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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of) Case UM 1121
OREGON ELECTRIC UTILITY COMPANY, LLC, et) Renewed Motion to Suspend
al.) Proceedings
Application for Authorization to Acquire Portland) CONSIDERARTION BY FULL COMMISSION
General Electric Company.) REQUESTED.

Portland Building Owners and Managers Association (“BOMA”) renews its motion to suspend the proceedings herein pending completion of various investigative and regulatory proceedings regarding Texas Pacific Group (“TPG”) with respect to this acquisition. BOMA moved to suspend the proceedings prior to oral argument. ALJ Logan denied the motion but ruled that BOMA could renew its motion at the conclusion of oral argument. Oral argument has now concluded. Neither of the circumstances forming the basis of the motion has yet occurred. Thus this motion is timely. Because of the significance of this Motion, BOMA requests that it be considered and determined by the full Commission.

DISCUSSION

In support of this Motion, BOMA relies upon this memorandum, the motion previously submitted (attached hereto for convenience and incorporated herein), and ORS 757.511(2) (d) and (e).

Two events have yet to occur but they each are significant. First, there has been no determination by the Securities and Exchange Commission regarding any proposed exemption from PUHCA requirements for applicants or its unregulated parent, Texas Pacific Group (TPG). Second, the investigations by the State

Attorney General's office into potential wrong doing have not been completed and the results made public. Each event bears directly upon the appropriateness of allowing the applicant to purchase Portland General Electric (PGE). Failing to suspend the proceedings and any determination by the Commission would be a breach of the Commission's obligation to carefully consider the appropriateness of the purchase – not just to determine “net benefits” -- but also whether there is harm to the public interest. A record artificially narrowed to put in only those items which support the purchase, discounting issues raised by Intervenors as speculative, would be arbitrary and capricious and subject to review and reversal.

ORS 757.511(2) (d) requires that Commission consider whether the acquisition complies with federal law. That requires consideration of the issues related to PUHCA. Applicants have made PUHCA a critical issue, readily admitting that failing to get an exemption is a “deal breaker”. See, oral testimony of witness Shifter. Little consideration has been given to the implications of that position. PUHCA exemption is necessary to facilitate the transfer of various assets, including the trading floor, to the applicant or its subsidiary. These transfers have been described as necessary to protect PGE customers. However, there has been nothing placed into the record indicating how applicants will operate PGE if no exemption is allowed – that is, if it should choose to go forward with the transaction. Yet how it will operate PGE is the very subject of this proceeding. No decision can be made without a ruling of the Securities and Exchange Commission and an amendment to the application in this docket that addresses how the applicants will operate PGE if the exemption is denied. To allow the transaction with the record incomplete is inappropriate. To spend the time and money to condition the sale appropriately if it is not going to go through – if witness Shifter is correct – is a waste of resources at a time when no one, least of a government agency, can afford to do so. To approve the transaction without knowing the “rest of the story” and how it might impact the operation and management is foolhardy.

ORS 757.511(2) (e) requires the Commission to consider whether the applicant or the key personnel associated with the applicant have violated any state or federal statutes. Certainly there are questions related to Neil Goldschmidt and his wife and how the decision making process occurred with the Oregon

Investment Council deciding to invest in this venture. The Assistant Attorney General, who did the initial investigation, Pete Shepard, recommended that it continue to determine the actual facts. A copy of the letter from Pete Shepard to The Honorable Randall Edwards is attached as Exhibit A

The Honorable Randal Edwards announced the continuation of the investigation on September 29, 2004. That investigation is ongoing although there is an announcement expected after the first of the year.

Why this is important is simple. There is NO mechanism to unwind the transaction once the Commission approves it, even if the Commission approves it with conditions. Once approved, the deal is done – there is no way to say, “We goofed.” If the investigations turn out to show that some or all of the applicants’ personnel or the personnel of the unregulated TPG have committed wrongdoing, the Commission will have failed to protect the public as required by its regulatory directives and PGE will be managed by possibly corrupt third parties willing to skim off benefits that more rightly should go to Oregonians.

During oral argument Commissioner Baum stated that the Commission has to look at facts, not respond to mere conjecture. That being said, one needs to remember that the “facts” include the outcome of the investigation and the request for a PUHCA exemption. Moreover, the claims of the applicants are arguably more speculative than the concerns of the Intervenors. The Commission’s inability to effectively regulate TPG, the timing and nature of the “rate credits” making them able to be withdrawn subsequent to the approval of the Commission of the transaction, the secrecy behind the financing (despite ORS 757.511(2)(c)), and the potential for public harm require suspension of the proceedings until the additional facts are known. Anything less would be an abrogation of the Commission’s duty to the Public and the customers served by PGE.

CONCLUSION

BOMA represents the Public - building owners, managers, and tenants who are directly served by PGE and as such are particularly affected by the outcome of the proceeding herein. The other Intervenors also represent the Public. See, for instance, ORS 774.020. The Commission should suspend the proceedings pending completion and disclosure of certain investigations into the investment decisions

made by Oregon Investment Council, for an amendment to the application to reflect what will happen if the Securities and Exchange Commission defies the request for exemption, and for a determination by that regulatory body regarding the applicability of PUHCA in the manner in which TPG and the applicants intend to operate PGE.

Dated this 19th day of December, 2004

X _____
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THE FOLLOWING IS A COPY OF THE ORIGINAL MOTION.

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of) Case UM 1121
)
OREGON ELECTRIC UTILITY COMPANY, LLC, et) Motion to Suspend Proceedings or in the
) Alternative to Condition Approval
al.)
Application for Authorization to Acquire Portland)
General Electric Company.)
CONSIDERARTION BY FULL COMMISSION
REQUESTED.

Portland Building Owners and Managers Association ("BOMA") moves to suspend the proceedings herein pending completion of various investigative and regulatory proceedings regarding Texas Pacific Group

("TPG") with respect to this acquisition. In the alternative, BOMA moves the Commission for an Order expressly retaining sufficient legal authority after approval of the proposed acquisition to revoke, amend, or condition the sale of Portland General Electric Company ("PGE") to Oregon Electric Utility Company ("OEUC"), a wholly owned shell subsidiary of TPG and its investment entities. Because of the significance of this Motion, BOMA requests that it be considered and determined by the full Commission.

DISCUSSION

The Treasurer of the State of Oregon, Randall Edwards, has asked the Oregon Attorney General's Office to investigate certain actions taken by the Oregon Investment Fund ("OIC"). The fund controls a portfolio of about \$56 million in public funds. The initial investigation was a result of the unusual coincidence and timing of OIC's decision to invest in TPG's acquisition of PGE and Neil Goldschmidt being asked to serve on the Board of the TPG shell corporation by which the acquisition would occur. The investigation has been expanded to include public investment fraud and official misconduct. Affidavit of Ann L. Fisher, attached hereto.

The Commission may take Official Notice of the pending accusations and investigations. OAR 860-014-0050 covers Official Notice:

(1) The Commission or Administrative Law Judge (ALJ) may take official notice of the following matters:

(a) All matters of which the courts of the State of Oregon take judicial notice;

(b) Rules, regulations, administrative rulings and reports of the Commission and other governmental agencies;

This material is of the nature of matters of which the courts of the State of Oregon take Judicial Notice and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ORS 40.060 et seq.

Even if the information about the investigation is not capable of being officially noticed, the applicants themselves admitted to the fact of the investigation during cross examination of Peter Kohler on October 21, 2004. ICNU attempted to clarify Dr. Kohler's understanding of the nature and extent of the investigation. A ruling of the administrative law judge following objection by applicants prevented a full

inquiry. Moreover, since the investigations are being requested and overseen by the State of Oregon, the Commission cannot realistically claim to be unaware of the investigation.

Additionally, another matter is currently “in the works” and should be considered as well. Applicants witness Shifter was cross examined on October 21, 2004 regarding efforts by TPG to gain a declaratory or other Order from the Securities and Exchange Commission (“SEC”) determining that TPG is not a holding company that would be subject to PUHCA. During the course of his testimony, Mr. Shifter stated that failure to get such a determination would cause TPG to reconsider completing the acquisition. He stated that TPG had been working with SEC staff to properly structure the request and expected that the SEC would issue a ruling within a short period of time after receiving the request.

At the conclusion of the evidentiary portion of the proceeding, only a few facts are clear. TPG through its investment arm is providing the money for the acquisition of PGE and will receive the tax and other benefits while a shell limited liability company established by TPG with limited assets will “own” PGE. This corporate structure presents enormous advantages to TPG. The most important of these is that under current law, the Commission’s authority is limited to the named applicant (OEUC) and PGE. In other words, the Commission has no authority over TPG except and to the extent that the Commission requires it as a condition of approval of the acquisition. Said yet another way, while every news article and report references TPG as the buyer and discusses the Commissions review *of TPG’s* purchase, the only review currently ongoing is of the applicant, OEUC. The Commission has authority to condition the terms approval of the acquisition if such conditions are in the public interest. ORS 757.511.

As a practical matter, this means that the Commission cannot require TPG to produce books and records, cannot penalize or censure TPG for wrongdoing, or disobeying a directive of the Commission, or require TPG to provide rate relief, forego tax benefits, or subject any sale by TPG of the memberships in the limited liability company to Commission review unless TPG accepts Commission authority as a condition of the sale. If facts come out later that TPG or its agents acted inappropriately, and the Commission has not conditioned the sale so as to sweep TPG under its authority, the Commission will not be able to right

the wrong. The Commission would have failed in its charge to protect the Public and Oregonians will once again be owned by entities that do not reflect the strong values we hold in Oregon and who are willing to skim off benefits that more rightly should go to Oregonians.

Currently there are one or more investigations into activities of TPG that directly relate to the reasonableness of the proposed acquisition and the possible benefits to Oregonians of the acquisition. They include investigations into the unusual coincidence of Diana Goldschmidt's and other friends of Neil Goldschmidt on the Investment Council voting within hours of Neil Goldschmidt being offered the position as director. However, these are not the not the only questions being raised. A review of the Minutes of an OIC meeting in which the decision to invest in the acquisition was made shows that the Council waived the usual limits on investments for this particular investment. Why the limit was raised and what the individual members in supporting this investment considered must be investigated. The AG's Office has indicated that the investigation will be broader than just the question about Ms Goldschmidt's vote.

If the Commission fails to suspend the proceedings pending the outcome of the investigations and the outcome of the SEC decision, it will be placed in the unenviable position of having intentionally disregarded serious and troubling information and failing to take adequate steps to protect ratepayers. Approval of the acquisition of PGE by a shell limited liability company owned by a company or companies found to have committed wrongdoing in putting together the acquisition itself is not in the public interest. In addition, if a determination by the SEC could kill the deal, the Commission should wait until the SEC has ruled before proceeding further. Once the SEC has made its determination (and assuming the State has found no wrong doing), the Commission can take up the consideration of the application. Unless it waits, it is very likely that the application will need to be amended to reflect the direction of the SEC, additional hearings and testimony will be necessary, and there will be a serious duplication of efforts that could have been avoided.

BOMA requesting that the Commission suspend these proceedings to allow the investigations to be completed and the results known. By suspending the proceedings, the Commission is placed in the best

position to show its commitment to protect the Public Interest. If the investigations show wrongdoing, the State and PGE's customers will have dodged a bullet. If the investigations disclose no wrongdoing, as applicants aver, then the Commission will then be in the best position to give reassurance to the Public that the acquisition of PGE by TPG is appropriate.

In the alternative, if the Commission feels compelled to move forward, despite the State's investigations and despite the considerable risk to customers, BOMA requests that the Commission require TPG to voluntarily accept Commission authority over TPG's activities to the extent they affect, impact or relate to the acquisition of PGE Oregon, including but not limited to OEUC's operation of PGE. In addition, the Commission must retain or acquire authority to later amend, modify, or revoke approval of the acquisition without cost or penalty and without assertions of claims by TPG, OEUC, or PGE that such actions were discriminatory, ultra vires, illegal, or improper. Anything less will make Oregon the laughingstock of the investment community and open the door to similar investment scams.

In support of this motion, BOMA relies upon the affidavit of Ann L. Fisher filed herewith.

CONCLUSION

BOMA represents building owners, managers, and tenants who are directly served by PGE and as such are particularly affected by the outcome of the proceeding herein. The Commission should suspend the proceedings pending completion and disclosure of certain investigations into the investment decisions made by Oregon Investment Council, the selection of Neil Goldschmidt as Board member of and spokesman for OEUC, and other actions taken or not taken by persons connected with TPG or any of its entities, and further for a determination by the Securities and Exchange Commission of TPG's request for a declaration that TPG is not a holding company subject to the Public Utility Holding Company Act.

Alternatively the Commission should condition any approval of the proposed acquisition in a way to retain legal authority over TPG as well as the Applicant and PGE in the event that such investigation discloses any fraud or misrepresentation, wrongdoing, side dealing, or any illegal or unethical acts taken by any entity associated with PGE, TPG (or any of its entities), or OEUC. #



DEPARTMENT OF JUSTICE

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September 29, 2004

The Honorable Randall Edwards
Treasurer
Oregon State Treasury
159 State Capitol
Salem, OR 97310-0840

Re: Review of Vote on October 29, 2003, By Oregon Investment Council Member Diana Goldschmidt to Modify Policy on Alternative Equity Investments Sub-Committee to Allow Subcommittee Consideration of \$300 Million Investment in TPG Partners IV, LP

DOJ File: 171-001-GG0818-04

Dear Mr. Treasurer:

We have been asked to review the circumstances surrounding a vote cast by Oregon Investment Council (OIC) member Diana Goldschmidt on October 29, 2003. On that date, the OIC authorized its Alternative Equity Investments Sub-Committee (Sub-Committee) to increase by \$100 million the amount the Sub-Committee could consider investing in TPG Partners IV, LP (Fund IV) at the Sub-Committee's November 10, 2003, meeting.

This is a legal opinion based upon stated facts provided by the Oregon State Treasury. Part A of this opinion necessarily relies on the accuracy of the stated facts. If the actual facts differed from the stated facts, then, of course, the opinion could reach different conclusions. We understand that the stated facts have been compiled from a variety of sources, including documents, records of actions, and recollections of representations made to Treasury staff. Part B of this opinion briefly identifies some of the facts that, if changed, could result in different legal outcomes. We conclude with the recommendation that you request the Attorney General to conduct an investigation to determine the facts.

STATED FACTS

Investments of the Oregon Public Employee Retirement Fund (OPERF) are overseen by the Oregon Investment Council (OIC). OPERF investments include those in which the state is a limited partner in certain partnerships. In these partnerships, the general partner controls specific investments within the limits established by the terms of the partnership. Since 1994, the OIC has committed as a limited partner a total of \$950 million in a series of investments in which Texas Pacific Group (TPG) was the general partner. The successive investments were designated First Fund, Fund II, Fund III, and Fund IV. OIC's most recent investment with TPG occurred in November, 2003 and is the subject of the vote in question.

Treasury staff learned in the spring of 2003 that TPG planned to return to the equity market with Fund IV later in 2003. In early summer, 2003, TPG informed Treasury Senior Equities Investment Officer Jay Fewel (Fewel) that TPG was in discussions to acquire Portland General Electric (PGE) from its bankrupt parent Enron. During September and early October 2003, negotiations about the terms of the partnership in Fund IV were conducted between TPG and prospective limited partners. No discussion of specific investments took place at that time.

OIC Policy 4.06.01, which has been in effect since before January 1, 2000, delegates to the Alternative Equity Investments Sub-Committee (Sub-Committee) the authority to approve alternative equity investments of \$200 million or less in alternative equity investments such as the various TPG funds. OIC's staff originally understood that Fund IV would not close until the first quarter of 2004. But in mid-October, 2003, TPG informed Treasury staff that the first closing date for Fund IV was to be moved up from first quarter of 2004 to October or November, 2003.

On Thursday, October 23, 2003, Fewel gave OIC members a report from Pacific Corporate Group, a Private Placement Memorandum for Fund IV, and a joint staff and consultant recommendation that the OIC authorize the Sub-Committee to invest up to \$300 million in Fund IV. None of the materials identifies any specific company or investment being considered for purchase by TPG with monies from Fund IV. Nor do they mention Neil Goldschmidt or his consulting firm. The materials distributed to the OIC indicate that the Sub-Committee would consider itself authorized to make the recommended investment unless an OIC member objected.

On Tuesday, October 28, while preparing for the November 10 Sub-Committee meeting, Deputy State Treasurer Linda Haglund (Haglund) became aware of the approval mechanism for the proposed \$100 million increase in the Sub-Committee's authority. She advised Fewel and Treasury's Investment Division Director Ron Schmitz (Schmitz) that the OIC should be asked affirmatively in a public meeting to approve the change in

policy 4.06.01 rather than allowing the absence of objection to be registered as authorization to the Sub-Committee as staff originally had contemplated.

The OIC had scheduled its Wednesday, October 29, 2003 meeting for the purpose of conducting an educational workshop. No action item for the OIC was identified in the agenda. The agenda was distributed and posted publicly a week before the meeting.

On October 29, 2003, the OIC members present were: Jerry Bidwell (Bidwell), Drummond, Randall Edwards (Edwards), Diana Goldschmidt, Mark Gardiner, and James Voytko. Assistant Attorney General Dee Carlson (Carlson) was present as legal counsel for OIC. OIC staff present included Schmitz and Fewel.

AAG Carlson advised the OIC in public session that it had authority to authorize the Sub-Committee to make an investment exceeding the \$200 million limit established in Policy 4.06.01. AAG Carlson advised that Oregon's Public Meetings Law permits an agency to take action in emergencies notwithstanding the absence of a specific item from the previously-published notice or agenda. Bidwell moved to grant the Sub-Committee authority to make the investment and Edwards seconded the motion. OIC members passed the motion unanimously and granted the Sub-Committee authorization to consider a \$300 million investment in Fund IV at the Sub-Committee's November 10, 2003, meeting.

Representations made to Treasury staff reveal that on Thursday, October 30, 2003, the day after the OIC authorized the Sub-Committee to consider an investment of up to \$300 million in Fund IV, a TPG partner met with Neil Goldschmidt to offer Mr. Goldschmidt a position on the board of the company being formed by TPG to purchase PGE. Mrs. Goldschmidt first became aware of her husband's involvement with TPG after he returned from his meeting with TPG. Between that time and the OIC's next meeting on November 19, 2003, at which she announced that she would not be involved in any of the OIC's subsequent discussions or actions involving TPG, Mrs. Goldschmidt did not have any contact with TPG or any Sub-Committee members about TPG or the investment in Fund IV.

On November 10, 2003, the Sub-Committee convened as previously planned. No member of the OIC then served on the Sub-Committee. All members of the Sub-Committee attended the November 10 meeting. The members discussed and approved a \$300 million investment in Fund IV subject to satisfactory negotiation of the requisite legal documents. Schmitz moved to approve the investment and Haglund seconded the motion. The motion passed unanimously.

ANALYSIS -- PART A

1. Ethics Standards.

Diana Goldschmidt, as an OIC member, is a "public official" under ORS 244.020(15).¹ Mrs. Goldschmidt is thus required to adhere to the code of ethics for public officials set forth in ORS 244.040.² ORS 244.040 generally prohibits use of public office for personal financial gain.³ Mrs. Goldschmidt is also required to follow certain procedures under ORS 244.120 when presented with an "actual" or "potential" conflict of interest while acting as a public official. The OIC's own Ethics Standards include Policy 4.00.03. That policy mirrors the requirements in ORS 244.120 with regard to action that must be taken when a member has an actual or potential conflict of interest. See Policy 4.00.03 §§ 3.B. and 3.C. Thus our analysis of Chapter 244 applies as well to that policy.

An "actual" conflict of interest exists when any action, decision, or recommendation by a public official *would* have a financial benefit or detriment to the person or the person's relative, or any business associated therewith.⁴ A "potential" conflict of interest exists when any action, decision, or recommendation *could* have a financial benefit or detriment to the person or the person's relative, or any business associated therewith, with certain limited exceptions.⁵ A public official's spouse is considered a relative of the public official for conflict of interest purposes.⁶

¹ ORS 244.020(15) defines "public official" to mean "any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services."

² ORS 244.010(1) provides that "The Legislative Assembly hereby declares that a public office is a public trust, and that as a safeguard for that trust, the people require all public officials to adhere to the code of ethics set forth in ORS 244.040."

³ ORS 244.040(1)(a) provides "No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this section, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated." ORS 244.040(1)(b) & (c) describe limits on honoraria. ORS 244.040(2) describes limitations on the value of gifts that can be accepted. ORS 244.040(3) to (6) describe other limitations upon the use of a public official's position for financial gain.

⁴ ORS 244.020(1) provides "'[a]ctual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (14) of this section."

⁵ ORS 244.020(14) provides "'[p]otential conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the

If an actual conflict of interest exists for an appointed public official serving on a board or commission, that person must announce publicly the nature of the actual conflict and refrain from participating as a public official from any discussion, debate, or vote on the issue except where the public official's vote is necessary to meet the minimum number of votes to take public action and, in that situation, the person must not be involved in any discussion or debate. If a potential conflict of interest exists for an appointed public official serving on a board or commission, that person must announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official.⁷

Based on the stated facts, Mrs. Goldschmidt did not have an actual or potential conflict of interest on October 29, 2003, when she voted to permit the Sub-Committee to consider a \$300 million investment in Fund IV. Based on the representations made to Treasury staff as set out in the stated facts, Neil Goldschmidt's involvement with TPG relative to the PGE acquisition did not begin until October 30, 2003, the day after the OIC acted. In addition, under the stated facts, Mrs. Goldschmidt did not have any communication or involvement with the Sub-Committee about TPG or PGE between the October 29, 2003, OIC meeting and the Sub-Committee's decision to make the investment on November 10, 2003. Therefore, her vote on October 29, 2003, did not violate the ethics standards for public officials in ORS 244.040 and 244.120.

following:

(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller classes that qualify under this exception.

(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

⁷ORS 244.020(16) provides "[r]elative' means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse."

⁸ORS 244.120(2) provides that "[a]n elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises."

In providing this advice, we caution that the advisory opinion process of the Oregon Government Standards and Practices Commission (GSPC), under ORS 244.280, provides the exclusive statutory procedure by which a person in doubt about the interpretation of ORS Chapter 244, and its application to a particular transaction or situation, can obtain an advisory opinion which is binding on the GSPC. *See Davidson v. Oregon Government Ethics Commission*, 300 Or 415, 712 P.2d 87 (1985). Our legal advice about the application of Chapter 244 to past events does not operate as a bar to subsequent GSPC investigation or enforcement action. Any person seeking to bind the GSPC must request an advisory opinion from the GSPC.

2. Public Investment Standards.

The OIC had authority to permit the Sub-Committee to invest \$300 million in Fund IV. It also had authority to delegate authority to its Sub-Committee. The OIC has delegated to the Sub-Committee the authority to make alternative equity investments within the guidelines of OIC policies, including OIC Policy 4.06.01. The Sub-Committee's decision to invest \$300 million in Fund IV did not exceed its delegated authority. Based on the stated facts, it appears that the OIC and Sub-Committee acted within the limits of their respective authority.

The OIC's policies provide one source of potential limitation on the behavior of its members and on its investment decisions. Statutes also prohibit certain criminal conduct involving public officials.⁸ We briefly describe some of those laws.⁹

A person commits the crime of public investment fraud under ORS 162.117(1) if the person knowingly makes any false statement or report for the purpose of influencing in any way action of the State Treasury.¹⁰ "Action of the State Treasury" is defined to "include" any purchase by the State Treasury.¹¹ This statute has not been construed by any appellate court and we are not aware of any prosecutions under it.

⁸ Some of these statutes provide civil as well as criminal remedies. *See, e.g., ORS 166.715 et seq* [Authorizing the state to pursue civil remedies].

⁹ We have not attempted in this advice to catalog all of the offenses that could arise from criminal misconduct by public servants responsible for the management of public funds. For example, the Oregon Racketeer Influenced and Corrupt Organizations Act (ORICO), ORS 166.715 *et seq.* could apply to such misconduct. *See, e.g., ORS 166.715(6)(a)(D)*[Offenses relating to abuse of public office can form part of the elements of an ORICO violation]. ORS 162.425, mislabeled "Misuse of confidential information," may be violated by certain public servants who acquire "a pecuniary interest in any property, transaction or enterprise which may be affected by" certain official actions by the agency with which the servant is associated.

¹⁰ ORS 162.117(1) provides "[a] person commits the crime of public investment fraud if, for the purpose of influencing in any way the action of the State Treasury, the person knowingly makes any false statement or report."

¹¹ ORS 162.117(4) provides "[a]s used in this section, 'action of the State Treasury' includes any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan, or any change or extension of any of them, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefore."

The use of the open-ended term “includes” rather the closed term “means” in the definition of the phrase “action of the State Treasury” suggests that both the Sub-Committee’s decision to invest in Fund IV and the OIC’s grant of authority for that decision could be “action[s] of the State Treasury” for purposes of ORS 162.117(1).¹² Based on the stated facts, however, and assuming *arguendo* that the failure to disclose information is sufficient to meet the requirement that the person “makes any false statement or report,” we conclude on the stated facts that Mrs. Goldschmidt could not have violated ORS 162.117. On the stated facts, she did not make any false statement or report to the OIC during its meeting on October 29, 2003 because she did not know until later that her husband had been approached by TPG. On the stated facts, Mrs. Goldschmidt had no communication with Sub-Committee members between the OIC meeting on October 29, 2003 and the Sub-Committee meeting on November 10, 2003. The stated facts contain no information from which we can conclude that Mrs. Goldschmidt made any “statement or report” to anyone during that period. For that reason, on the stated facts, Mrs. Goldschmidt could not have committed the crime of public investment fraud.

ORS 162.405 and ORS 162.415 describe the crimes of official misconduct in the second and first degrees. “Public servants” are subject to both statutes. Because the OIC is an instrument of the state of Oregon, its members are “public servants.” ORS 162.005(2)(a).

Official misconduct in the second degree requires proof that a public servant knowingly violates a statute relating to the public servant’s office. ORS 162.405. The stated facts provide no basis upon which to conclude that any statute relating service on the OIC has been violated. On the stated facts, Mrs. Goldschmidt could not have violated ORS 162.405.

In contrast to the crime of official misconduct in the second degree, the crime of official misconduct in the first degree does not depend on violation of a statutory duty. For example, the offense may be committed by a public servant who knowingly fails to perform a duty “clearly inherent in the nature of office” or by one who “knowingly performs an act constituting an unauthorized exercise in official duties.” ORS 162.415(1)(a) and (b). But all variations on the elements of official misconduct in the first degree require proof that the public servant acted “with intent to obtain a benefit” ORS 162.415(1). The stated facts provide no basis upon which to conclude that Mrs. Goldschmidt acted with that intention.

ANALYSIS – PART B

The conclusions in Part A could vary with changes in the stated facts. For example, if Mr. Goldschmidt’s involvement with TPG relative to PGE or Fund IV began

¹² ORS 162.121 states “The provisions of ORS 30.862 and 162.117 to 162.121 shall be liberally construed to effectuate its remedial purposes.”

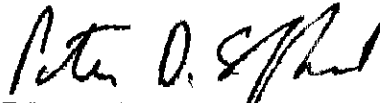
Randall Edwards
September 29, 2004
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on or before the OIC vote that occurred on October 29, 2003, and if his spouse knew about that involvement when she voted on that date to permit the Sub-Committee to make up to a \$300 million investment in Fund IV, then it is possible that violations of law or policy occurred. Variations in other stated facts also could change the resulting legal analysis.

RECOMMENDATION

As noted, our legal conclusions are dependent upon the accuracy of the stated facts. We have not conducted any investigation to validate these facts or to ascertain the existence of other relevant facts. We recommend that you ask the Attorney General to conduct an investigation to determine the facts and to ascertain whether anyone engaged in any prohibited conduct.

Sincerely,



PETER D. SHEPHERD
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served BOMA’s Renewed Motion to Sususpend on the official service list for Docket No. UM 1121, by causing the same to be electronically served on December 19, 2004, upon all parties who have an email address on the official service list, and by U.S. Mail on December 19, 2004, postage-prepaid, to those parties who do not have an email address on the official service list.

Dated at Portland, Oregon, this 19th day of December 2004.

By: _____

Ann L. Fisher

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