



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-09

June 4, 2021¹

QUESTION PRESENTED²

May a legislator or a business a legislator owns apply for a small business loan made available by the Small Business Recovery Act of 2020, Laws 2020 (1st S.S.), Chapter 6, Sections 1 through 7 (“2020 Act”), and the Small Business Recovery and Stimulus Act, Laws 2021 Chapter 5, Sections 1 through 8 (“2021 Act”)?

ANSWER

No. The 2020 Act and 2021 Act authorize small business loans, which are contracts. As a result, Article IV,

¹This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)).). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On May 5, 2021, the Commission received a request for an informal advisory opinion that detailed the issues as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). Commission staff provided an informal advisory opinion in response to the request on May 12, 2021. The Commission now issues that guidance as a formal advisory opinion. *See* 1.8.3.9(B)(3) NMAC.

Section 28 of the New Mexico Constitution prohibits a legislator from being directly or indirectly interested in any small business loan authorized by the 2020 Act or the 2021 Act for the duration of the legislator’s term and for one year after their term expires.

ANALYSIS

If a statute authorizes state agencies to make appropriated funds available to private individuals and businesses by contract, then two laws specifically constrain the ability of legislators and their families to benefit from the appropriated funds:

First, Article IV, Section 28 of the New Mexico Constitution constrains a legislator’s ability to contract with a state agency or political subdivision. It provides, in pertinent part, that no member of the legislature “during the term for which he [or she] was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.” N.M. Const. art. IV, § 28 (alteration added).

Second, section 10-16-9(A) of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), imposes additional prohibitions that apply to contracts involving legislators, their immediate family members, and their businesses. Section 10-16-9(A) provides in pertinent part:

A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator’s family or with a business in which the legislator or the legislator’s family has a substantial interest unless the legislator has disclosed the legislator’s substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract.

§ 10-16-9(A); see also NMSA 1978, § 10-16-2(L) (defining “substantial interest” to mean an ownership interest that is greater than twenty percent). Section 10-16-9(A) requires disclosure of a legislator’s substantial interest in a business that contracts with state agencies, and that any contract with the legislator-affiliated business be awarded consistent with the Procurement Code and not through a sole

source or small purchase exception to a competitive procurement process. § 10-16-9(A).

The 2020 Act created a small business recovery loan fund and authorized the New Mexico Finance Authority (“NMFA”) to issue loans of up to \$75,000.00 to qualifying small businesses. See Laws 2020 (1st S.S.), ch. 6, §§ 3(A), 4(A) & 4(D)(1). The small business loans are distinguishable from other forms of coronavirus economic aid, such as CARES relief grants, because those forms of aid are unconditional grants of money. See Advisory Opinion No. 2021-03 (Feb. 5, 2021) (concluding that a legislator or the legislator’s business may apply for and receive a CARES relief grant authorized by Laws 2020 (2nd S.S.), ch. 1, § 2). The loans that NMFA may issue under the 2020 Act have several conditions: for example, a qualifying business must agree to repay the loan “with interest under the terms of the loan agreement.” See Laws 2020 (1st S.S.), ch. 6, § 4(D)(2)(b)(1); see also *id.* § 5 (setting the annual interest at one-half of the Wall Street Journal prime rate on the date the loan is issued and requiring payment terms for loans issued under the legislation). In view of the consideration required the legislation, the small business recovery loans are contracts with the New Mexico Finance Authority.

The 2021 Act made several changes to the small business recovery loan program, including liberalizing qualifications and extending the application deadline. See Laws 2021, ch. 5, § 2(E) (changing the definition of “qualifying small business” so as not to require proof of more than 30% revenue loss and to instead only require a showing that the business had “a substantial decline in gross revenue”), § 4(C)(4) (extending the application deadline to May 31, 2022). See also Legislative Finance Committee, Fiscal Impact Report on Senate Bill 3 (Feb. 10, 2021), <https://www.nmlegis.gov/Sessions/21%20Regular/firs/SB0003.PDF> (describing the 2021 Act’s changes to the small business recovery loan program to expand eligibility).

Because the 2020 Act “authorizes” the small business loan contracts within the meaning of Article IV, Section 28 of the New Mexico Constitution, any legislator who was a member of the Fifty-Fourth Legislature cannot have a direct or indirect interest in a small business recovery loan during their term of office and for one year thereafter. The Constitution’s prohibition on a legislator’s direct and indirect interests in a contract has several ramifications: First, if a legislator has an ownership interest in an otherwise qualifying business, then Article IV, Section 28 likely disqualifies the business from receiving a recovery loan authorized by the Act. See Att’y Gen. Op. 91-11 (1991) (concluding that a water users association

could not contract with a firm in which Senator Christine Donisthorpe was a president and stockholder for a project funded through a contract authorized by the Legislature during Senator Donisthorpe's term in office). Second, if the legislator sits on the board of an otherwise qualifying business or nonprofit corporation, then the legislator's board membership also likely disqualifies the business or nonprofit from receiving a recovery loan. *See* Att'y Gen. Op. 90-17 (1990) (concluding that a legislator's service on the board of directors of a nonprofit organization disqualifies the organization from obtaining any contracts with state agencies where the contract was authorized by a law passed during the legislator's term). Last, if the legislator's immediate family members own a small business, then the legislator likely would have an indirect interest in the loan contract between that business and NMFA that would prevent the business from receiving the loan. *Cf.* NMSA 1978, § 10-16-2(F) (defining "financial interest" as an ownership interest in a business held by an individual or the individual's family).

The 2020 Act was passed by the Fifty-Fourth Legislature. Because the 2020 Act clearly "authorize[s]" the small business loans, Article IV, Section 28 prohibits any legislator that was a member of the Fifty-Fourth Legislature and any business a legislator that was a member of the Fifty-Fourth Legislature owns from applying for a small business loan until at least December 31, 2021. Whether the prohibition extends past December 31, 2021 turns on whether the 2021 Act also "authorizes" the small business loans.

The 2021 Act passed by the Fifty-Fifth Legislature also authorizes small business loans under Article IV, Section 28. The 2021 Act removes conditions on small business qualifying for small business loans, Laws 2021, ch. 5, § 2(E); authorizes the New Mexico Finance Authority to issue rules to permit businesses that do not have a record of actual losses to apply for small business recovery loans, *id.*, § 4(A); authorizes the New Mexico Finance Authority to issue small business loans in amounts greater than the authorization contained in the 2020 Act, *see id.*, § 4(C)(1); authorizes the New Mexico Finance Authority to require collateral or personal guarantees to secure loan amounts in excess of \$75,000, *id.*, § 4(C)(3); extends the deadline for loan applications from December 30, 2020 to May 31, 2022, *id.*, § 4(C)(4); and authorizes recipients receiving loans under the 2020 Act to refinance their loans subject to the terms and conditions of the 2021 act, *id.*, § 8. In view of those statutory provisions, like the 2020 Act, the 2021 Act

“authorizes” small business loans for the purposes of Article IV, Section 28.³ Therefore, Article IV, Section 28 also prohibits a legislator and any business a legislator owns from being “interested directly or indirectly in any” small business loan contract with the New Mexico Finance Authority authorized by either the 2020 Act or the 2021 Act.

CONCLUSION

For the reasons above, Article IV, Section 28 prohibits a legislator or a business a legislator owns from receiving a small business recovery loan until one year after the end of the legislator’s current term of office.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
JEFFREY L. BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
HON. GARREY CARRUTHERS, Commissioner
RONALD SOLIMON, Commissioner
JUDY VILLANUEVA, Commissioner
FRANCES F. WILLIAMS, Commissioner

³ New Mexico case law distinguishes between, on the one hand, legislation that appropriates funds for payments on contracts and, on the other hand, legislation that authorizes contracts for the purposes of Article IV, Section 28. *See State ex rel. Baca v. Otero*, 1928-NMSC-021, ¶ 11, 33 N.M. 310 (concluding that, under Article IV, Section 28, a legislator could receive compensation on a contract of employment as rural school supervisor because the contract was authorized by a 1923 statute empowering the superintendent of public instruction to enter contracts and not by the appropriations bill of the 1927 Legislature, of which the legislator was a member). In view of that distinction, the 2021 Act, like the 2020 Act, authorizes the small business loan contracts.