

ADVISORY OPINION

APPROVAL DATE: May 20, 1996

NUMBER: 96-09

STATUS: **Current**

REVIEWED: May 5, 2021

NEXT REVIEW: May 2026

REFERENCES: RCW 42.52.030, RCW 42.52.040,
RCW 42.52.180, RCW 42.52.903

SUMMARY OF CHANGES: No changes.

Disclosure Requirements for Boards and Commissions

QUESTION

Can a state board whose members are required by statute to be appointed from identified groups adopt rules that require members to disclose their interests and abstain from voting on certain matters as a way of addressing ethical prohibitions in the law?

ANSWER

Yes. Statutes establishing state boards and commissions frequently require members to be appointed from identified groups or interests. However, some requirements in chapter 42.52 RCW would effectively prevent some identified individuals from serving. RCW 42.52.903 provides that nothing in chapter 42.52 RCW shall prevent such persons from serving. Accordingly, such boards and commissions may adopt rules to require members to disclose their interests and abstain from voting or attempting to influence votes on certain matters as a way of addressing the ethical restrictions in the statute.

ANALYSIS

The Board has been asked to review rules proposed by the Housing Finance Commission to address the application of chapter 42.52 RCW to the Commission's activities. The Housing Finance Commission (the Commission) is governed by RCW 43.180. The Commission was established by the Legislature as an instrumentality of the state with authority to issue bonds. RCW 43.180.040. The purpose of the Commission is to act as a financial conduit to issue non-recourse revenue bonds

and use the funds to help provide affordable housing throughout the state. RCW 43.180.010. This activity necessarily requires the Commission to enter into contracts with banks, savings and loan associations, bond underwriters, and other financial institutions.

The Commission consists of three ex-officio members, a representative of housing consumer interests, a representative of labor interests, a representative of low-income persons, and:

[f]ive members of the public appointed . . . on the basis of geographic distribution and their expertise in housing, real estate, finance, energy efficiency, or construction.

...

RCW 43.180.040(g) (emphasis added). Members of the Commission are not full-time state officers or employees and are compensated in accordance with RCW 43.03.240. They may be reimbursed for expenses subject to RCW 43.03.050-.060.

As a result of the requirement in RCW 43.180.040(g) that some members have expertise in housing, real estate, and finance, it is possible that some members of the Commission may also work for financial institutions which may seek to contract with the Commission. This raises two potential ethics issues. First, it may involve RCW 42.52.030, which deals with financial interest in transactions. RCW 42.52.030 provides:

(1) No state officer or state employee may be beneficially interested, directly or indirectly, in a contract, sale, lease, purchase, or grant that may be made by, through, or is under the supervision of the officer or employee, in whole or in part, or accept, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in the contract, sale, lease, purchase, or grant.

(2) No state officer or state employee may participate in a transaction involving the state in his or her official capacity with a person of which the officer or employee is an officer, agent, employee, or member, on in which the officer or employee owns a beneficial interest...

There are two potential issues under RCW 42.52.030. While an employee of a financial institution is probably not "beneficially interested" in a contract between the institution and the Commission, the second part of RCW 42.52.030(1), which prohibits a state officer or employee from accepting "any compensation . . . from any other person beneficially interested in the contract", may apply. Presumably, the officer or employee's employer—that is the financial institution—is beneficially interested in a contract with the Commission. The second issue is raised in RCW 42.52.030(2), which provides that an officer may not participate in a transaction involving the state with a person of which the officer or employee is an employee. Again, in this case, the member of the Commission may be participating in a transaction involving the state with the financial institution which employs the member.

The second statute involved is RCW 42.52.040, which deals with assisting persons in transactions involving the state. RCW 42.52.040 prohibits an officer or employee from assisting a person in a

transaction involving the state in which the officer or employee has at any time participated or if the transaction has been under his or her official supervision within a period of two years preceding such assistance. RCW 42.52.040(1)(a)(b). RCW 42.52.040(2) also prohibits a state officer or employee from sharing in compensation received by another for assistance that the officer or employee is prohibited from providing.

The Commission has recognized that these ethics requirements apply to its members and that they may effectively limit individuals appointed to the Commission from fulfilling their official duties. In an effort to address this problem the Commission has proposed the following rule:

PROPOSED—WAC 262-02-030 Rules of Conduct. (1) Activities Incompatible with Public Duties; Financial Interests in Transactions. No commissioner or commission employee may be beneficially interested, directly or indirectly, in a contract, sale, lease, purchase, or grant that may be made by, through, or is under the supervision of the commissioner or commission employee, in whole or in part, or accept, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in such contract, sale, lease, purchase or grant.

No commissioner or commission employee may participate, in his or her official capacity, in a transaction involving the state with a partnership, association, corporation, firm or other entity of which the commissioner or commission employee is an officer, agent, employee or member, or in which the commissioner or commission employee owns a beneficial interest.

A commissioner may participate in a general discussion with respect to a method or system of financing for housing or nonprofit facilities which could benefit an industry or interest group which includes an entity of which the commissioner is an officer, agent, employee or member or in which the commissioner owns a beneficial interest; provided, that such commissioner shall announce or otherwise make known such involvement at the time of such discussion. A commissioner shall abstain from any vote taken by the Commission to approve a transaction involving the commission with any entity with which the commissioner is so involved, and if a commissioner abstains from voting because of such involvement such commissioner shall announce for the record his or her reason for his or her abstention.

The commission may contract with a partnership, association, corporation, firm or other entity of which the commissioner is an officer, agent, employee or member or in which the commissioner owns a beneficial interest so long as each commissioner so involved with such entity abstains from voting and the reason for such abstention is announced for the record at the time of such vote.

Example 1. A commissioner serves as an officer and member of the board of directors of a savings and loan company. The commission is considering a program involving the issuance of bonds to provide for the acquisition of mortgage

loans originated by mortgage lenders across the state. The commissioner may participate in a general discussion of the commission's program for financing mortgage loans and the commission may enter into a contract for the origination and sale of mortgage loans with the savings and loan company on whose board the commissioner sits; provided, that (a) at the time of the discussion, the commissioner informs the other commissioners of his involvement with the savings and loan company, (b) the commissioner abstains from any vote approving any contract between the commission and the savings and loan company, and (c) at the time of such vote, the commissioner explains the reason for his abstention.

Example 2. A commissioner and a commission employee serve without compensation on a housing advisory committee established by the Federal National Mortgage Association. The commissioner and the commission employee may participate fully in the consideration and approval of contracts between the Federal National Mortgage Association and the commission for the purchase and sale of commission bonds and for the credit enhancement of single-family and multifamily mortgages, because neither the commissioner nor the commission employee has any direct or indirect interest in the Federal National Mortgage Association as a member of an advisory committee and their participation in discussions and approval of such arrangements is in the public interest.

This rule addresses the ethical problems by requiring members to disclose their interests and abstain from voting on certain matters. The question is whether the application of such a rule will satisfy the requirements of RCW 42.52.

In most cases, the answer is no. For example, an employee of a state agency could not simply disclose his or her interest to avoid the prohibition in RCW 42.52.030(2) against accepting compensation from a person beneficially interested in a contract made under the employee's supervision.

However, the composition of boards and commissions is unique in that state statutes often require members to be appointed from certain groups or represent certain interests. In recognition of this fact, the Legislature adopted RCW 42.52.903 which provides:

Nothing in this chapter shall be interpreted to prevent a member of a board, committee, advisory commission, or other body required or permitted by statute to be appointed from any identifiable group or interest, from serving on such body in accordance with the intent of the legislature in establishing such body.

RCW 42.52.903 recognizes the potential difficulty when the Legislature requires a board or commission to include members from identifiable groups or interests. In this case, RCW 43.180.040(2)(g) requires appointment to the commission from identifiable interests including individuals with expertise in housing, real estate, finance, energy efficiency, or construction.

The Board concludes that the prohibitions in chapter 42.52 RCW must be read in conjunction with the exception in RCW 42.52.903. Therefore, the Board approves the approach taken by the commission with the following additional suggestion. The proposed rule requires disclosure and abstention from voting. The Board suggests the rule also include a prohibition against members attempting to influence other members from casting votes that would benefit the abstaining member's employer. The Board will distinguish such influence, which should be prohibited, from using one's general expertise to influence other members with regard to the general kinds of transactions the commission engages in.

The rule proposed by the commission represents an exception to the general application of chapter 42.52 RCW. Such exceptions are only authorized if the board or commission involved adopts a specific rule and such proposed rule should be provided to the Board for its review.