



# STATE OF CONNECTICUT

## OFFICE OF STATE ETHICS

### Advisory Opinion No. 2017-1

January 19, 2017

**Question Presented:**      **The petitioner asks whether, and under what circumstances, she may take official action as Chair of the Public Utilities Regulatory Authority on matters that may affect the financial interests of her husband, who is employed as the Vice President of Commercial, Industrial, and Institutional Programs for the Connecticut Green Bank, a quasi-public agency.**

**Brief Answer:**              **The petitioner may take official action on such matters provided (1) that she prepares and files a written conflict statement under General Statutes § 1-86 (a), or (2) that the proposed mitigation mechanism has been set in place at, and is adhered to by, the Connecticut Green Bank.**

At its December 2016 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Katherine S. Dykes, Chair of the Connecticut Public Utilities Regulatory Authority. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (Code).

### **Background**

In her petition for an advisory opinion, the petitioner sets forth the following facts:

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I was nominated by Governor Malloy on October 27, 2016 to serve as a Commissioner of the Public Utility Regulatory Authority (PURA), subject to confirmation by the Connecticut General Assembly when it comes back in session in 2017. As one of three PURA utility commissioners, I decide various matters brought before PURA with respect to electricity, natural gas, water and some aspects of telecommunications. The Commissioners of PURA hear and decide matters related to public service companies, including rate cases, bond issuances, mergers, and tariff changes. I also serve as the Chair of PURA and am responsible for the organization and management of PURA. See General Statutes § 16-2(f).

As a PURA Commissioner . . . I am seeking guidance as to whether actions I take in my role as Chair of PURA could have a direct impact on the financial interests of my husband, Michael “Mackey” Dykes, who is employed as the Vice President of Commercial, Industrial and Institutional Programs for the Connecticut Green Bank (CGB). While this petition is pending, out of an abundance of caution I have proactively taken steps to recuse myself from any PURA dockets that could potentially affect the financial interests of my husband.

The CGB is a quasi-public state agency established pursuant to Section 16-245n of the Connecticut General Statutes for the purpose of developing programs to finance and otherwise support clean energy (i.e., renewable energy and energy efficiency), investment in residential, municipal, small business, and larger commercial projects in the state. The CGB is governed by a Board of Directors, which includes the Commissioner of the Department of Energy and Environmental Protection. The CGB Board, among other things, approves the CGB’s annual Comprehensive Plan and budget; approves the CGB’s financial programs and products, including financial transactions, for all of the CGB’s programs. No PURA Commissioners sit on the CGB Board. PURA does not perform regulatory oversight over the CGB, and does not approve financial products and transactions of the

CGB.

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At the CGB, my husband is responsible for CGB commercial, industrial and institutional programs, which extend to schools, hospitals, houses of worship, and other non-profits. He is tasked with designing, implementing, and overseeing new and existing clean energy financing programs for this sector, including the statewide Commercial Property Assessed Clean Energy (C-PACE) program. His responsibilities include generating and aggregating demand for C-PACE projects, sourcing and facilitating deployment of private capital, and using the tools of the state to bring down the cost of capital.

PURA's adjudicatory function encompasses some statutorily delegated matters that may involve the commercial and industrial programs of the CGB, and/or may affect private commercial and industrial entities who receive funding from the CGB. Examples of such matters include:

- PURA is required by statute to oversee the implementation of various tariffs and procurement programs—including net metering, virtual net metering, and the LREC/ZREC program—that provide revenues to private entities (including commercial and industrial entities) to support energy efficiency and renewable energy investments. Such investments may also be supported by commercial and industrial financing projects provided by the CGB.
- PURA is also charged by statute with certifying the eligibility of new energy facilities in the state to qualify as “renewable” under Connecticut's statutory definitions. Some of the facilities that seek certification by PURA are commercial and industrial customers who have received financing by the CGB.

Like all CGB employees, my husband's performance is

evaluated on the basis of certain performance goals in effect for each fiscal year. . . . Three of his FY2017 performance goals could be indirectly affected by my official actions at PURA. Performance goal 1(a) sets a goal of closing no less than 79 C-PACE projects during the fiscal year, and 1(b) sets a goal of closing no less than 15 CT Solar Lease projects. Performance goal 3(a) encourages the use of C-PACE financing to enhance economics in lieu of specific incentives. Performance goal 9 establishes a goal of raising revenues (i.e., transaction fees and interest on C-PACE loans) for the product and program portfolio. As such, this goal is affected by the quantity of C-PACE transactions closed during the performance period (goal 1(a)).

These three goals could potentially be affected by official actions taken at PURA because the C-PACE program may be used to finance Class I or III generation facilities that are installed on commercial and industrial buildings. PURA reviews and certifies Class I, II, and III generation facilities, including facilities that are owned by the CGB and leased to commercial and industrial customers through the CT Solar Lease program. In addition, PURA reviews certain utility incentives (virtual net metering, LREC/ZREC program) that may affect Class I generation facilities. Changes in PURA's administration of the renewable energy certifications and/or utility incentives could have an impact on the deployment of clean energy sources, which in turn may affect the number of C-PACE projects that are completed, as well as the [CGB's] ability to develop solar lease projects. . . .<sup>1</sup>

Additional facts will be set forth as necessary.

### Analysis

The threshold issue is whether the petitioner is subject to the

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<sup>1</sup>Petition for Advisory Opinion submitted by Katherine S. Dykes to the Citizen's Ethics Advisory Board (December 9, 2016) (hereinafter "Advisory Opinion Petition").

Code. “Persons generally subject to [it] . . . are described . . . as either ‘public officials’ or ‘State employees.’”<sup>2</sup> The term “[p]ublic official” is defined, in relevant part, as “any person appointed to any office of the . . . executive branch of state government by the Governor, with or without the advice and consent of the General Assembly . . . .”<sup>3</sup>

PURA is “within” the Department of Energy and Environmental Protection, an executive-branch state agency, and its members are “appointed by the Governor with the advice and consent of both houses of the General Assembly.”<sup>4</sup> As such, members of PURA (including the petitioner) satisfy the definition of “public official” and are, therefore, subject to the Code, including General Statutes §§ 1-85 and 1-86 (a), which define and proscribe “substantial” and “potential” conflicts of interests.

### 1. “Substantial” Conflict of Interests

Section 1-85 provides, with an exception not pertinent here, that a public official has a “substantial” conflict of interests—and “may not take official action on [a] matter”—under these circumstances:

he has reason to believe or expect that *he, his spouse, a dependent child, or a business with which he is associated* will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity.<sup>5</sup>

To have a “substantial” conflict, then, the petitioner must have “reason to believe or expect” that, “by reason of [her] official activity” at PURA, there will be a “direct” financial impact on one of the following: herself, her husband, a dependent child, or a “business with which [s]he is associated.” We will address each, in no particular order.

We can quickly rule out both the petitioner herself and “dependent child,” as there are no facts before us to suggest that

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<sup>2</sup>Advisory Opinion No. 82-5, Connecticut Law Journal, Vol. 43, No. 45, p. 7B (May 11, 1982).

<sup>3</sup>General Statutes § 1-79 (11).

<sup>4</sup>General Statutes § 16-2.

<sup>5</sup>(Emphasis added.)

either she (apart from her husband) or a “dependent child” will be affected financially by virtue of her official action at PURA.

As for a “business with which [s]he is associated,” the question is whether the CGB meets the Code’s definition of that term, which, in relevant part, is this: Any “entity through which business for profit or not for profit is conducted in which the public official . . . or member of . . . her immediate family is” one of the following:

- director,
- officer (i.e., president, executive or senior vice president or treasurer of such business),
- owner,
- limited or general partner,
- beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of any class.<sup>6</sup>

In relation to the CGB, neither the petitioner nor her immediate family members fit within any of those categories. True, the CGB employs her husband, but it does so—not as “executive or senior vice president” (a position held by someone else)—but as “Vice President of Commercial, Industrial, and Institutional Programs.”<sup>7</sup> As such, he is not an “officer,” as defined in § 1-79 (2).

Even if he were an “officer,” the CGB—a “[q]uasi-public agency”<sup>8</sup>—still would not be a “*business* with which [the petitioner] is associated.”<sup>9</sup> In Advisory Opinion No. 90-29, the State Ethics Commission (Commission) interpreted § 1-79 (2)’s definition of “business with which he is associated” to exclude governmental entities.<sup>10</sup> In a later opinion, it was asked whether the “New England

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<sup>6</sup>General Statutes § 1-79 (2). For purposes of this provision, “[i]mmediate family” means any spouse, children or dependent relatives who reside in the individual’s household.” General Statutes § 1-79 (6).

<sup>7</sup>Advisory Opinion Petition.

<sup>8</sup>General Statutes § 1-79 (12).

<sup>9</sup>(Emphasis added.) General Statutes § 1-79 (2).

<sup>10</sup>Connecticut Law Journal, Vol. 52, No. 14, p. 3D (October 2, 1990) (noting that “the legislative history supports [no other] construction,” and

Council for Emergency Medical Services, Inc. . . . is a governmental entity” and thus excluded from § 1-79 (2)’s definition.<sup>11</sup> Its answer—which sheds light on the issue here—was this:

*[T]he Council has not been designated a “quasi-public agency” pursuant to . . . § 1-79 (l) [now (12)], nor is the Council a department, agency, board, commission, council, division or office of any branch of Connecticut state or municipal government. The Council, rather, is classified a 501(c) (3) corporation for IRS purposes. Consequently, it is in the same category as charities, non-profit museums and educational institutions, which the Commission has previously ruled are included within the definition of “[b]usiness with which . . . associated” for purposes of the Code . . . .*<sup>12</sup>

Clearly, the Commission read § 1-79 (2)’s definition as excluding quasi-public agencies, and we do the same (for to read it otherwise would yield an utterly absurd result<sup>13</sup>). That said, the CGB, a quasi-public agency, cannot be a “business with which [the petitioner] is associated.” As a result, the petitioner may take official action that would affect the CGB’s financial interests, without having a “substantial” conflict under § 1-85.

That leaves the petitioner’s husband and the following question:

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that “no Connecticut case has held that the terms ‘business’ and ‘government’ are in any way synonymous”).

<sup>11</sup>Advisory Opinion No. 91-16, Connecticut Law Journal, Vol. 52, No. 50, p. 3C-4C (June 18, 1991).

<sup>12</sup>(Emphasis added.) *Id.*, 4C.

<sup>13</sup>“[W]e [are to] construe a statute in a manner that will not . . . lead to absurd results.” (Internal quotation marks omitted.) *In re Justice W.*, 308 Conn. 652, 670 (2012). The absurdity here would be this: Employees and directors of quasi-public agencies are “state employees” and “public officials,” respectively, under the Code. General Statutes § 1-79 (11) and (13). And state employees and public officials generally may not take official action that would financially impact a “business with which [they are] associated.” General Statutes §§ 1-85 and 1-86 (a). If, then, we were to read the term “business with which he is associated” as including a quasi-public agency, its officers and directors could not take official action that would affect the quasi-public’s financial interests. “The legislature could not have intended such a bizarre result.” *Komondy v. Zoning Bd. of Appeals*, 127 Conn. App. 669, 681 (2011).



whether the petitioner would have “reason to believe or expect” that, “by reason of [her] official activity” at PURA, there would be a “direct” impact on her husband’s financial interests.<sup>14</sup> The short answer is no, and the reason for it stems from § 1-85’s use of the word “direct.”

To have a “substantial” conflict under § 1-85, the financial impact (on one of the listed persons) must be “direct.” Because neither the Code nor its regulations define the term “direct,” the Commission, in a prior declaratory ruling, turned to its dictionary definition, stating: “For purposes of § 1-85, the term ‘direct’ means absolute, immediate, or without intervening conditions.”<sup>15</sup> Our regulations offer two examples of such a “direct” financial impact:

- “[A] state employee required, in the course of his or her official duties, to determine whether a consulting contract should be awarded to his or her spouse . . . .”<sup>16</sup>
- A legislator called upon to vote on the “specific bonding request” of a “for-profit corporation” on whose board of directors the legislator sits.<sup>17</sup>

A third example comes from Advisory Opinion No. 2002-14.<sup>18</sup> There, a legislator asked whether he could seek legislation allowing the city of Milford to issue bonds in order to raise funds to purchase the Milford Academy’s property.<sup>19</sup> Under an agreement between the city and the school, the school would use the sale’s proceeds to reimburse its creditors—one of which was the legislator’s law firm.<sup>20</sup> In concluding that the legislator had a substantial conflict under § 1-85 (and thus could not act), the Commission explained:

It can be argued . . . that the potential payment to [the legislator’s] law firm is insufficiently immediate to qualify as “direct,” since an intervening condition, the

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<sup>14</sup>General Statutes § 1-85.

<sup>15</sup>State Ethics Commission Declaratory Ruling 92-C, citing *The American Heritage Dictionary of the English Language*, at p. 373, Houghton Ruffin Company (1979).

<sup>16</sup>Regs., Conn. State Agencies § 1-81-28 (a).

<sup>17</sup>Regs., Conn. State Agencies § 1-81-28 (a).

<sup>18</sup>Connecticut Law Journal, Vol. 64, No. 3, p. 18C (July 16, 2002).

<sup>19</sup>Id., 18C-19C.

<sup>20</sup>Id.



purchase of the [school] property by the City, must first occur. In reality, however, the Agreement between the City and the [school] predates the request that [the legislator] now obtain the necessary municipal bonding authority to implement the deal. Given this fact, there is, at this time, no meaningful intervening condition, i.e., additional, substantive prerequisite, which must take place for the payment to the . . . law firm to occur.<sup>21</sup>

Here, by contrast, there would be no “direct” financial impact on the petitioner’s husband by virtue of the petitioner’s PURA activity. In addition to his base salary—which would not be affected by any PURA activity—the petitioner’s husband may “earn an additional amount . . . based on achievement of performance goals.”<sup>22</sup> Three of those goals—Nos. 1, 3, and 9, which are dependent on the closing of C-PACE transactions and Solar Lease Projects—could be affected by the petitioner’s PURA activity. As the petitioner puts it: “Changes in PURA’s administration of the renewable energy certifications and/or utility incentives *could* have an impact on the deployment of clean energy sources, which in turn *may* affect the number of C-PACE projects that are completed, as well as the [CGB’s] ability to develop solar least projects.”<sup>23</sup> That is, even if the petitioner’s PURA activity creates an environment in which it is more likely that C-PACE transactions and Solar Lease Projects will close, there is still an “additional, substantive prerequisite” that must take place in order for the petitioner’s husband to meet his performance goals: the actual closing of those transactions and projects—i.e., independent business decisions over which PURA has no control.

Thus, the petitioner’s PURA activity would not have a “direct” financial impact on her husband (or, as noted above, herself, her family members, or a “business with which [s]he is associated”), meaning she would not have a “substantial” conflict under § 1-85.

## 2. “Potential” Conflict of Interests

Even though the petitioner may not have a substantial conflict under § 1-85, she may have a “potential” one under § 1-86 (a). Under this provision, a public official has a “potential” conflict if, “in the

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<sup>21</sup>Id., 19C-20C.

<sup>22</sup>(Emphasis added.) Advisory Opinion Petition.

<sup>23</sup>Id.

discharge of” her “official duties,” she

would be required to take an action that would affect a financial interest of such official . . . such official’s . . . spouse, parent, brother, sister, child or the spouse of a child or a business with which such official . . . is associated, other than an interest of a de minimis nature, [or] an interest that is not distinct from that of a substantial segment of the general public . . . .<sup>24</sup>

“Unlike a substantial conflict, there is no requirement that the financial impact be direct . . . . However, there still must be a reasonable expectation on the part of the individual that there will be some financial impact based on h[er] actions.”<sup>25</sup> If the financial impact is (1) too speculative to predict, (2) de minimis (i.e., < \$100),<sup>26</sup> or (3) no different from that to a substantial segment of the general public (“e.g., all licensed drivers, all homeowners,” etc.<sup>27</sup>), then the official does not have a “potential” conflict and may act without restriction.

Here, our sole focus, once again, is on the petitioner’s husband, and the reason for it is this: The CGB is not (as noted earlier) a “business with which [the petitioner] is associated,” and there are no facts before us to suggest that either she herself or any of her other family members (parent, sibling, etc.) will be affected financially by virtue of her PURA activity.

As for her husband, the question is whether the petitioner would have a “reasonable expectation” that her official action at PURA would “affect” his financial interests in an amount exceeding \$100. Generally, this would require us to delve into the details of the CGB’s merit compensation structure. But we need not do so, as the petitioner asks us to assume, for purposes of this opinion, that she would have such a “reasonable expectation” with respect to PURA

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<sup>24</sup>General Statutes § 1-86 (a).

<sup>25</sup>Advisory Opinion No. 93-11, Connecticut Law Journal, Vol. 54, No. 48, p. 5C-6C (June 1, 1993).

<sup>26</sup>See Regs., Conn. State Agencies § 1-81-30 (a) (defining “[a]n interest of a de minimis, i.e., insignificant, nature [a]s an interest resulting in a financial gain or loss of less than one hundred dollars per person per year”).

<sup>27</sup>Regs., Conn. State Agencies § 1-81-30 (b).

action that could affect her husband's performance goals.<sup>28</sup> Based on that assumption, the petitioner would have a potential conflict under § 1-86 (a) with respect to such actions.

How to proceed when faced with a potential conflict depends on whether the official is a "member of a state regulatory agency." Our regulations define this term as follows: "[A] member of any commission, board, council, *authority* or other similar body which is authorized by law to *regulate*, i.e., control, administer, or oversee, any profession, occupation, *industry*, activity, fund, endeavor or area of conduct."<sup>29</sup> PURA is an "authority" (i.e., the Public Utilities Regulatory *Authority*), and it is "statutorily charged with regulating the rates and services of Connecticut's investor owned electricity, natural gas, water and telecommunication companies and is the franchising authority for the state's cable television companies."<sup>30</sup> Hence, its Commissioners fit squarely within the regulation's definition of "member of a state regulatory agency."

As a "member of a state regulatory agency," the petitioner has two options when faced with a potential conflict: The first is to recuse herself from the matter; the second is to act on it, but only after preparing a § 1-86 (a) statement, entering a copy of it into the journal or minutes of the agency, and delivering a copy of it to the Office of State Ethics. In this "written statement"—which must be "signed under penalty of false statement"—she must "describ[e] the matter requiring action and the nature of the potential conflict and explain[] why despite the potential conflict, [she] . . . is able to vote and otherwise participate fairly, objectively and in the public interest."<sup>31</sup>

Accordingly, even assuming that she has a potential conflict with respect to official action taken by PURA that could affect her husband's performance goals, the petitioner need not (though she certainly may) recuse herself. If she decides to act, she would, of course, be required to prepare and file a § 1-86 (a) statement, as described above.

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<sup>28</sup>E-mail from Katherine S. Dykes to the Legal Division of the Office of State Ethics (January 10, 2017).

<sup>29</sup>(Emphasis added.) Regs., Conn. State Agencies § 1-81-30 (c).

<sup>30</sup>[http://www.ct.gov/PURA/cwp/view.asp?a=3157&q=404410&puraNav\\_GID=1702](http://www.ct.gov/PURA/cwp/view.asp?a=3157&q=404410&puraNav_GID=1702); see also General Statutes § 16-1 *et. seq.*

<sup>31</sup>General Statutes § 1-86 (a).

### 3. Proposed Mitigation Mechanism to Eliminate “Potential” Conflict of Interests

To eliminate any potential conflicts under § 1-86 (a)—and, by implication, to obviate the need to prepare and file a § 1-86 (a) statement each time she takes official action at PURA that could affect her husband’s performance goals—the petitioner has proposed a mitigation mechanism.

Before getting into the details of that mechanism, it may be helpful to summarize the CGB’s merit compensation structure, under which (as noted above) “employees [may] earn additional compensation—above their base salary—based on achievement of each performance goal.”<sup>32</sup> Here is how it works (in the words of the General Counsel of the CGB):

- Performance of each goal is scored on a scale of 1 (below expectations) to 4 (exceeds expectations), and weighted based on the priority of the goal (3 points for high priority, 2 for medium, and 1 for low).
- The weighted scores for the ten goals are then averaged to come up with a total average combined score.
- At the end of the fiscal year, employees with total scores in a certain range receive the maximum bonus (e.g., 3% of base salary for FY 2016); employees with scores in the next range below that receive a medium bonus (e.g., 2% of base salary for FY 2016); and so on.<sup>33</sup>

The petitioner’s husband, recall, has three performance goals (Nos. 1, 3, and 9) that could be impacted by official action taken at PURA. Under the mitigation mechanism, as laid out by the General Counsel of the CGB, this impact could be “eliminate[d] . . . by preemptively assigning him a score of 0 points for [those] performance goals . . . .”<sup>34</sup> For example:

For FY 2017 . . . if [he] were to receive 0 points for goals

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<sup>32</sup>Memo from Brian Farnen, General Counsel and Chief Legal Officer of the Connecticut Green Bank, to the Citizen’s Ethics Advisory Board.

<sup>33</sup>Id.

<sup>34</sup>Id.

1, 3, and 9, his total average combined score would be lower as a result, such that he would functionally earn no merit compensation for those three goals. His performance would continue to be evaluated based on performance of all goals, but his financial interests would not be affected relevant to the goals that have a nexus to PURA action. This mitigation mechanism could be refreshed each fiscal year with input from PURA counsel to identify and preemptively assign 0 points for any performance goals that could be affected by action at PURA.<sup>35</sup>

By assigning zero points for any performance goals that could be affected by official action taken by PURA, the nexus between the petitioner's official action and her husband's financial interests—i.e., the nexus giving rise to the potential conflict under § 1-86 (a)—is broken. And once broken, the potential conflict disappears. As a result, the petitioner would not have to prepare and file a § 1-86 (a) statement when taking official action at PURA that could affect her husband's performance goals.

### **Conclusion**

Based on the facts presented, we conclude that the petitioner may take official action in her role as Chair of PURA on matters that may affect the financial interests of her husband provided (1) that she prepares and files a written conflict statement under § 1-86 (a), or (2) that the proposed mitigation mechanism has been set in place at, and is adhered to by, the CGB.

By order of the Board,

Dated 1/19/17

/s/ Charles F. Chiusano  
Chairperson

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<sup>35</sup>Id.