



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

September 29, 1998

Jim Ryan

ATTORNEY GENERAL

FILE NO. 98-021

GOVERNMENTAL ETHICS AND
CONFLICT OF INTEREST:
Participation of an Illinois
Commerce Commission Commissioner
or Employee in the State Employees'
Deferred Compensation Plan

Mr. Charles E. Fisher
Executive Director
Illinois Commerce Commission
Post Office Box 19280
Springfield, Illinois 62794-9280

Dear Mr. Fisher:

I have your letter wherein you inquire: (1) whether it would constitute a violation of section 2-102 of the Public Utilities Act (220 ILCS 5/2-102 (West 1996)) for a commissioner or an employee of the Illinois Commerce Commission to participate in the State Employees' Deferred Compensation Plan if the assets of the fund or funds which he or she designates for investment include stocks or bonds issued by utilities which the Commission regulates; and (2) whether the spouse, children or parents of a commissioner or an employee of the Illinois Commerce Commission may invest in stocks and bonds of corporations which are subject to regulation by the Illinois Commerce Commission without creat-

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ing a violation of section 2-102 of the Act. For the reasons hereinafter stated, it is my opinion that a commissioner or an employee of the Illinois Commerce Commission may designate investment in a mutual fund which is a part of the State Employees' Deferred Compensation Plan without violating section 2-102 of the Public Utilities Act, even if the assets of the fund include obligations of regulated utilities. Further, it is my opinion that it is not a per se violation of section 2-102 of the Public Utilities Act for the spouse, children or parents of an Illinois Commerce Commission commissioner or employee to own stocks or bonds in a corporation which is subject to regulation by the Commission.

With respect to your first question, article 24 of the Illinois Pension Code (40 ILCS 5/24-101 et seq. (West 1996)) authorizes the creation of a deferred compensation program for the officers and employees of the State of Illinois. Pursuant to this grant of authority, the Illinois State Board of Investment has developed and established the State Employees' Deferred Compensation Plan, a long-term savings program pursuant to which State officers and employees are allowed to designate a portion of their salary or other State compensation to be withheld by the State and invested at the discretion of, and in a manner approved by, the State Board of Investment. (40 ILCS 5/24-104 and 24-105 (West 1996).)

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As provided in article 24 of the Pension Code, State employee deferred compensation funds may be invested in life insurance, annuity contracts, mutual funds and such other investments as are deemed acceptable by the Illinois State Board of Investment. (40 ILCS 5/24-105 (West 1996).) The State Board of Investment currently offers ten investment options: Vanguard Money Market Reserves Prime Portfolio - Institutional Shares; Stable Return Fund; T. Rowe Price New Income Fund; Vanguard Bond Index Fund Total Bond Market Portfolio; Fidelity Puritan Fund; Vanguard Institutional Fund; Fidelity Fund; Acorn Fund; Ariel Growth Fund; and T. Rowe Price International Stock Fund.

To illustrate the situation which gives rise to your inquiry, I will focus on the Acorn Fund, a no-load stock mutual fund which invests in small, rapidly growing companies in both the United States and foreign markets. As a stock mutual fund, the Acorn Fund pools money from State employee investors to buy shares of common stock of numerous smaller companies and to invest in securities that are convertible into common stock. A professional money manager is responsible for investing the Acorn Fund's assets for its shareholders. State shareholders have no control over the Fund manager's timing or selection decisions in buying or selling stocks or securities. Dividends, interest and capital gains provided by Fund-owned securities are not distributed directly to shareholders, but rather are reinvested in the shareholders' accounts.

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You have noted that in 1987, the Acorn Fund owned "7,000 shares of securities * * * of Central Illinois Public Service Company, a corporation regulated by the [Illinois Commerce] Commission." You have inquired whether section 2-102 of the Public Utilities Act prohibits a commissioner or an employee of the Illinois Commerce Commission from owning shares in one of the State Employees' Deferred Compensation Plan's mutual funds, such as the Acorn Fund, if the fund has an interest in the securities of one or more corporations which are subject to regulation by the Illinois Commerce Commission.

Section 2-102 of the Public Utilities Act provides, in pertinent part:

" * * *

(b) No person in the employ of or holding any official relation to any corporation or person subject in whole or in part to regulation by the Commission, and no person holding stock or bonds in any such corporation, or who is in any other manner pecuniarily interested therein, directly or indirectly, shall be appointed to or hold the office of commissioner or be appointed or employed by the Commission; and if any such person shall voluntarily become so interested his office or employment shall ipso facto become vacant. If any person become so interested otherwise than voluntarily he shall within a reasonable time divest himself of such interest, and if he fails to do so his office or employment shall become vacant.

* * *

(Emphasis added.)

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The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. (Kunkel v. Walton (1997), 179 Ill. 2d 519, 533.) Legislative intent is best evidenced by the language used in the statute. (Burrell v. Southern Truss (1997), 176 Ill. 2d 171, 174.) Where statutory language is clear and unambiguous, it must be given effect as written. City of Chicago v. Morales (1997), 177 Ill. 2d 440, 448, cert. granted 118 S. Ct. 1510 (1998).

Under the language quoted above, neither a commissioner nor an employee of the Illinois Commerce Commission is permitted to own stocks or bonds of a corporation which is subject to regulation by the Commission. Similarly, no commissioner or employee of the Illinois Commerce Commission may have any other direct or indirect financial interest in a corporation which is subject to regulation by the Commission. Therefore, in resolving your inquiry, it is necessary to determine the extent of the interest that a State officer or employee has in a mutual fund which is a part of the State Employees' Deferred Compensation Plan.

The Illinois State Board of Investment has promulgated rules for administering the State Employees' Deferred Compensation Plan (80 Ill. Adm. Code 2700.100 et seq. (1998)), section 2700.660 of which (80 Ill. Adm. Code 2700.660 (1998)) currently provides:

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"a) As required by the Internal Revenue Code, Section 457 [26 U.S.C. § 457 (b) (6)], title to, and beneficial ownership of, any assets, whether in cash or investments, which the State of Illinois may earmark to pay or measure any Deferred Compensation under this Plan, shall, at all times, remain as part of the general assets of the State of Illinois.

b) The Participant and his or her beneficiary shall not have any property interest whatsoever in any specific asset of the State of Illinois on account of his or her election to defer any Compensation under this Plan.

c) To the extent that any person acquires a right to receive payments from the State of Illinois under the terms of this Plan, such right shall be no greater than the right of any unsecured general creditor of the State of Illinois." (Emphasis added.)

Under the language of section 2700.660 and the applicable Federal provisions, title to any assets of the State Employees' Deferred Compensation Plan is vested in the State of Illinois. Therefore, participants in the State Employees' Deferred Compensation Plan who are shareholders in one of the Plan's mutual funds do not own the stocks or bonds in those corporations in which their mutual fund's manager has chosen to invest. Moreover, because the participants do not have a property interest in the mutual fund's investments, they do not possess a direct or indirect pecuniary interest in the fund's holdings. At most, the participants in the State Employees' Deferred Compensation Plan possess an expectation of a future payment from the State of Illinois. Consequently, it is my opinion that a commissioner or an employee of the Illinois Commerce Commission may

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direct the investment of deferred compensation in a mutual fund which is a part of the State Employees' Deferred Compensation Plan, the assets of which include stocks or bonds issued by regulated utilities, without violating section 2-102 of the Public Utilities Act.

Moreover, even assuming that the participants in the State Employees' Deferred Compensation Plan possess more than a mere expectation of a future payment and, thereby, an indirect interest in the mutual fund, I do not believe that a violation of section 2-102 of the Public Utilities Act would result in these circumstances. You have indicated that "the [Acorn Fund's] first quarter report for 1987 showed the value of the [Fund's] investment in the utility to be \$1,776,250, total investments in common stocks and other equity-like securities to be \$460,653,569, and total net assets in the fund to be \$516,053,327". If this information is correct, then the value of the utility's securities represented substantially less than 1% of the total value of the Acorn Fund. In opinion No.S-787, issued July 18, 1974 (1974 Ill. Att'y Gen. Op. 201), Attorney General Scott noted that while the facts may indicate that a public officer possesses an indirect pecuniary interest in a contract, that interest might be so minimal as to permit the interest to be disregarded. In the current circumstances and assuming no significant increase in the ownership of utility securities, the value of those securities owned by the Acorn Fund, when compared to the total value of the

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Fund, is de minimis. Therefore, the likelihood that the official actions of an Illinois Commerce Commission commissioner or employee could affect the return on the investments of the Acorn Fund or some other mutual fund is virtually nonexistent, and the interest, if it exists at all, may be disregarded.

I must further note, however, that the conclusions I have expressed are based upon current Illinois and Federal law. Under Federal requirements that must be satisfied by January 1, 1999, all assets and income of state and local government deferred compensation plans will be required to be held in trust, or in qualifying custodial accounts or annuity contracts, for the exclusive benefit of plan participants and beneficiaries. (26 U.S.C. §457(g).) It is my understanding that the State of Illinois is currently in the process of creating a custodial account to which ownership of all deferred compensation assets and income will be transferred, but that the current distribution requirements will remain in effect. If this is correct, then there will be no significant change in the position of the beneficiaries of the deferred compensation plan. Therefore, the conclusions I have reached will also be applicable to the revised deferred compensation program. If, however, a different system is developed to satisfy the Federal requirements, it may be necessary to reexamine this issue in the future.

You have also inquired whether section 2-102 of the Public Utilities Act prohibits the spouse, children or parents of

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a commissioner or an employee of the Illinois Commerce Commission from investing in stocks and bonds of a corporation which is subject to regulation by the Commission. As noted above, section 2-102 of the Public Utilities Act prohibits a person "who is in any * * * manner pecuniarily interested * * * directly or indirectly * * *" in any corporation subject to regulation by the Illinois Commerce Commission from holding the office of commissioner or from being employed by the Commission. Clearly, the interest that a commissioner or employee of the Commission would possess in the stocks or bonds owned by other family members is not a direct pecuniary interest in a corporation. Therefore, it must be determined whether stock and bond ownership in these circumstances constitutes an indirect pecuniary interest in a corporation which is prohibited by section 2-102 of the Public Utilities Act.

The pertinent provisions of section 2-102 of the Public Utilities Act have not been construed judicially. It is well established, however, that statutes on similar subjects may be utilized as an aid to the construction of a statutory provision. (In re Application for Judgment and Sale of Delinquent Tax Properties for the Tax Year 1989 (1995), 167 Ill. 2d 161, 168.) Therefore, the meaning of its terms may be gathered from the provisions of the State's other conflict of interest statutes and the construction accorded thereto.

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Section 3 of the Public Officer Prohibited Activities Act (50 ILCS 105/3 (West 1997), as amended by Public Act 90-655, effective July 1, 1998) generally prohibits a public officer from having any financial interest in any contract or work in the making or letting of which he or she may be called upon to act or vote:

"(a) No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested, directly in his own name or indirectly in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * *

* * *

(Emphasis added.)

In People v. Simpkins (1977), 45 Ill. App. 3d 202, it was held that it was not a per se violation of section 3 of the Public Officers Prohibited Activities Act for the spouse of a member of the corporate authorities of a public body to be employed by the entity which the officeholder serves. In reaching this conclusion, the court stated:

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* * *

* * * We interpret 'indirect interest' to refer to the interest of the official, such as ownership of stock or a beneficial interest in a trust, not the individual interest of another to whom the official is related. The language is intended to prevent

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imaginative schemes by which an official
might veil his interest from public view.

* * *

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(Emphasis added.) People v. Simpkins
(1977), 45 Ill. App. 3d at 208-9.

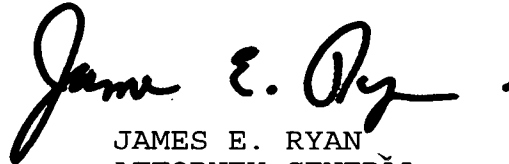
Under the reasoning of this case, if the pertinent facts demonstrate that an officer has an actual interest in a contract entered into by another person with the entity which the officer represents, a violation of section 3 of the Public Officer Prohibited Activities Act will occur. No such interest will be presumed, however, based solely upon the existence of a familial relationship.

Applying this reasoning to your question, if the facts demonstrate that an Illinois Commerce Commission commissioner or employee has an actual interest in stocks or bonds owned by another person which were issued by a corporation regulated by the Commerce Commission, then a violation of section 2-102 of the Public Utilities Act will occur. No such interest will be presumed, however, based solely upon the existence of a familial relationship. Therefore, it is my opinion that section 2-102 of the Public Utilities Act is not violated merely because the spouse, children or parents of a commissioner for, or an employee

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of, the Illinois Commerce Commission owns stocks or bonds in a corporation which is subject to regulation by the Commission.

Sincerely,

A handwritten signature in cursive script that reads "James E. Ryan". The signature is written in black ink and includes a period at the end.

JAMES E. RYAN
ATTORNEY GENERAL