



Oregon

John A. Kitzhaber, MD, Governor

Government Ethics Commission

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October 7, 2011

Ted Wheeler
State Treasurer
Oregon State Treasury
159 State Capitol
900 Court Street NE
Salem, Oregon 97301-4043

Dear State Treasurer Wheeler:

At its October 7, 2011 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion:

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 11A-1002

STATED FACTS: Ted Wheeler holds the elected position of State Treasurer. In his official capacity, the Treasurer serves on the Oregon Investment Council (OIC). The OIC is a six-member board consisting of five voting members and one nonvoting member; the Treasurer is a voting member. The OIC establishes policy and oversees the investment and management of certain funds managed by the Office of the State Treasurer.

The Treasurer also serves as the statutory investment officer for the OIC. In this capacity, the Treasurer is entrusted with investing and managing funds consistent with OIC policy. Further, the OIC may contract with other parties, in addition to or in lieu of the Treasurer and his staff, to assist in the investment and management of funds.

The Treasurer recently became a member of the board of directors of the Wheeler Foundation. Information indicates the Wheeler Foundation is a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code. The Treasurer is not paid for this service.

Information indicates that two firms contracted to provide investment services for the Wheeler Foundation, either directly or through an affiliate, participate in the OIC's emerging managers program or act as a manager on behalf of the OIC in the investment or management of funds under the control of the OIC.



QUESTION 1: Would the Treasurer's acceptance of membership on the board of directors of the Wheeler Foundation create an actual or potential conflict of interest?

ANSWER 1: No. The mere existence of a particular situation or set of circumstances, such as holding the elected position as State Treasurer and serving as a member of the board of directors of the Wheeler Foundation, does not create a conflict of interest as defined by Oregon Government Ethics law.

Oregon Government Ethics law defines actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(12)]. A public official is met with a statutory conflict of interest when participating in any official action, decision or recommendation, the effect of which would or could be to the private pecuniary benefit or detriment of the public official, the public official's relative or any business with which the public official or a relative is associated.

The difference between an actual conflict of interest and a potential conflict of interest is determined by the words "would" and "could." An actual conflict of interest occurs when a public official participates in an official action that would have a direct and specific financial impact on that official, the official's relative or any business with which the official or a relative is associated. A potential conflict of interest exists when a public official takes action that could possibly have a financial impact on that official, a relative of that official or a business with which the official or the relative of that official is associated.

A nonprofit corporation, such as the Wheeler Foundation, that is tax exempt under section 501(3) of the Internal Revenue Code with which a public official is associated as a member of the board of directors, in a nonremunerative capacity, does not fall within the definition of "business" in ORS 244.020(2). Accordingly, any official action taken by the Treasurer, in his capacity as a public official, that could financially impact the Wheeler Foundation, would not appear to give rise to a statutory conflict of interest.

Although it is not apparent in the stated facts, before the Treasurer participates in any official action, decision or recommendation, he must also determine if the action would or could financially impact him, his relatives or any other business with which he or his relatives are associated.

QUESTION 2: Does the participation of the two firms, contracted to provide investment services for the Wheeler Foundation, in the OIC's emerging managers program or acting as a manager on behalf of the OIC in the investment or management of funds under the control of the OIC have an impact on how Oregon Government Ethics law applies to the answer to QUESTION 1?

ANSWER 2: No. Based on the information provided, the aforementioned investment firms do not appear to be businesses with which Treasurer Wheeler, or his relatives, are associated, as defined in ORS 244.020(3). As discussed in ANSWER 1, Treasurer Wheeler could only be met with a statutory conflict of interest if participating in any official action, decision or recommendation, the effect of which would or could be to the private pecuniary benefit or detriment of him, his relatives or any business with which he or his relatives are associated.

QUESTION 3: What steps should be taken by the Treasurer in the event that his role as a public official gives rise to an actual or potential conflict of interest?

ANSWER 3: When met with conflicts of interest, the Treasurer would be required to handle them in accord with the methods described in ORS 244.120 and ORS 293.708.

ORS 244.120 requires the Treasurer to publicly announce the nature of any conflict of interest before taking action on the matter. In the case of an actual conflict of interest, the Treasurer would be required to refrain from further participation, including discussion and vote, in official action on the issue that gave rise to the conflict of interest.

Although it is not apparent in the stated facts, the situation could arise when the Treasurer is met with an actual conflict of interest and his vote is required to meet a minimum number of votes required to take official action. In these circumstances, ORS 244.120(2)(b)(B) would require the Treasurer make the required announcement, refrain from any discussion, but may participate in the vote required for official action by the governing body. It should be noted these circumstances do not often occur. This provision does not apply to situations where there are insufficient votes because of a member's absence when the governing body is convened. Rather, it applies in circumstances when all members of the governing body are present and the number of members who must refrain due to actual conflicts of interest make it impossible for the governing body to take official action.

In addition to the requirements identified in ORS 244.120, ORS 293.708 requires public officials, including the Treasurer, who are members of the OIC to notify in writing the State Treasurer or the Chief Deputy State Treasurer, within three business days after the member becomes aware, that any action, decision or recommendation by the member might constitute an actual or potential conflict of interest. The Commission would advise the Treasurer to provide written notification to the Chief Deputy State Treasurer.

QUESTION 4: Does the exemption identified in ORS 244.020(12)(c) apply to the Treasurer in relation to his membership on the Wheeler Foundation board?

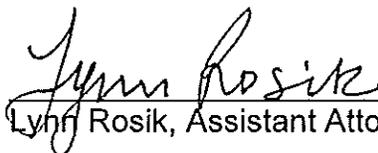
ANSWER 4: Yes. ORS 244.020(12)(c) exempts from the definition of potential conflict of interest situations when the pecuniary benefit or detriment arises out of membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code. This same exemption applies to actual conflicts of interest defined on ORS 244.020(1). According to the stated facts, the Wheeler Foundation is a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code. Therefore, it would appear, any official action taken by the Treasurer, in his capacity as a public official, that could financially impact the Wheeler Foundation, would be exempt from the methods of handling conflicts of interest as described in ORS 244.120(2).

The statutes relevant to issues addressed in this opinion are provided as an addendum to this Commission Advisory Opinion.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE COMMISSION MAY ALSO APPLY.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 7th day of October 2011.

Kenneth Lewis, Chairperson



Lynn Rosik, Assistant Attorney General

11A-1002dt

ADDENDUM

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

244.020(1) "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.

244.020(2) "Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

244.020(3) "Business with which the person is associated" means:

(a) Any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth \$1,000 or more at any point in the preceding calendar year;

(b) Any publicly held corporation in which the person or the person's relative owns or has owned \$100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;

(c) Any publicly held corporation of which the person or the person's relative is a director or officer; or

(d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).

244.020(12) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged.

(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

244.020(14) "Public official" means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee, agent or otherwise, irrespective of whether the person is compensated for the services.

(15) "Relative" means:

(a) The spouse of the public official or candidate;

(b) Any children of the public official or of the public official's spouse;

(c) Any children of the candidate or of the candidate's spouse;

(d) Siblings, spouses of siblings or parents of the public official or of the public official's spouse;

(e) Siblings, spouses of siblings or parents of the candidate or of the candidate's spouse;

(f) Any individual for whom the public official or candidate has a legal support obligation;

(g) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or

(h) Any individual from whom the candidate receives benefits arising from that individual's employment.

244.040 Prohibited use of official position or office; exceptions; other prohibited actions. (1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

244.040(2) Subsection (1) of this section does not apply to:

(a) Any part of an official compensation package as determined by the public body that the public official serves.

(b) The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042.

(c) Reimbursement of expenses.

(d) An unsolicited award for professional achievement.

(e) Gifts that do not exceed the limits specified in ORS 244.025 received by a public official or a relative or member of the household of the public official from a source that could reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.

(f) Gifts received by a public official or a relative or member of the household of the public official from a source that could not reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.

(g) The receipt by a public official or a relative or member of the household of the public official of any item, regardless of value, that is expressly excluded from the definition of "gift" in ORS 244.020.

(h) Contributions made to a legal expense trust fund established under ORS 244.209 for the benefit of the public official.

244.040(7) The provisions of this section apply regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed under ORS 244.120.

244.120 Methods of handling conflicts; Legislative Assembly; judges; appointed officials; other elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

244.120(2) An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

244.120(3) Nothing in subsection (1) or (2) of this section requires any public official to announce a conflict of interest more than once on the occasion which the matter out of which the conflict arises is discussed or debated.

244.120(4) Nothing in this section authorizes a public official to vote if the official is otherwise prohibited from doing so.

293.708 Conflicts of interest for council members. (1) As used in this section:

- (a) "Business" has the meaning given that term in ORS 244.020.
- (b) "Business with which the person is associated" has the meaning given that term in ORS 244.020.
- (c) "Relative" has the meaning given that term in ORS 244.020.

293.708(2) When a person who is a member of the Oregon Investment Council becomes aware that action on a matter pending before the council might lead to private pecuniary benefit or detriment to the person, to a relative of the person or to a business with which the person or a relative of the person is associated, the member shall notify in writing the State Treasurer or the Chief Deputy State Treasurer that any action, decision or recommendation by the member might constitute an actual or potential conflict of interest. The member shall provide the notice not later than three business days after the member becomes aware of the possibility of an actual or potential conflict.

293.708(3) Subsection (2) of this section does not apply if the pecuniary benefit or detriment arises out of circumstances described in ORS 244.020 (12).

293.708(4) Complaints of violations of this section may be made to the Oregon Government Ethics Commission for review and investigation as provided by ORS 244.260 and for possible imposition of civil penalties as provided by ORS 244.350 or 244.360.

293.708(5) Nothing in this section excuses a member of the council from compliance with ORS 244.120.

TED WHEELER
STATE TREASURER



PHONE 503-378-4379
FAX 503-373-4

STATE OF OREGON
OREGON STATE TREASURY
159 STATE CAPITOL, 900 COURT ST NE
SALEM, OREGON 97301-4043

RECEIVED
AUG 18 2011
OREGON GOVERNMENT
ETHICS COMMISSION

August 17, 2011

Oregon Ethics Commission Board Members
3218 Pringle Road SE, Suite 220
Salem, Oregon 97301

Re: DOJ Conflicts Advice: Wheeler Foundation

Dear Commission Members:

Attached you will find a memo from Dee Carlson, Senior Assistant Attorney General, in response to my request for advice pertaining to my participation on the Wheeler Foundation.

I respectfully ask for an official advisory opinion letter from the Oregon Government Ethics Commission as to the two questions posed, and per the facts outlined, in the attached memo.

Please let me know if you have questions. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Wheeler", with a long horizontal flourish extending to the right.

Ted Wheeler
State Treasurer

TW/pr
Attachment

JOHN R. KROGER
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: August 16, 2011
TO: Darren Bond, Deputy Treasurer
FROM: Dee Carlson, Senior Assistant Attorney General
Tax & Finance Section
SUBJECT: Conflicts Advice: Wheeler Foundation
DOJ File No. 171001-GT0524-11

A handwritten signature in black ink, appearing to be "DC", written over the "FROM" line of the memorandum.

QUESTIONS PRESENTED

1. The Treasurer is both the statutory investment officer ("Investment Officer") for the Oregon Investment Council ("OIC") and an OIC member. In either role, does the Treasurer's assumption of the position of an unpaid director of his family's non-profit investment foundation, the Wheeler Foundation, create an actual or potential conflict of interest?
2. If no, does it make a difference that two firms that contract to provide investment services for the Wheeler Foundation directly or through an affiliate either participate in the OIC's emerging managers program or act as a manager on behalf of the OIC with respect to the OPERF equity portfolio?
3. What steps should be taken by the Treasurer in the event that his role as a public official gives rise to an actual or potential conflict of interest?

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SHORT ANSWERS

1. Not by itself, no. The mere fact that the Treasurer has the described decision-making roles with the OIC and the Wheeler Foundation would not, of itself, give rise to an actual or potential conflict of interest under Oregon law. This would be true even if the Treasurer were paid for his work as a member of the board of directors of the Wheeler Foundation or if the Wheeler Foundation were a for-profit entity. Here, mere status does not create a statutory ethics issue. For an actual or potential conflict of interest to arise, there must be some basis under which the Treasurer's actions, decisions, or recommendations in his public capacities would lead to or potentially lead to a pecuniary benefit or detriment for him, for certain relatives, or for businesses with which he or such relatives are associated. Additionally, the relevant conflict of interest statutes normally do not apply to pecuniary benefits or detriments resulting from a public official being a member in (or a member of the board of directors for) a nonprofit corporation that is tax-exempt under Section 501(c) of the Internal Revenue Code. ORS 244.020(12)(c). We understand that the Wheeler Foundation is such an entity.
2. Not normally, no. There is no *per se* conflict of interest, actual or potential, created by the Wheeler Foundation engaging firms that are the same as or affiliates of firms engaged by the OIC. Even if the Wheeler Foundation did not fall within the exemption from conflicts of interest for certain tax-exempt entities described in ORS 244.020(12)(c), there would need to be some applicable decision or other action leading to an actual or potential pecuniary benefit or detriment as described in the preceding short answer before the Treasurer would be subject to remedial action or to the relevant compliance procedures of ORS 244.040 and ORS 293.708.
3. ORS 244.120 and 293.708 provide the processes pertinent to the Treasurer in handling actual and potential conflicts of interest. In matters where action by the Treasurer in his described public roles would lead to a nonexempt private pecuniary benefit or detriment

to himself, certain family members or applicable businesses, the Treasurer should, on the record, disclose the nature of the conflict, avoid participating in the discussion on the issue, and not vote - unless his vote is required to satisfy quorum requirements (in which case, he can only vote, but not join in the discussion by the OIC on the issue). ORS 244.120(2)(b).¹ If action by the Treasurer would potentially lead to a nonexempt private pecuniary benefit or detriment as outlined above, the Treasurer should declare the potential conflict, but still would be able to (and should) participate in the OIC discussion and vote on the issue. ORS 244.12(2)(a). Under ORS 293.708, the Treasurer should, in either the case of an actual or potential conflict, provide written notice to the Chief Deputy State Treasurer within three days of becoming aware of the actual or potential conflict. Under ORS 293.708(2), the disclosure of the actual or potential conflict also should be made part of the official record of the public body. ORS 244.130. These procedures would not apply to circumstances where the pecuniary benefit or detriment that otherwise would lead to an actual or potential conflict of interest arise solely from membership in (or membership on the board of directors of) a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

STATEMENT OF FACTS

1. Investment Roles of the Treasurer.

¹ ORS 244.120(2) and(3) provide as follows:

- (2) An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:
- (a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or
 - (b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:
 - (A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.
 - (B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.
- (3) Nothing in subsection (1) or (2) of this section requires any public official to announce a conflict of interest more than once on the occasion which the matter out of which the conflict arises is discussed or debated.

The Treasurer serves as the statutory Investment Officer for the OIC. ORS 293.716. As Investment Officer, the Treasurer is tasked, *inter alia*, with investing and managing the investment of subject funds consistent with OIC policy. ORS 293.736. The Treasurer is authorized to employ sufficient personnel to assist him in this role and to provide staff support to the OIC. ORS 293.716(3)(a). The Treasurer has delegated most of these duties to personnel within the Investment Division of the Office of the State Treasurer ("OST"). OST staff operates pursuant to policies and oversight controls established by the Treasurer and is subject to his management oversight. *Id.*

The Treasurer also serves as a voting member of the OIC. ORS 293.706(4). The OIC is composed of five voting members and one nonvoting member.² Subject to the investment objective in ORS 293.721 and the standards contained in 293.726, the OIC establishes policy for and oversees the investment of certain statutorily defined "investment funds."³ ORS 293.731. The largest of those funds is the Oregon Public Employees Retirement Fund ("OPERF"). The OIC also is authorized to contract with other persons in addition to or in lieu of the Investment Officer to assist in the investment and management of the investment funds. ORS 293.748.

2. OIC Relationship with UBS GAM and Chinook.

We are informed that certain OPERF funds are managed for investment purposes under contract with the OIC by UBS Global Asset Management ("UBS GAM"), a division of UBS AG. UBS GAM is an independent contractor authorized to exercise its discretion as to the investment of assigned funds in public equities pursuant to the terms of its contract with the OIC and OIC policies. UBS GAM performance is monitored by OST staff and an independent consultant, who report separately to the OIC.

The OIC also allocates certain OPERF funds to Northern Trust for investment in public equities as part of the OIC's emerging managers program ("EMP"). Northern Trust is the EMP contract manager. As an independent contractor, Northern Trust has broad discretion over EMP

² The nonvoting member must be a member of the Public Employees Retirement Board. ORS 293.706(3).

³ The various "investment funds" are defined in ORS 293.701(2).

operations. Although the OIC allocates the funds, Northern Trust identifies and reviews EMP participants and controls the level of participation in the program by each EMP emerging manager. Chinook Capital Management, LLC ("Chinook") currently participates as one of several EMP emerging managers subject to Northern Trust's oversight.

3. The Wheeler Foundation, Treasurer, UBS FS, and Chinook.

The Treasurer recently became a member of the board of directors of the Wheeler Foundation, his family's investment foundation. This is not a paid position. The Wheeler Foundation is a blind trust. We understand that it is organized as a nonprofit corporation that is tax-exempt under Section 501(c) of the Internal Revenue Code.

The Wheeler Foundation engaged Chinook and UBS Financial Services (UBS FS) to provide investment services for the foundation prior to the Treasurer becoming a member of the Foundation's board of directors. We understand that UBS FS is an affiliate of UBS GAM and is another division of UBS AG. Although UBS FS and UBS GAM are both ultimately governed by the UBS AG executive board and board of directors, as separate divisions (Wealth Management Americas and Global Asset Management, respectively) they are headed by separate divisional CEOs. There is no connection between how much business either Chinook or UBS AG does with the OIC or with the OST and how much Chinook or UBS FS charge the Wheeler Foundation for their services. The State Treasurer receives no compensation in return for participation by either Chinook or UBS FS with the OIC, the OST or the Wheeler Foundation.

DISCUSSION

1. No Self-Dealing by Public Officials.

Fundamentally, Oregon law proscribes public officials from using or attempting to use their "official position or office to obtain financial gain or avoidance of financial detriment *** if the financial gain or avoidance of financial detriment would not otherwise be available but for

the public official's holding of the official position or office." ORS 244.040(1).⁴ In accordance with that proscription, the Oregon legislature has provided that an actual or potential conflict of interest may occur as the result of an action, decision, or recommendation of the public official that would (actual) or could (potential) "be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated." ORS 244.020(1), (12). No conflict occurs when the official is required by law to be a member of a certain business to hold the public office, when the action, decision, or recommendation would affect to the same degree a broader class of people, or (as previously noted) when the business in question is tax-exempt under Section 501(c) of the Internal Revenue Code. ORS 244.020(12).⁵

⁴ This prohibition extends to relatives of public officials and businesses with which they are associated, subject to certain exemptions. ORS 244.040(1) and (2) read as follows:

(1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

(2) Subsection (1) of this section does not apply to:

(a) Any part of an official compensation package as determined by the public body that the public official serves.
(b) The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042.

(c) Reimbursement of expenses.

(d) An unsolicited award for professional achievement.

(e) Gifts that do not exceed the limits specified in ORS 244.025 received by a public official or a relative or member of the household of the public official from a source that could reasonably be known to have a legislative or administrative interest.

(f) Gifts received by a public official or a relative or member of the household of the public official from a source that could not reasonably be known to have a legislative or administrative interest.

(g) The receipt by a public official or a relative or member of the household of the public official of any item, regardless of value, that is expressly excluded from the definition of "gift" in ORS 244.020.

(h) Contributions made to a legal expense trust fund established under ORS 244.209 for the benefit of the public official.

⁵ ORS 244.020(1) and (12) provide as follows:

(1) "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.

(12) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

The term "relative" as used in the foregoing statutes is quite broad. Essentially, it includes spouses, children, siblings, those for whom the public official has a support obligation, those receiving benefits arising from the public official's employment, and those from whom the public official receives benefits arising from their employment.⁶ The term "business" essentially refers to any legal entity operated for gain.⁷ And, the phrase "business with which the person is associated"⁸ essentially means any private business or closely held corporation in which the

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- (a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.
 - (b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged.
 - (c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

⁶ In ORS 244.020(15), the Oregon legislature defined the term "Relative" for purposes of ORS chapter 244 as follows:

(15) "Relative" means:

- (a) The spouse of the public official or candidate;
- (b) Any children of the public official or of the public official's spouse;
- (c) Any children of the candidate or of the candidate's spouse;
- (d) Siblings, spouses of siblings or parents of the public official or of the public official's spouse;
- (e) Siblings, spouses of siblings or parents of the candidate or of the candidate's spouse;
- (f) Any individual for whom the public official or candidate has a legal support obligation;
- (g) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or
- (h) Any individual from whom the candidate receives benefits arising from that individual's employment.

⁷ The definition for "business" in ORS 244.020(2) reads as follows:

(2) "Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

⁸ The definition for "business with which the person is associated" in ORS 244.020(3) reads as follows:

(3) "Business with which the person is associated" means:

- (a) Any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth \$1,000 or more at any point in the preceding calendar year;
- (b) Any publicly held corporation in which the person or the person's relative owns or has owned \$100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;
- (c) Any publicly held corporation of which the person or the person's relative is a director or officer; or

public official or a relative has a qualifying ownership interest, is an employee, officer, director or acts as an agent, or (for public officials required to file a statement of economic interest under ORS 244.050) any business listed as a source of income as required under ORS 244.060 (3).⁹ ORS 293.020(3).

2. **The Treasurer's Simultaneous Public and Private Roles Are Not a *Per Se* Violation of Oregon's Ethics Laws.**

Given the foregoing statutory scheme, an actual or potential conflict of interest does not arise out of Treasurer Wheeler's joint status as Investment Officer or OIC member and his simultaneous status as a member of the board of directors of the Wheeler Foundation. Defined conflicts only would arise out of a particular action, decision, or recommendation made by the Treasurer in his official capacities that has a prohibited special pecuniary effect on him, on a relative, or on a business with which they are associated within the meaning of applicable law. With respect to Chinook and USB AG, we understand that the Treasurer made no decision or recommendation, and took no action, with respect to either company that resulted in a pecuniary benefit or detriment for himself, any relative, or any business with which they are associated – and, in particular, not for the Wheeler Foundation. The charges from either firm to the foundation have no correlation to amounts paid to those firms or their affiliates by the OIC. The Treasurer, his relatives, and any associated businesses have not received any benefit or detriment from either firm in anticipation of or resulting from any decision, recommendation, or action by the Treasurer in his official capacities.

(d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).

⁹ ORS 244.060 reads, in relevant part, as follows:

The statement of economic interest filed under ORS 244.050 shall be on a form prescribed by the Oregon Government Ethics Commission. The public official or candidate filing the statement shall supply the information required by this section and ORS 244.090, as follows:

(3) The names, principal addresses and brief descriptions of the sources of income received during the preceding calendar year by the public official or candidate or a member of the household of the public official or candidate that produce 10 percent or more of the total annual household income.

As we understand the facts, even if a normally prohibited benefit or detriment arose due to the Treasurer's role as a member of the board of directors of the Wheeler Foundation, that would not create a potential or actual conflict of interest under Oregon law because of the exemption for certain nonprofit entities described in ORS 244.020(12)(c). It appears that the Wheeler Foundation is such an exempt entity. However, even if this were not the case (and the exemption did not apply), we are unaware of any decision, recommendation or action by the Treasurer arising from his public capacities inconsistent with the required standard of conduct described in ORS 244.040(1).

3. The Attenuated Connection Between the OIC and the Wheeler Foundation Is Unlikely to Give Rise to an Actual or Potential Conflict of Interest.

We also observe that, if the exemption in ORS 244.020(12)(c) did not apply, the connections between the Treasurer's official roles and his role as a member of the board of directors of the Wheeler Foundation are probably too attenuated to give rise to an actual or potential conflict of interest under a reasonably foreseeable fact scenario. Chinook, as part of OPERF's emerging managers program, is overseen by Northern Trust, which acts as an independent contractor. The OIC allocates funds to Northern Trust, but it does not determine who participates in the program or how much funding each EMP participant receives. Northern Trust's decisions regarding Chinook's role as an EMP participant also have no apparent correlation to Chinook's role as a money manager for the Wheeler Foundation.

Similarly, the fact that UBS GAM, an OPERF money manager, and UBS FS, a Wheeler Foundation money manager, are divisions of the same large international parent company, UBS AG, suggests no worrisome link between Treasurer Wheeler's official duties and his duties with the Wheeler Foundation. Although UBS AG ultimately controls its divisions, UBS GAM and UBS FS are separate divisions overseen by separate divisional CEOs who account for their own performance and profitability.

In both cases, the point of connection is that the OIC and the Wheeler Foundation are clients of the same money manager, not that any action, decision or recommendation made by the Treasurer should currently be in issue. And, particularly given the buffered connection that

the Treasurer has with either manager, it is highly unlikely that a decision, recommendation or action would ever come before the Treasurer that would give rise to a conflict of interest.

4. Required Action in the Event of a Conflict of Interest.

Should a circumstance ever arise that might suggest the possibility of an actual or potential conflict of interest, there are specific procedures that would be prudent for the Treasurer to follow. First, the Treasurer should provide written notice of any actual or potential conflict to the Deputy State Treasurer within three days after becoming aware of the conflict. ORS 293.708(2). An email would satisfy this requirement, but the Treasurer can choose to act more formally. Upon any such notice, the OIC should have such actual or potential conflict made part of its public record. ORS 244.130.¹⁰ The OIC also may provide the notice and the method by which the conflict was disposed to the Oregon Government Ethics Commission (the "Commission"). *Id.*

In addition to providing written notice under ORS 293.708(2), the Treasurer should publicly announce the nature of the actual or potential conflict before taking any official action. ORS 244.120(2). If the conflict of interest is potential in nature, the Treasurer should then participate in the discussion or debate on the issue that gives rise to the potential conflict and vote, if a vote is taken. *Id.* If the conflict of interest is actual, the Treasurer should then refrain from participating in any discussion or debate on the issue that gives rise to the conflict. ORS 244.120(2)(b). The Treasurer also would refrain from voting on any issue giving rise to the actual conflict of interest, unless his vote is necessary to meet a quorum requirement (in which case he could vote but not discuss or debate the issue). *Id.* This process does not appear to interfere with the requirement that the Investment Officer make monthly investment reports to the OIC. ORS 293.766.

¹⁰ ORS 244.130(1) reads as follows:

(1) When a public official gives notice of an actual or potential conflict of interest, the public body as defined in ORS 174.109 that the public official serves shall record the actual or potential conflict in the official records of the public body. In addition, a notice of the actual or potential conflict and how it was disposed of may in the discretion of the public body be provided to the Oregon Government Ethics Commission within a reasonable period of time.

5. Role of the Oregon Government Ethics Commission.

We caution to add that the Commission has statutory jurisdiction over the determination of ethical violations and the initial application of ORS chapter 244. *E.g.*, ORS 244.260.¹¹ While this memorandum examines pertinent ethics statutes and how they apply in this described situation, this advice is neither binding on the Commission nor does it necessarily create a good faith defense in any proceeding before that body. Furthermore, this office is precluded from representing public officials accused of an ethics violation before the Commission. ORS 244.250(8).

Please consider consulting the Commission for a preliminary ruling regarding the application of the ethics statutes to any prospective circumstances. The Commission offers three types of preliminary advice regarding application of the ethics statutes to hypothetical circumstances or potential transactions: Commission opinions, staff advisory opinions, and staff advice. ORS 244.280; 244.282; 244.284. The Commission may issue written advisory opinions on the application of any provision of ORS chapter 244 to any proposed transaction or action or any actual or hypothetical circumstance. ORS 244.280(1). Unless the advisory opinion is revised or revoked, the Commission may not impose a penalty under ORS 244.350 or 244.360 on a person for any good faith action the person takes in reliance on the advisory opinion. ORS 244.289(3). The Commission may, however, impose a penalty if the Commission determines that the person requesting the opinion omitted or misstated material facts in making the request. *Id.*

A staff advisory opinion is a written opinion issued by the executive director of the Commission in response to a written request. ORS 244.282(1). A staff advisory opinion typically requires less time than a Commission opinion. Unless the opinion is revised or revoked, the Commission can only issue a written letter of reprimand, explanation, or education

¹¹ Any person may file a written complaint with the Commission alleging a violation under ORS chapter 244. After a preliminary review of a potential ethics violation, the Commission decides whether to conduct an investigation. ORS 244.260(3), (4)(d). The investigation ends when the Commission decides to dismiss the complaint, issue a settlement order, commence further proceedings, or take other appropriate action. ORS 244.260(6)(a). For more detail regarding Commission procedures, see generally ORS 244.260.

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for good faith reliance on a staff advisory opinion. ORS 244.282(3)(a). Again, however, the Commission may impose a penalty if the Commission determines that the person requesting the staff advisory opinion omitted or misstated material facts in making the request. ORS 244.282(3)(b).

Staff advice is less formal written or oral advice given by the executive director or other staff member in response to a written or oral request for advice. ORS 244.284(1). The Commission may consider reliance on staff advice as a mitigating factor before determining whether or not to impose a penalty. ORS 244.284(2). The Commission is not otherwise limited in its disciplinary discretion.