



COMMONWEALTH OF KENTUCKY  
**EXECUTIVE BRANCH ETHICS COMMISSION**  
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Executive Branch Ethics Commission  
**ADVISORY OPINION 19-02**  
February 5, 2019

**RE:** Are companies that apply for, receive, or have received economic incentives doing business with or being regulated by the Kentucky Cabinet for Economic Development?

**DECISION:** Yes, as long as the agreements between CED and the companies are still active.

This Executive Branch Ethics Commission (the "Commission") issues this opinion in response to your November 30, 2018, request for an advisory opinion from the. This matter was reviewed at the February 5, 2019 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1).

You are General Counsel for the Kentucky Cabinet for Economic Development (CED). The CED has programs that are established by statute under KRS Chapter 154 to recruit out-of-state businesses to Kentucky and assist existing Kentucky businesses to expand. The CED provides services to these businesses by assisting with site location, gathering data on potential communities, navigating state and local regulations and ordinances, coordinating efforts for obtaining permits and licenses, and preparation of financial inducements. CED has several programs in place to offer performance-based incentives such as cash awards, tax incentives, job training assistance, and wage assessments for businesses who agree to locate or expand in Kentucky. CED also has a few programs that provide cash reimbursements, grants, or forgivable loans.

Businesses interested in receiving financial incentives must first apply to the CED. CED staff review these applications and make recommendations to the Kentucky Economic Development Finance Authority (KEDFA) or the Bluegrass State Skills Corporation (BSSC),

depending on the specific incentive. KEDFA or BSSC must approve each incentive. Each business that KEDFA or BSSC approves to receive a financial incentive must enter into a legally binding agreement (Agreement) with the CED agreeing that the business must meet minimum requirements such as job, wage, and/or investment requirements by a date certain in order to receive the incentives.

If a business does not fulfill the requirements of the Agreement, CED will suspend or reduce the incentives depending on the terms of the Agreement. The CED Compliance Division monitors a business's compliance with the Agreement and suspensions or reductions are automatic if the business does not meet the requirements. Once the timeframe established by the agreement expires, the Agreement term is complete. If the company has another project and creates more jobs, the business must reapply to receive new incentives.

You have provided the following questions for the Commission related to these incentives:

- 1) As contemplated by the Executive Branch Ethics Code, is the Cabinet for Economic Development “doing business with” companies who:
  - a. Have an active incentive agreement with the Cabinet?
  - b. Have a pending application for incentives with the Cabinet?
  - c. Have an inactive incentive agreement (i.e., the incentive agreement has expired or otherwise been terminated) with the Cabinet?
  
- 2) As contemplated by the Executive Branch Ethics Code, is the Cabinet for Economic Development “regulating” companies who:
  - a. Have an active incentive agreement with the Cabinet?
  - b. Have a pending application for incentives with the Cabinet?
  - c. Have an inactive incentive agreement (i.e., the incentive agreement has expired or otherwise been terminated) with the Cabinet?

For purposes of the above questions, “Cabinet” includes all boards attached to the CED.

The Executive Branch Code of Ethics (Ethics Code) provides several instances when the terms “doing business with” and “regulated by” appear. KRS 11A.045 provides the gift prohibitions in the Ethics Code. There are particular carve out provisions that apply specifically to the CED in paragraph (3):

- (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 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. This subsection shall not apply to:

- (a) Activities involving sponsorships, naming rights, or similar honoraria granted under KRS 45A.097; or
- (b) Individuals traveling on their own while involved in activities related to KRS 45A.097.

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- (3) Nothing in KRS 11A.001 to 11A.110 shall prohibit or restrict the acceptance by a public servant of the Cabinet for Economic Development or by any other public servant working directly with the cabinet on an economic incentive package of anything of economic value as a gift or gratuity, if the gift or gratuity:

- (a) Was not solicited by the public servant;
- (b) Was accepted by the public servant in the performance of his or her official duties and in compliance with guidelines to be established by the Kentucky Economic Development Partnership which shall include requirements that all gifts or gratuities of a reportable value under KRS 11A.050(3)(k) be registered with the Kentucky Economic Development Partnership and with the Executive Branch Ethics Commission and that all tangible property with a value in excess of twenty-five dollars (\$25), other than food and beverages consumed on the premises, shall be turned over to the Cabinet for Economic Development within thirty (30) days of receipt. In filing reports of gifts or gratuities with the Executive Branch Ethics Commission, the Cabinet for Economic Development may delete information identifying the donors if the cabinet believes identification of the donors would damage economic development; and
- (c) Was not accepted under circumstances which would create a violation of KRS Chapter 521.

(Emphasis added).

KRS 11A.040(6) through (9) provide the provisions concerning post-employment that apply after a public servant leaves state service. KRS 11A.040(7) specifically provides language concerning “doing business with” and “regulated by”:

- (7) A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within six (6) months following termination of his office or employment, accept employment, compensation, or other economic benefit from any person or business that contracts or **does business with, or is regulated by**, the state in matters in which he was directly involved during the last thirty-six (36) months of his tenure. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he was involved prior to taking office or beginning his term of employment, or for which he received, prior to his state employment, a professional degree or license, provided that, for a period of six (6) months, he personally refrains from working on any matter in which he was directly involved during the last thirty-six (36) months of his tenure in state government. This subsection shall not prohibit the performance of ministerial functions, including but not limited to filing tax returns, filing applications for permits or licenses, or filing incorporation papers, nor shall it prohibit the former officer or public servant from receiving public funds disbursed through entitlement programs.

(Emphasis added).

KRS 11A.040(10) provides the outside employment provisions that apply while a public servant still works for the Commonwealth:

- (10) Without the approval of his appointing authority, a public servant shall not accept outside employment from any person or business **that does business with or is regulated by** the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds.
  - (a) The appointing authority shall review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.
  - (b) The appointing authority shall not approve outside employment for a public servant if the public servant is involved in decision-making or recommendations concerning the person or business from which the public servant seeks outside employment or compensation.

- (c) The appointing authority, if applicable, shall file quarterly with the Executive Branch Ethics Commission a list of all employees who have been approved for outside employment along with the name of the outside employer of each.

(Emphasis added).

KRS 11A.010 provides definitions of terms used in the Ethics Code. Specifically, “doing business with” means “contracting, entering into an agreement, leasing, or otherwise exchanging services or goods with a state agency in return for payment by the state, including accepting a grant, but not including accepting a state entitlement fund disbursement. KRS 11A.010(14). Payment by the state contemplates the use of “state funds” which is defined by KRS 446.010(41) as

sums actually received in cash or negotiable instruments from all sources unless otherwise described by any state agency, stateowned corporation, university, department, cabinet, fiduciary for the benefit of any form of state organization, authority, board, bureau, interstate compact, commission, committee, conference, council, office, or any other form of organization whether or not the money has ever been paid into the Treasury and whether or not the money is still in the Treasury if the money is controlled by any form of state organization, except for those funds the management of which is to be reported to the Legislative Research Commission pursuant to KRS 42.600, 42.605, and 42.615.

Whether or not CED is doing business with a business depends on whether the business is receiving an incentive from CED that would result in the business receiving state funds as part of the agreement. If the business is not receiving a cash reimbursement incentive from CED, then the business is not doing business with CED for the purposes of the other incentive programs. As such, the Commission would not consider the receipt of tax credits to be a receipt of state funds.

“Regulated by” is not defined in the Ethics Code. Merriam-Webster’s online dictionary defines “regulate” as “to govern or direct according to rule; to bring under the control of law or constituted authority; to make regulations concerning.” Black’s Law Dictionary, Seventh Edition, defines “regulation” as “the act or process of controlling by rule or restriction.” In other words, an agency that regulates a business does so under authority given to it by law. A business is “regulated by” an Executive Branch agency when the agency can exert some form of statutorily mandated control or regulatory power granted by statute that provides the Executive Branch agency the ability to restrict the actions of the business. KRS Chapter 154 provides the statutory framework for the incentive programs. As you indicated,

the CED may take action to suspend or reduce the incentive award when a business does not fulfill the terms of the Agreement by a date certain. The act of suspending or reducing the award is a form of regulation.

As to your questions, the Commission will apply the same analysis to each of the terms “doing business with” and “regulated by” for the purposes of the application of the Ethics Codes to your scenario. The two terms always appear side-by-side in the statutory provisions, specifically in the area of gifts, outside employment, and post-employment. Indeed, these terms do not appear independently of each other in any other provision of the Ethics Code. Furthermore, for the purposes of the following analysis, we will assume the incentive that CED is awarding is the cash reimbursement. If the program is not a cash reimbursement, then, as stated above, CED is not doing business with the business, but is still be regulating the business. As such, the Commission will rephrase and address each of your questions as follows:

QUESTION 1: Does the CED “do business with” or “regulate” companies that have active incentive agreements with the CED?

ANSWER: Yes, the CED regulates and does business with companies that have active incentive agreements with the CED.

QUESTION 2: Does CED “do business with” or “regulate” companies that have pending applications for incentives with the CED?

ANSWER: No, until an agreement is finalized between the CED and the business, the CED is neither regulating nor doing business with the business. The business has no obligations to CED until the Agreement is finalized.

QUESTION 3: Does CED “do business with” or “regulate” companies that have inactive incentive agreements (i.e., the incentive agreement has expired or otherwise been terminated) with the CED?

ANSWER: No, once the terms of the agreement are complete, expired, or terminated, the business cannot receive the incentive or have it suspended or reduced by CED. As such, CED may no longer take regulatory action against the business. Furthermore, the business cannot receive cash payments or incentives without reapplying to CED for new incentives; thus, the business is no longer doing business with CED.

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By Chair: Christopher L. Thacker