

Palm Beach County Commission on Ethics

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March 2, 2012

Leonard Berger, Senior Assistant County Attorney
Palm Beach County Governmental Center
301 North Olive Avenue
West Palm Beach, FL 33401

Re: RQO 11-118
Contingency Fees

Dear Mr. Berger:

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion and rendered its opinion at a public meeting held on March 1, 2012.

YOU ASKED in your email dated December 14, 2011 whether the contingent fee prohibition, as contained in the Palm Beach County Code of Ethics, applies to investment or financial advisors, underwriters, investment banks, credit enhancers, sureties, bond, underwriter or issuer's counsel, bank or disclosure counsel, title insurers or ratings agencies, where the normal and customary compensation for these services are contingent upon an action or decision of government.

IN SUM, when acting in the normal course of their profession, financial services professionals involved in the public issuance of bonds are not prohibited from contractual arrangements or compensation contingent upon the closing of the subject transaction. This arrangement is ordinary and customary in the bond underwriting industry as compensation paid under this sort of contract comes from the monies financed.

THE FACTS as we understand them are as follows:

As an Assistant County Attorney you have been asked whether bond underwriting services compensated after approval amount to a prohibited contingency fee, prohibited under §2-443(g) of the code of ethics.

Palm Beach County, like many other government entities, approves issuance of bonds in a variety of contexts. The county approves both general and revenue bonds to fund capital projects. It also approves industrial development bonds on behalf of third parties to fund certain projects. Lastly, the county must approve bonds that are issued in the name of other government agencies, such as the Educational Facilities Authority and the Housing Finance Authority to fund the projects of these agencies.

In each case, the entity seeking project financing enters into multiple contractual arrangements with persons in the financial services industry to assist with the financial structuring and funding of the project. These persons include but are not limited to investment advisors, financial advisers, underwriters, investment banks, credit enhancers, sureties, bond counsel, underwriters counsel, issuer counsel, bank counsel, disclosure counsel, title insurers and ratings agencies. According to the terms of these contractual arrangements, compensation for financial services occurs only upon the closing of the transaction. This arrangement is ordinary and customary in the industry as compensation paid under this sort of contract comes from the monies financed.

However, before the closing of the transaction and the compensation that comes with it, one or more government approvals are required. At the very least, the County Commission must approve issuance of the bond and in some circumstances, must approve an application for development order or other development permit before a project can move forward. Therefore, compensation for the individuals described above is contingent upon approval of one or more Board of County Commission votes.

THE LEGAL BASIS for this opinion is found in the following relevant section of the revised Palm Beach County Code of Ethics, which took effect June 1, 2011.

Section 2-443(g) *Contingent fee prohibition.*

No person shall, in whole or in part, pay, give or agree to pay or give a contingency fee to another person. No person shall, in whole or in part, receive or agree to receive a contingency fee. As used herein, "contingency fee" means a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent on or in any way contingent on the passage, defeat, or modification of: an ordinance, resolution, action or decision of the board of county commissioners or local municipal governing body as applicable, any employee authorized to act on behalf of the board of county commissioners or local municipal governing body as applicable, the county administrator or municipal administrator as applicable, or any action or decision of an advisory board or committee. *This prohibition does not apply to real estate brokers when acting in the course of their profession as regulated by §§475.001-475.5018, Florida Statutes, as may be amended. Nothing in this section may be construed to prohibit any salesperson from engaging in legitimate government business on behalf of a company from receiving compensation or commission as part of a bona fide contractual arrangement with that company provided such compensation or commission is ordinary and customary in the industry...*(emphasis added)

Compensation contingent upon government action is generally prohibited, however, there are exceptions if the fee is ordinary and customary in a given industry. While §2-443(f) specifically excludes real estate agents and salespersons *receiving compensation or commission as part of a bona fide contractual arrangement provided such compensation or commission is ordinary and customary in the industry*, it does not *ipso facto* include all other potential arrangements similar in nature to the specified exempted industries. Bond underwriting operates in a like manner to the real estate industry in that there is no compensation or commission unless and until the applicable governmental entity approves both the project and the issuance of the bond.

When reviewing the applicability of the Florida Code of Ethics as it pertains to contingency fees the Florida Supreme Court held that the prohibition did not extend to real estate agents, notwithstanding the fact that they were not specifically excluded by state statute. Where there was no evidence of corruption or improper influence and the contingent commission was not contrary to public policy, the

Court found the arrangement not to have violated the state contingency statute.¹ The court noted that real estate brokerage agreements have traditionally provided for fees contingent on the consummation of a sale, and that the industry is highly regulated under state statutes.² Similarly, bond underwriting is regulated by the Municipal Securities Rulemaking Board (MSRB), created by Congress in 1975, as well as by federal regulation under the Code of Federal Regulation.³

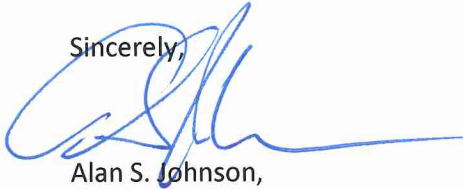
Additionally, considering the similarity between contingencies involving real estate agents, salespersons on commission and bond underwriting professionals, where the ordinary and customary manner of payment is upon completion of the contract or transaction, there is a rational basis for interpreting the code so as not to "lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity."⁴

IN SUMMARY, based on the information you have provided, bond underwriting professionals are exempted from the contingency prohibitions of §2-443(g) from receiving compensation or commission as part of a bona fide contractual arrangement provided such compensation or commission is ordinary and customary in the bond underwriting industry.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 should you have any further questions in this matter.

Sincerely,



Alan S. Johnson,
Executive Director

ASJ/gal

¹ Rotemi Realty, Inc. v. Act Realty Co., Inc., 911 So.2d 1181 (Fla. 2005), s112.3217, Florida Statutes.

² §§475.001-475.5018

³ CFR Title 17, Part 240

⁴ Las Olas Tower Company v. City of Ft. Lauderdale, 742 So2d 308 (4th DCA 1999), RQO 11-066 (extending the law enforcement outside employment filing exemptions of sec.2-443(e)(5)g to fire-rescue extra duty details)