

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 96-48

October 29, 1996

- RE: 1) Must applicant for linked deposit investment loan file disclosure with the Cabinet for Economic Development?
 2) May employee of agency granting investment loan apply for loan?
- DECISION: 1) Yes.
 2) No.

This opinion is in response to your October 14, 1996, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 29, 1996, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. House Bill 872, pertaining to the Linked Deposit Investment Program (the "Program") was enacted during the last session of the General Assembly. This bill transferred the Program from the Department of the Treasury (the "Treasury") to the Department of Agriculture (the "Department") and the Cabinet for Economic Development (the "Cabinet"), jointly.

Under the provisions of the Program, a small business or agricultural concern may apply to an eligible financial institution for a loan. If the applicant meets the financial institution's normal criteria for creditworthiness, the financial institution may forward the completed loan package to the Cabinet (for a small business applicant) or the Department (for an agricultural applicant). Employees of the Cabinet and the Department review their respective loan applications to ensure statutory compliance with criteria aimed at making sure the applicant is a small business or agricultural concern and that the applicant does not have an interest in the applying financial institution. Once these criteria are verified, the Department or the Cabinet requests verification from the Treasury that adequate funds exist in the abandoned and unclaimed property account to fund the linked deposit loan. The loan will not be approved if any of the following events occur:

1. The financial institution does not forward the completed loan package to the state;
2. The Department or the Cabinet determines that the loan package is incomplete or is not in accordance with administrative regulations;
3. The Treasury does not verify adequate funding for the loan; or
4. The State Investment Commission does not grant the loan.

You ask, first, whether the Cabinet must require an applicant to complete an economic incentive recipient disclosure form as required by KRS 11A.233 (2) and secondly, whether an employee (or employee spouse) of the Cabinet, the Department, the Treasury, the State Investment Commission or the Cabinet for Finance & Administration ("Finance") is precluded, under the Executive Branch Code of Ethics, from applying for a loan under the Program.

KRS 11A.233 (1) and (2) provide:

(1) For purposes of KRS 11A.201 to 11A.246, the term "executive agency lobbyist" does not include a person acting to promote, oppose, or otherwise influence the outcome of a decision of the Cabinet for Economic Development or any board or authority within or attached to that cabinet relating to the issuance or award of a bond, grant, lease, loan, assessment, incentive, inducement, or tax credit pursuant to KRS 42.4588, 103.210, Chapter 154, or Chapter 224A, or otherwise relating to any other component of an economic incentive package.

(2) Notwithstanding subsection (1), before any board or authority within or attached to the Cabinet for Economic Development takes final action on any contract or agreement by which any bond, grant, lease, loan, assessment, incentive, inducement, or tax credit is awarded, the beneficiary of an economic incentive package shall file with the approving board or authority a disclosure statement

Specifically, you ask whether the Cabinet's review to determine whether a loan package is complete and in accordance with administrative regulations is considered "final action" such that the applicant must file a disclosure statement, and whether a loan under the Program falls within the definition of an "economic incentive package."

HB 872 provides in Section 5, (4), (5) and (7) as follows:

...

(4) There is hereby created a "linked deposit investment program" in the Cabinet for Economic Development whose purpose is to monitor link deposit loans for eligible small businesses through state financial institutions in accordance with administrative regulations promulgated pursuant to subsection (7) of this section.

(5) The State Investment Commission may accept or reject a linked investment, or any portion thereof, with the eligible lending institution. If it is determined by the Department of Agriculture or the Cabinet for Economic Development that the lending institution has violated standards of the linked deposit investment program, the commission shall reject the linked investment.

...

(7) The Department of Agriculture and the Cabinet for Economic Development, in consultation with the State Investment Commission, shall promulgate administrative regulations pursuant to

KRS Chapter 13A setting forth the conditions for which small businesses and agribusinesses are eligible for loans made available through the Linked Deposit Investment Program.

In response to your first question, the Commission notes that the Cabinet was given the responsibility of promulgating the administrative regulations which set forth the conditions for which the applicants are eligible for loans and that such conditions will be used by the Cabinet in monitoring the loans. The Commission further notes that, if the Cabinet determines that the lending institution has violated these conditions, then the linked investment loan application is rejected. The Commission believes that the Cabinet's involvement in the decision as to whether to grant a loan to an applicant constitutes "final action" by the Cabinet. Such action taken by the Cabinet significantly impacts whether or not the loan will be funded by the State Investment Commission.

Further the Commission notes that Section 5 (2) of House Bill 872 provides that investment moneys in linked deposits "shall be in low interest loans for agricultural production or for small business expansion or development." The Commission believes that because the bill itself states that the low interest loans are for agricultural production and for small business expansion or development that the loans would be an "economic incentive" for agribusiness and small businesses thus, falling into the definition of an "economic incentive package."

Therefore, the Commission believes that an applicant approved by the Cabinet for a linked investment loan must file a disclosure statement with the Cabinet as required by KRS 11A.233 above. Such disclosure is required, also, because applicants for economic incentive packages from the Cabinet are not required to register as executive agency lobbyists when attempting to influence the outcome of a decision of the Cabinet. Conversely, applicants for linked investment loans which are for agricultural purposes are required to register as executive agency lobbyists if they attempt to influence a decision of the Department concerning funds of more than \$5,000, but they are not statutorily required to file the economic incentive recipient disclosure statement.

Regarding your second question, KRS 11A.040 (4) provides:

(4) No public servant shall knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340....

Although the State Investment Commission makes the final decision as to whether to grant the funds for a linked investment loan, it appears to the Commission that the initial decision as to whether to approve and grant an investment loan is made by the Cabinet or Department. Thus, the Commission believes the granting of the loan is made by both the

Cabinet or Department, and the State Investment Commission. Employees who obtain such loans have an agreement with the Cabinet or Department. Additionally, according to Section 5(4) of House Bill 872, applicants who are awarded such loans are monitored by the Cabinet or the Department. The Commission believes that, if employees of the Cabinet and the Department are allowed to obtain investment loans which are granted and subsequently monitored by their respective agencies, a violation of KRS 11A will occur.

Therefore, an employee of the Cabinet or the Department should not apply for a linked investment loan if the loan application will be reviewed and monitored by the agency for which he works. However, a Cabinet employee is not prohibited from seeking an incentive loan if that loan is for agricultural purposes and will be reviewed by the Department rather than the Cabinet. The same is true for a Department employee seeking a loan which will be reviewed by the Cabinet.

Additionally, the Commission notes that the loans under the Program may be rejected by the State Investment Commission, even if the applicant is approved by the Cabinet or the Department. It follows then that employees who serve as staff to the State Investment Commission are prohibited from obtaining a loan from the Program.

The Commission believes that employees of Finance, other than those who serve as staff to the State Investment Commission, and employees of the Treasury are not prohibited from obtaining a loan under the Program. The Commission notes that the Treasury does verify whether or not there is adequate funding for such loans, but such criteria is an objective factor used by the Department or the Cabinet in determining whether to approve a loan.

EXECUTIVE BRANCH ETHICS COMMISSION

BY: Ruth H. Baxter, Chair