Office of Government Ethics
83 x 9 -- 07/20/83

Memorandum to a DAEO dated July 20, 1983

This is in response to your memorandum of July 8, 1983, in which you ask our advice regarding the applicability of the conflict provisions in [certain legislation] to [an individual] who is under consideration for appointment to the Board of Directors of [a Federal entity].

[The entity] was created under [a specific Act]. Section 809**1** of this Act provides for a Board of Directors for [the entity] to consist of not less than 15 nor more than 21 members appointed by [a specified Government official]. The Board is to be representative of the various segments of the building community, of the various regions of the country and of the consumers who would be affected by the actions of [the entity]. The Board is to include:

> (A) representatives of the construction industry, including representatives of construction labor organizations, product manufacturers, and builders, housing management experts, and experts in building standards, codes, and fire safety, and
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> (B) members representative of the public interest in such numbers as may be necessary to assure that a majority of the members of the Board represent the public interest and that there is adequate consideration by the Institute of consumer interests in the exercise of its functions and responsibilities. Those representing the public interest on the Board shall include architects, professional engineers, officials of Federal, State, and local agencies, and representatives of consumer organizations. Such members of the Board shall hold no financial interest or membership in, nor be employed by, or receive other compensation from, any company, association, or other group associated with the manufacture, distribution, installation, or maintenance of specialized building products, equipment, systems, subsystems, or other construction materials and techniques for which there are available substitutes. (Emphasis added.)

The underlined word "such" limits the financial holdings only of the (B) members who must be "representative of the public interest." Grammatically this is so and it was confirmed at the Senate hearings on the nomination of [the] first chairman of [the Board]. Senator Proxmire noted that the statute provided for two groups of nominees -- (A) and (B) -- and that Group (B) could not hold any financial interest in any company associated with the manufacture of specialized building products. [Citation to Committee hearing omitted].

At the hearings, Senator Proxmire asked [the nominee] whether an engineer or architect who receives a fee from a company associated with the manufacture of specialized building products would be subject to the conflict of interest provision applicable to (B) members contained in the last sentence in the above quotation. [The nominee's] response was "I think that [the term compensation] probably is intended to refer to other than normal professional fees." Senator Proxmire disagreed with [the nominee's] interpretation, concluding that the sentence would have no meaning "if it overlooks usual compensation in determining conflicts of interest." [Citation omitted.] This evidences a strict construction of the conflict of interest provision. Your memorandum of July 8 does not state whether the [individual responsible for appointing the Board members] intends to appoint [the individual now in question] as an (A) or (B) member. According to our analysis of the statute [the individual] can be appointed as an (A) member since the last sentence of the statute does not apply to (A) members. By reason of her ownership of shares in a manufacturer and distributor of [construction materials], she could be deemed a representative of the construction industry.

If the intention is to appoint [the individual] as a (B) member, she would have to dispose of her holdings in [the company] since it is a manufacturer of [construction materials]. By letter dated June 28, 1983 to [a member] of your staff, her lawyer has tried to cure this situation by proposing that [the individual and her spouse] transfer all their shares to an irrevocable trust for the benefit of their children, two of whom are adults and two of whom are minors. He states that an independent trustee unrelated to [the individual and her spouse] would be appointed.

This would not solve [the individual's] problem as a (B) appointee. While section 809 does not address this matter specifically, support for our conclusion is found in other

statutes and analogous situations.

The Department of Energy Organization Act contains a provision that a supervisory employee cannot knowingly hold any interest in energy concerns. Such an employee is deemed to hold such an interest

> if such interest is sold or otherwise transferred to his spouse or dependent while such officer or employee is, or within six months prior to the date on which such officer or employee becomes, an officer or employee of the Department. The placing of an interest under a trust by an individual shall not satisfy the requirement of section 7212 of this title [divestiture of energy holdings] . . . . (42 U.S.C. § 7211(d)).

It might be argued that the absence of the above language in section 809 would indicate that [the individual] could adopt a trust. The argument, however, is weak. Section 809 was only a small part of a much more comprehensive Act on housing. It does not amplify its conflict provision for [the Board] as does the Energy Act since the latter Act was much broader in its coverage and more concerned with potential conflicts. The Energy Act does set forth legislative thinking on the type of solution suggested by [the individual's] lawyer.

Additional support is found in the Ethics in Government Act (the Act). Our Office can qualify a blind trust if it does not contain any asset which an interested party is prohibited from holding by any law or regulation. An interested party is defined as including the dependent child or children of the settlor. See sections 202(f)(3)(C)(ii) and 202(f)(3)(D) of the Act.

The prohibition in the Federal Communications Act against employees of the FCC holding shares in telecommunication companies has been interpreted as being applicable only to the employee, not to his or her spouse or dependent child. FCC was criticized by former Congressman Moss for not scrutinizing situations where employees had transferred their shares to their spouses or children to avoid the statutory prohibition. Such could be the case here if [the individual] were allowed to set up a trust to avoid the prohibition of section 809.

It is our opinion that [the individual] would have a conflict of interest within the meaning of section 809 for (B) membership

on the Board of [the entity] by reason of her ownership of shares in [the company] and that her proposed placement of these shares in an irrevocable trust for her children would not remove that disability. There would be at the least an apparent conflict.

David R. Scott
Chief Counsel

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1 [Citation of codification omitted.]