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TO: Trent Bushner

FROM: Ken Fellman, Esq.
Gabrielle Daley, Esq.

RE: Ethics/Conflicts of Interest Policy Requirements for Colorado SOMB

DATE: February 26, 2019

You have asked us to research the requirements an ethics/conflict of interest policy issues for Commissioners of the Sex Offender Management Board (“SOMB”).

While some establishing statutes contain specific ethics/conflicts requirements for various state boards and commissions, C.R.S. §16-11.8-103, the statute that created the SOMB, does not. However, there is a general ethical code pertaining to state government employees including all state boards and commissions contained at §24-18-101 through 24-18-113. Section 24-18-108.5 contains the rule of conduct for members of boards and commissions:

§24-18-108.5. Rules of conduct for members of boards and commissions

- (1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.
- (2) A member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses shall not perform an official act which may have a direct economic benefit on a business or other undertaking in which such member has a direct or substantial financial interest.

Last year HB 1198, “best practices for state boards and commissions” was signed into law. The statutory provision it created is C.R.S. §24-3.7-102. This statute was the basis for the Governor’s veto of the bill pertaining specifically to the SOMB. Section 102 requires both annual training and the implementation of polices to (among other things) identify and manage conflicts of interest. §24-3.7-102(1)(d).

Other boards with statutory conflict of interest provisions are subject to a range of requirements. Some take a conservative approach and require abstention from even the appearance of a conflict. Others allow voting so long as the conflict is properly disclosed.

These are the kind of requirements that we observed in our survey of Colorado statutory provisions on ethics requirements for boards and commissions. Note that not all of the items listed appear in the conflict of interest requirements for all boards and commissions – these are simply examples of what we found to be required in some cases:

- Disclosure of conflict
- Abstention from voting
- Abstention from attempting to influence the votes of any other member

- Abstention from all proceedings
- Avoidance of actual conflicts
- Avoidance of appearance of conflicts

The Colorado Secretary of State website has a portal for filing conflict of interest statements. C.R.S. §24-18-110, provides that such disclosure is an affirmative defense to any civil or criminal action or any other sanction relating to a conflict of interest.

The statutes implicated by such disclosure are listed below. The second two bullet points are listed because they are implicated by the Secretary of State filing issue, but they do not apply to SOMB members.

- C.R.S. §18-8-308: failure to disclose a conflict of interest as a class 2 misdemeanor.
- C.R.S. §24-18-109(3)(a)&(3)(b): requires disclosure of conflict by a local government official; prevents a local government official from voting on such matters or attempting to influence the decisions of other member's votes; and permits local government officials to vote even in the case of a conflict of interest if necessary for a quorum if disclosure under 24-18-110 is completed.
- C.R.S. §32-1-902(3)(b): provides that the directors of boards of special districts must disqualify themselves from voting on any issue with a conflict of interest unless disclosed.

We additionally found several examples of conflict of interest policies adopted by Colorado Boards/Commissions (attached): 1) Colorado Independent Ethics Commission Conflict of Interest Policy; 2) Colorado Aeronautical Board, at 22-24; 3) Commission on Affordable Health Care Conflicts of Interest Policy. Of these three policies, CAHC is the most contemporary. We used it as the starting point for drafting a comprehensive policy incorporating elements of the other two policies and ensuring that the policy is up to date with the new law passed in 2018. This draft ethics policy for the SOMB is attached for your review.

Please let us know if this memorandum generates any questions or concerns.