

Executive Branch Ethics Commission  
**ADVISORY OPINION 10-02**  
May 14, 2010

**RE:** May the Division of Compliance Assistance in the Department for Environmental Protection, Energy and Environment Cabinet, solicit public-private partnerships, to include entities and persons regulated by the Department, for the purpose of reducing and preventing environmental crimes?

**DECISION:** Yes

This opinion is issued in response to your April 28, 2010 request for an advisory opinion from the Executive Branch Ethics Commission (the “Commission”). The matter was reviewed by the Commission at its meeting on May 14, 2010 and the following opinion is issued.

According to your letter, the Division of Compliance Assistance (“Compliance Assistance”), which is part of the Energy and Environment Cabinet’s Department for Environmental Protection, desires to build public-private partnerships in order to reduce and prevent environmental crimes in Kentucky. Prior to initiating these partnerships, Compliance Assistance seeks an advisory opinion from the Commission to verify that these partnerships do not conflict with the Executive Branch Code of Ethics (the “Code”).

You state that Compliance Assistance is proactively working to reduce environmental crimes and create a healthier Kentucky. Much like the education and outreach programs being conducted by Kentucky’s police services to reduce drug use and drunk driving, Compliance Assistance is actively educating the public and the environmental professionals that work in Kentucky. This education addresses the public health risks and legal consequences that result from failing to comply with environmental laws. According to your letter, by building a more aware public and better equipped environmental professional, Compliance Assistance is encouraging sustainable behaviors and preventing environmental crimes from occurring.

Unfortunately, resource constraints are affecting Compliance Assistance’s potential. Budget cuts and growth restrictions are limiting the volume of its education and outreach services. To bridge this gap and expand the positive impact of Compliance Assistance’s services, the agency desires to build public-private partnerships. You indicate that the public-private partnerships envisioned by Compliance Assistance include the following combination of opportunities:

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- **Technical Expertise** - Across the Commonwealth, there are thousands of environmental professionals that could partner with Compliance Assistance as speakers at agency-sponsored training events. This broad expertise and hands-on experience would make agency-sponsored training more pertinent to the attendees and allow Compliance Assistance to expand its training menu. In addition, these individuals could serve as mentors for struggling facilities through partnerships facilitated by Compliance Assistance.
- **Service Contributions** - Logistics can often be a challenge for a small agency when dealing with a very large target audience and a diverse pool of information to communicate. Private partners could offset this challenge by jointly participating in environmental crime prevention marketing efforts.
- **Material Contributions** - Many industrial and commercial businesses in Kentucky could donate material goods that would enable Compliance Assistance to expand the volume and quality of its outreach and training. For example, an industry could donate equipment that would be used as examples in training classes to illustrate the proper operation and use of items used to prevent environmental problems. Partners could also donate meeting space and training supplies that would allow Compliance Assistance to extend its training arm across the Commonwealth without incurring a significant increase in operating costs.
- **Financial Donations** - Many of Kentucky's businesses and citizens are developing strong environmental ethics and frequently showcase their desire to improve Kentucky communities. Because of this, Compliance Assistance expects that if the opportunity was presented, a number of corporate and private citizens would be interested in donating funds to the agency to enable it to expand its training and educational efforts to reduce environmental crime. These funds would be used to purchase compliance related materials, hold training events, and make compliance related materials readily available.

In your letter, you state that Compliance Assistance believes that these partnerships are consistent with the objectives of KRS 11A.055 and the Legislature's desire to reduce and prevent crimes through the use of public-private partnerships. In addition, although the Department for Environmental Protection actively regulates a large number of corporate and private citizens, Compliance Assistance is not involved in defining or influencing cabinet policies or requirements applicable to these entities and only the staff of Compliance Assistance will be involved in raising funds. Because of the provisions in KRS 11A.055 and the agency's clear separation of responsibilities from the Energy and Environment Cabinet's regulatory programs, Compliance Assistance believes that public-private partnerships initiated by it would not result in a conflict of interest. However, because a portion of these partnerships could include financial support to the agency to sustain and expand its educational efforts, the Compliance Assistance is seeking the Commission's concurrence that these partnerships as described above are acceptable.

Compliance Assistance has represented to the Commission that it will track all donated funds and expenditures.

The Commission has reviewed similar requests regarding potential public-private partnerships in the past on a case by case basis. At issue is not only whether such partnerships as described in your letter may be entered into, but also whether Compliance Assistance may solicit funds from its potential partners. In reviewing these issues, the following statutes must be considered:

KRS 11A.005(1), which states:

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

- (a) A public servant be independent and impartial;
- (b) Government policy and decisions be made through the established processes of government;
- (c) A public servant not use public office to obtain private benefits; and
- (d) The public has confidence in the integrity of its government and public servants.

KRS 11A.020(1)(d), which states:

(1) No public servant, by himself or through others, shall knowingly:

...

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

Furthermore, KRS 11A.045(1), relating to the acceptance of gifts, provides the following:

(1) No public servant, his spouse, or dependent child knowingly shall accept any gifts or gratuities, including travel expenses, meals, alcoholic beverages, and honoraria, totaling a value greater than twenty-five dollars (\$25) in a single calendar year from any person or business that does business with, is regulated by, is seeking grants from, is involved in litigation against, or is lobbying or attempting to influence the actions of the agency in which the public servant is

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employed or which he supervises, or from any group or association which has as its primary purpose the representation of those persons or businesses. Nothing contained in this subsection shall prohibit the commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety.

“Gift” is defined in relevant part in KRS 11A.010(5) as “a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received...”

The Commission has interpreted KRS 11A.045(1) to prohibit state agencies from soliciting or accepting gifts from persons or businesses that do business with, are regulated by, are seeking grants from, are involved in litigation against, or are lobbying or attempting to influence the actions of that state agency. (See Advisory Opinions 06-19 and 02-48). Since Compliance Assistance is an integral part of the Energy and Environment Cabinet (the “Cabinet”), Compliance Assistance is generally prohibited from soliciting or accepting gifts from any person or business that does business with, is regulated by, is seeking grants from, is involved in litigation against, or is lobbying or attempting to influence the actions of the Energy and Environment Cabinet.

However, there is an exception to the general prohibition against solicitation. KRS 11A.055(2) states in relevant part as follows:

(2) Any provision of KRS Chapter 11A to the contrary notwithstanding, a state agency or a public servant may raise funds, either individually or as a department or agency, for crime prevention . . . without violating the provisions of this chapter. Raising of funds shall include but not be limited to holding events for the benefit of a program specified in this section, contacting potential donors, providing prizes, and engaging in other forms of fundraising and providing the funds thus raised to the program.

Since Compliance Assistance’s purpose in seeking public-private partnerships is to reduce and prevent environmental crimes in Kentucky, the penalties for which are contained in KRS 224.99-010 and include Class A misdemeanors and Class D felonies, in light of the exception provided for in KRS 11A.055(2), it is the Commission’s opinion that Compliance Assistance may solicit and accept funds from any entity, public or private, not-for-profit or for-profit, regulated by or doing business with the Cabinet, so long as it is for the purpose of reducing and preventing environmental crimes in Kentucky.

In addition to the solicitation and gift aspect of the issue before the Commission is the issue of endorsement by the agency of a private entity, which is prohibited. In previous reviews of public-private partnership proposals, the Commission came to the conclusion that whether or not a state agency may enter into a partnership with a private company is a policy decision that is dependent on many factors. The Code requires that state officials be independent and impartial

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in carrying out duties for the Commonwealth. This factor is paramount in considering such partnering. State officials have an inherent duty to avoid any appearance of favoritism. Another factor to consider is the benefit the partnership will provide for the citizens of the Commonwealth and the benefit for the state's economic development. See Advisory Opinion 02-21, a copy of which is attached. In general, the Commission believes that a state agency is not prohibited from soliciting corporate donations for state-sponsored programs, provided the entities solicited have no business or regulatory relationship with the agency and provided the entities are not lobbying or seeking to influence matters of the state agency.

In Advisory Opinion 09-30, a copy of which is attached, the Commission stated that in order to determine whether a state agency and not-for-profit private organizations may enter into partnerships to promote the agency's initiatives, the proposed programs must be reviewed in order to determine if the implementation of the programs would amount to the agency impermissibly endorsing a private entity. The Commission concluded that an agency could enter into an agreement with a not-for-profit private entity in a program that would benefit the entire Commonwealth, or would promote economic development or tourism in the state. An agency may not, however, "endorse" a private company by publicly and actively promoting one private company over another, regardless of any benefit it might have to the state.

Thus the Commission has previously concluded that public-private partnerships such as those proposed by Compliance Assistance for the purpose of reducing and preventing environmental crimes in Kentucky are permissible partnerships when not-for-profit private organizations are involved, due to the fact that the entire Commonwealth will benefit from such partnerships, in this instance from a cleaner environment. In regard to entering into partnerships with for-profit organizations, the Commission concluded in Advisory Opinion 09-30 that this should be reviewed on a case-by-case basis. While you have not identified specific for-profit organizations with whom your agency hopes to partner, you have indicated that the proposed public-private partnerships could include any business or individual interested in promoting compliance with environmental laws in Kentucky. The Commission has reviewed the types of public-private partnerships envisioned by Compliance Assistance and finds that such partnerships would be permissible with for-profits as well, so long as the benefit of such partnerships goes to the citizens of the Commonwealth and not to the for-profit organizations themselves. However, if more than one such organization expresses an interest in a similar partnership arrangement, those organizations should be afforded the same opportunity to enter into similar partnerships with Compliance Assistance. (It should go without saying that in regard to partnerships, or responses to solicitations for funds for that matter, no favoritism should be shown toward any entity for their support, nor enmity for their lack thereof.)

While you did not raise the question in your request, the Commission is often asked whether corporate sponsors may be recognized for their support. The Commission has consistently stated that a state agency should not publicly and actively recognize a private product or company, or acknowledge a corporate donor, in a public manner such as in the newspaper or on television. See Advisory Opinions 02-21 and 07-27. However, the Commission has previously stated that the placement of a plaque or marker to identify a public/private

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partnership does not rise to the level of an active or public endorsement by a state agency. See Advisory Opinions 02-33 and 07-27. You may conclude from these past opinions that any recognition given to entities with whom Compliance Assistance partners must be kept to a minimum and be in the form of a passive display rather than an active recognition which could tend to promote the private entity over the program itself and lead the public to mistake the recognition for an endorsement by the state of that particular entity.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**

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By Chair: Gwen R. Pinson

Attachments: Advisory Opinion 02-21  
Advisory Opinion 09-30

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