio members to vote.

Although the banking members recuse themselves from voting, their expertise, specific knowledge, and input are not only invaluable in determining whether or not to levy assessments, but also in determining the level of assessments to be applied should the BFD deem assessments necessary for the fund.

The current BFD By-Laws, "ARTICLE VI CONFLICT OF INTEREST" reads:

"Section 1. Loans. No member of the Board shall vote in any decision regarding a loan or guarantee if the member or any bank of which the member is an officer or director, has any interest or relationship, direct or indirect, with any individual, firm, partnership, corporation, or association which would be a party involved in the loan or guarantee. A correspondent relationship with the lender shall not be deemed such a relationship.

Section 2. Assessments and Collateralization. Any decision to fix or adjust an assessment and any decision concerning collateralization shall be voted upon only by the non-appointed, ex officio members.

Section 3. Disclosure. Any member, officer, employee, or agent of the Board shall disclose to the Board, in a public meeting, any conflicting or suspect interest or relationship prior to deliberation and final action by the Board. 1516840v5 5

Section 4. Violations. Any action taken in violation of this Article or the Indiana Code with regard to conflicts of interest may void the action of the Board."

(Indiana Board for Depositories, 2012).

The BFD notes similarities of the present matter to Advisory Opinion No. [07-1-7](#), July 12, 2007, which discusses an individual who served as the Economic Development Coordinator for an energy company and also served in the local government position on the Air Pollution Board (“Board”). In this opinion, the Commission determined that the term “financial interest”, for purposes of the Code, does not include an interest in an administrative rule an agency adopts because the rule would apply industry-wide. The BFD points out that the BFD board members’ votes and discussions regarding the assessments would be similar to the Air Pollution Board’s approval of the administrative rule in that their particular employers may be affected, but the votes would ultimately be industry-wide decisions.

The BFD requested a formal advisory opinion that addresses the issue of the appointed members’ ability to vote on assessments without violating State conflicts of interest rules. The BFD feels that the knowledge and subject-matter expertise of the appointed members is necessary to both the discussion and decisions of the board when voting on assessments. The BFD would like to update their by-laws based on this formal advisory opinion.

### **ISSUE**

1. Would participation in discussions or votes regarding the assessments present a potential conflict of interest for the appointed members of the BFD under IC 4-2-6-9?
2. Does IC 4-2-6-9 prohibit the appointed members’ participation in future discussions or votes regarding the assessments that may affect the public depositories for whom they serve as officers?

### **RELEVANT LAW**

#### **IC 4-2-6-1 Definitions**

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

...

(10) "Financial interest" means an interest:

(A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or

(B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation. The term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

#### **42 IAC 1-5-6 Conflicts of interest; decisions and voting**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 6. Decision and voting restrictions are set forth in IC 4-2-6-9.

### **IC 4-2-6-9**

#### **Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter relating to that 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 member, 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 ethics officer in writing and do either of the following:

(1) 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:

(A) 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

(B) 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.

(2) File a written disclosure statement with the commission that:

(A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

(ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed not later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) 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)(1)(B) shall be filed with the appointing authority.

### **ANALYSIS**

The BFD's enabling statute specifically requires that the BFD be composed of specific individuals. *See* IC 5-13-12-2. Five of the nine required members are ex-officio members, and the remaining four are appointed. The BFD's enabling statute requires that the appointed members be serving as chief executive officers of public depositories (banking institutions), in Indiana, at various sizes.

The four BFD appointed members in question are considered special state appointees for purposes of the Code. A "special state appointee" is "a person who is not a state officer or employee and is elected or appointed to a board. . . that is authorized by statute. . . and functions in a policy or advisory role in the executive department of state government, including a separate body corporate and politic." *See* IC 4-2-6-1(a)(18). According to IC 5-13-12-1, the BFD is a body corporate and politic.

IC 4-2-6-9 prohibits a special state appointee from participating in any decision or vote, or matter relating to that decision or vote, if the special state appointee has knowledge that various persons may have a "financial interest" in the outcome of the matter, including the special state appointee or a business organization in which the special state appointee is serving as an officer, director, a member, a trustee, a partner, or an employee. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest involving property, services, or a transaction between an agency and any person; however, the term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

In this case, the four BFD special state appointees would be prohibited from participating in the BFD's vote, and matters relating to the vote, regarding the assessments if either the special state appointee, or his or her employer, has a financial interest in the outcome of the matter; however, the assessments apply to all public depositories throughout Indiana. They do not apply to any one, individual financial institution. Consequently, a conflict of interests would not arise for the special state appointees because the assessments do not apply to any one financial institution. The special state appointee's financial interest in the assessment would not be greater than the interest of the general public; however, a potential conflict of interests would arise if an assessment or any other matter came before the Board that would only affect a special state appointee's individual institution.

### **CONCLUSION**

The Commission finds that a conflict of interests under IC 4-2-6-9 would not arise for the four special state appointees if they participate in discussions and votes regarding the assessments on public funds because they do not have a financial interest in the vote of the assessments that is greater than that of the general public.