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## MEMORANDUM

DATE: July 28, 2015

FOR PUBLIC RELEASE PURSUANT TO 1 CMC § 8561(j)

FROM: George Hasselback, Legal Counsel  
CNMI Office of the Public Auditor

Signature:  Date: 7/28/2015

REVIEWED BY: Michael Pai, Public Auditor  
CNMI Office of the Public Auditor

Signature:  Date: 9/8/15

**Subject: Government Ethics Code Advisory Opinion 2015-03**

On June 18, 2015, the CNMI Office of the Public Auditor (“OPA”) received a request for an advisory opinion as to whether a particular set of facts would constitute a violation of the CNMI Government Ethics Code Act of 1992 (“the Ethics Act”). OPA is empowered to offer advisory opinions by statute.<sup>1</sup> This particular request included a copy of a letter (“the letter”) addressed to both OPA and the attorney for a regulatory agency of the CNMI government (“the CNMI agency”). The letter was written by an attorney retained by a locally-operated business (“the CNMI business”) and contained a factual background and several opinions rendered by this attorney regarding actions taken by employees of the CNMI business. The letter contained a request by this attorney for a review of the opinions provided and asked for OPA’s concurrence as to the conclusions these opinions reached. This advisory opinion will address those legal conclusions in turn.

The situation presented involves two former employees of the CNMI agency (“the former employees”) who recently left governmental service for jobs in the private sector, specifically with the CNMI business.<sup>2</sup> According to the information contained in the letter, the former employees were directly involved in the regulatory process of the CNMI agency during their employ. More specifically, both of the former employees were directly involved with regulatory projects in which the CNMI business advised (and, in some cases, continues to advise) applicants seeking regulatory permits from the CNMI agency.

<sup>1</sup> 1 CMC § 8561(j)

<sup>2</sup> Given that OPA is authorized to “render advisory opinions...based upon a real or hypothetical set of circumstances,” the facts as provided by the requesting party and the CNMI agency have been assumed to be true for the purposes of rendering this opinion. No independent investigation into the veracity of the facts presented has been undertaken.

Specifically, the letter explained that the former employees and their current employer (the owner of the CNMI business) “wanted to avoid even the appearance of impropriety” and hoped “to clarify what may be permissible under the” Ethics Act. In speaking with the attorney for the CNMI agency, it was determined that the letter was a direct result of concerns voiced by the CNMI agency that the former employees were participating directly in proceedings before it in which they had participated as CNMI employees.

The letter continued to provide legal opinions to the CNMI business, seeking concurrence as to each from OPA. These opinions will be addressed individual and in-turn.

1 CMC § 8543 contains strict prohibitions regarding the extent to which former CNMI government employees may participate in proceedings with which they were involved when they were employed with the CNMI government. It states that:

No former public official or public employee shall assist or represent any person other than the Commonwealth in any judicial, legislative, or administrative proceeding involving the Commonwealth or any of its agencies, if the official or employee participated personally and substantially in the proceeding during his term of public office or public employment.

The letter recognizes that the former employees “participated personally” in several ongoing proceedings that are pending before the CNMI agency. It does opine, however, that the former employees had not “participated...substantially,” in these proceedings as their involvement was confined to “pre-application meetings, and early review of permit applications.” Thus, the letter concludes, the former employees would not be prohibited from “providing assistance in preparing future applications for other permits for those same clients on that same project.”

The Ethics Act does not provide a definition of “substantially” in order to determine whether or not a former CNMI employee “participated substantially” in a proceeding.<sup>3</sup> Furthermore, a review of relevant CNMI case law does not reveal any judicial opinion that clarifies what constitutes “substantial participation” in this context. However, considering the strong language contained in the “Findings and Purpose” section of the Ethics Act (1 CMC § 8502), it is clear that the Ethics Act is intended, as the letter states, to prevent “even the appearance of impropriety” and that its prohibitions should be strictly construed to meet that goal.

In speaking with the attorney for the CNMI agency, the role of the former employees in the questioned proceedings was clarified. While it was made clear that they may not have participated in the entirety of the proceedings before the CNMI agency, they did, however, take an active role in the advancement of the permitting applications in question. Given that the routing and scrutiny of such applications is, by the regulation of the CNMI agency, necessarily the function of multiple layers of CNMI employees and officials, considering such employees’ participation as “not substantial” merely because their participation occurred only during the preliminary stages of the permit application is incorrect. “Substantial participation,” (for the purposes of § 8543) can constitute

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<sup>3</sup> 1 CMC § 8501 *et seq.*

participation that is confined to preliminary matters if that participation includes actual decision-making authority over any stage of the process, as opposed to strictly ministerial functions that include no decision-making authority. Put another way, once a CNMI government official or employee has been involved with a project as a function of their position in a capacity that does, or potentially could, ultimately influence the outcome of the regulatory/enforcement process of that agency, such participation is “substantial” and that former employee would be prohibited from “assisting or representing” any entity (other than the Commonwealth) in that proceeding at any future stage of the proceeding.

Here, since the former employees participated in proceedings before the CNMI agency in which their participation did, or could have, affected the outcome of those proceedings, they are permanently barred from further participation in those proceedings.<sup>4</sup> It must also be made clear that this bar applies not only to the appearance of the former employees at these proceedings in a representative capacity, but also any other work on such proceedings that could be considered “assistance” to any entity other than the Commonwealth in such proceedings. Given that the penalties associated with violations of the Ethics Act are not only confined to criminal penalties for the violators, but that any permits issued in violation of the Ethics Act are “invalid and without any force or effect whatsoever,”<sup>5</sup> the greatest caution should be exercised to prevent any participation of the former employees with any aspect of the proceedings in which they participated while employed by the CNMI agency.

The letter further opines that “[i]n terms of existing permits on which [the former employees] had substantially participated, it seems open to question, as to whether [the former employees] can offer advise [sic] to the clients in order to ensure future compliance with those permits.” This opinion is clarified when the letter attempts to draw a distinction between advice and representation by the former employees that is adversarial to the CNMI agency (that would, in the letter’s opinion, violate § 8543) and advice and representation that is non-adversarial (which would not). The letter concludes with the opinion that as long as the former employees are only providing advice and representation that is non-adversarial, they can continue to do so even if they have “personally and substantially” participated in the same proceeding.

The Ethics Act makes no distinction between advice and representation provided by former employees of the Commonwealth in adversarial and non-adversarial proceedings. 1 § 8543 prohibits any and all advice and representation. Given that there is no mention of an “exception” to the general prohibition contained in § 8543, the letter provides no authority for such an exception and the Ethics Act is intended to prohibit any activity that could raise the specter of impropriety in government dealings, OPA cannot agree that any such exception exists. In short, it is irrelevant whether or not the entity to which a former government employee provides advice and representation is in an

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<sup>4</sup> Given the strict nature of the prohibitions in § 8543, “advice and representation” would not only include appearances at formal meetings with representatives of the CNMI agency by the former employees. Rather, the former employees would be prohibited from any active participation in the proceedings to include, among others, contact with CNMI agency employees regarding the proceedings, rendering advice to clients regarding the proceedings (either formally or informally) or assistance with assembling and filing of application materials.

<sup>5</sup> 1 CMC § 8573.

adversarial or non-adversarial relationship with the agency administering the proceeding in which that former employee participated.

Any advice or representation provided by the former employees concerning proceedings in which they personally and substantially participated would violate the Ethics Act, regardless if their intentions were to "ensure that [the CNMI business's] relation with [the CNMI agency] never becomes adversarial." Such action is strictly prohibited by the Ethics Act regardless of the relative degree of cooperation (either existing or anticipated) as between the CNMI business and its clients and the CNMI agency.

The letter also opines that large projects for which multiple permits are required from the CNMI agency can be severed into discrete portions that would allow future participation by the former employees in subsequent rounds of permitting. It reaches the conclusion that the former employees may render advice and representation for clients of the CNMI business as they seek future permits "necessary for the same project" without offending the Ethics Act. Given that such subsequent permitting only becomes necessary when the previous permitting has already been completed and that such subsequent permitting on the "same project" will likely depend upon significant repetition of information and analysis (as from the initial permitting), this conclusion cannot be supported by this opinion. The conclusion reached above regarding "substantial participation" would also apply to subsequent phases of a given project. Once a CNMI government official or employee has been involved with a project as a function of their position in a capacity that does, or potentially could, ultimately influence the outcome of the regulatory/enforcement process of that agency, such participation is "substantial" and that former employee would be prohibited from "assisting or representing" any entity (other than the Commonwealth) in that proceeding at any future stage of the proceeding.

Here, if the former employees render advice or assistance to anyone other than the Commonwealth at later stages of permitting on a project that they personally and substantially participated in an earlier stage of permitting, it would violate the restrictions of § 8543.

Finally, since it is the intention of this opinion to prevent any inadvertent violations of the Ethics Act, it must be noted that the CNMI business is a professional services firm and, without adequate safeguards in place, the prohibitions to which the former employees are bound may be imputed to the firm as a whole. Put another way, other firm employees cannot simply act as "proxies" for the actions of the former employees, as this would still constitute "advice or representation" on the part of the former employees that would be barred by the Ethics Act. OPA cannot opine on what steps, if any, would be necessary to prevent this, but would caution that restrictions placed upon former CNMI employees by the Ethics Act may have serious consequences for their subsequent, private-sector employers should such matters be left unresolved.