



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-10

The Honorable Lewis Moore
State Representative, District 96
2300 N. Lincoln Blvd., Room 329
Oklahoma City, Oklahoma 73105

September 21, 2018

Dear Representative Moore:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Does 36 O.S.2011, § 302—which prohibits the Insurance Commissioner from being “financially interested, directly or indirectly, in any insurer, agency, or insurance transaction”—allow the Insurance Commissioner to (i) maintain an insurance license while in office, and (ii) receive continuing commissions for insurance business transacted prior to taking office?**
- 2. If the Insurance Commissioner is not permitted to receive continuing commissions for insurance business transacted prior to taking office, may those commissions instead be held in trust for the Commissioner until the term of office ends?**

I.
BACKGROUND

The Oklahoma Insurance Commissioner (the “Commissioner”) is a state official who is elected to serve a four-year term, but may serve no more than eight years in total. OKLA. CONST. art. VI, § 23. The Commissioner must be at least 25 years old and “well versed in insurance matters.” *Id.*; *see also* 36 O.S.2011, § 302 (requiring the Commissioner to have at least five years’ experience in insurance “administration, sales, servicing or regulation”). By statute, the Commissioner is the chief executive officer of the Oklahoma Insurance Department (the “Department”) and is responsible for the administration and enforcement of the Oklahoma Insurance Code (the “Code”). 36 O.S.2011, § 301; 36 O.S.Supp.2017, § 307. Relevant to your questions, Section 302 of the Code provides that while the Commissioner must have a background in the insurance industry, he or she “shall not be financially interested, directly or indirectly, in any insurer, agency or insurance transaction except as a policyholder or claimant under a policy.” 36 O.S.2011, § 302.

II. DISCUSSION

To determine how Section 302 affects the Commissioner’s ability to maintain a license or receive commissions, it is necessary to first understand the meaning of certain statutory terms used therein. The Code defines “insurance” as “a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.” 36 O.S.2011, § 102. An “insurance transaction” includes the following actions with respect to an insurance contract: (i) “solicitation and inducement,” (ii) “preliminary negotiations,” (iii) “effectuation of a contract of insurance,” and (iv) “transaction of matters subsequent to effectuation of the contract and arising out of it.” *Id.* § 105. An “insurer” is defined as a “person engaged in the business of making contracts of insurance or indemnity.” *Id.* § 103(A). A “person” may be an individual, as well as an entity such as a “company,” “association,” “organization,” “society,” or “corporation.” *Id.* § 104.

The other key terms for our analysis of Section 302—“agency” and “financially interested”—are not defined in the Code or rules promulgated by the Department. When a statutory term is not defined, it must be “understood in its ordinary sense, except when a contrary intention plainly appears[.]” 25 O.S.2011, § 1. In divining the ordinary meaning of a term, we must also take into account the context in which it is used. *See In re Initiative Petition No. 366*, 2002 OK 21, ¶ 9, 46 P.3d 123, 127. The word “agency” is used in the Code and Department regulations to distinguish an individual licensee from a business entity licensee. *See, e.g.*, 36 O.S.2011, § 1435.31(B)(1) (permitting “[a]ny person licensed and appointed as an insurance producer, broker, or managing general agent,” as well as “any insurance agency” to appoint and employ licensed customer service representatives”); OAC 365:25-17-7 (referring separately to a “general agent” and an “independent agency”). On its website, the Department lists “insurance agency” as one type of licensee, describing an “insurance agency” as a business entity that earns income from the sale, solicitation, and negotiation of insurance in Oklahoma.¹ Accordingly, for the purposes of Section 302, the word “agency” is best understood to mean an entity engaging in the business of insurance.

In the absence of a definition of “financially interested” in the Code, the definition of “material financial interest” in the rules of the Oklahoma Ethics Commission (the “Ethics Rules”) is instructive. *See* 25 O.S.2011, § 2 (“Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase whenever it occurs, except where a contrary intention plainly appears.”); *see also* OKLA. CONST. art. XXIX, § 3(D) (“Effective Ethics Commission rules shall be published in the official statutes of the State.”). Like Section 302, the Ethics Rules are intended to address potential conflicts of interest for state officers and employees, including the Commissioner. *See* OKLA. CONST. art. XXIX, § 3(B).

Broadly, under the Ethics Rules a state employee has a “material financial interest” in a business entity—such as an insurer or agency—if he or she (or a family member) (i) holds a leadership position or ownership interest in the entity or (ii) receives dividends or income from the entity. *See* 74 O.S. ch. 62, app. 1, R. 4.7. A state employee may also have a “material financial interest” in any source of income received by the employee or a family member from *non-State* employment.

¹ *See* https://www.ok.gov/oid/Licensing_and_Education/Insurance_License_Types.html (last visited July 26, 2018).

See id. However, while this definition is helpful to our analysis, it differs from the language of Section 302 in two important ways. First, while the Ethics Rules define a *material* financial interest—and thus include certain threshold ownership percentages or dollar amounts—Section 302 includes no such qualifier. *See id.* Second, the Ethics Rule explicitly exempts interests in investment vehicles like mutual funds or pension plans, where the state officer/employee has no control over investment decisions. Section 302 contains no such exemption. Rather, the Commissioner is exempt only in situations where he or she is a policyholder or claimant. *See* 36 O.S.2011, § 302.²

Given the broad language of Section 302—prohibiting the Commissioner from being “financially interested, *directly or indirectly*, in *any* insurer, agency or insurance transaction”—it should be read as more restrictive than the Ethics Rule’s limitations. *See* 74 O.S. ch. 62, app. 1, R. 4.3. (“In addition to [the Ethics] Rules, a state officer or employee shall comply with . . . any more restrictive provisions of the statutes of the State of Oklahoma[.]”). Thus, for purposes of Section 302, the Commissioner is “financially interested, directly or indirectly,” in an insurer or insurance agency if the Commissioner has a connection with the insurer or insurance agency that results in any financial benefit to the Commissioner or members of the Commissioner’s family. *See* A.G. Opin. 2011-14, at 105 (opining that constitutional prohibitions on State officers “indirectly receiving prohibited interests, profits or perquisites include the receipt of such prohibited gain by an officer’s spouse”). Examples may include, but are not limited to, owning stock or other equity interest in the entity or receiving dividends or income in any amount from the entity. The Commissioner is “financially interested, directly or indirectly,” in an insurance transaction when the Commissioner engages in any of the actions described in Section 105 of the Code and receives any financial benefit as a result, with the exception of transactions involving the Commissioner as policyholder or claimant.³

Having determined the nature of the restrictions of Section 302 of the Code, we now turn to whether those restrictions limit the Commissioner’s ability to (i) maintain an insurance license while in office, and (ii) receive continuing commissions for insurance business transacted prior to taking office.

A. An Insurance Commissioner may maintain an insurance license while in office, provided that the Commissioner does not engage in activity that results in a direct or indirect “financial interest” in an “insurer, agency, or insurance transaction.”

The Department issues eight different types of licenses for individuals and business entities engaged in the insurance business, as well as three licenses that authorize a licensee to offer certain

² It is also notable that Section 335 of the Code, which in language identical to Section 302 prohibits Department *employees* from having a financial interest in “any insurer, agency or insurance transaction,” explicitly *permits* investment by such employees in “mutual funds that may own stock in insurance companies.” 36 O.S.2011, § 335. Again, no such exemption appears in Section 302 with respect to investments by the Commissioner.

³ These conclusions are broadly consistent with an ordinary understanding of “interested”, defined as “having a share or concern in some affair or project.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1178 (2002). “Interest” is similarly defined as, among other things, a “right, title, or legal share in something” or “participation in advantage, profit, and responsibility.” *Id.*

types or “lines” of insurance.⁴ With the exception of the insurance consultant license,⁵ a person who holds a license is in most, but not all circumstances, “financially interested, directly or indirectly, in any insurer, agency or insurance transaction.” For example, to be eligible to sell, solicit, or negotiate insurance for an insurer, a licensed producer⁶ is required to be an “appointed agent” of an insurer. 36 O.S.Supp.2017, § 1435.15(A). Being an appointed agent necessarily entails a contract that sets forth the compensation the licensee will receive from the insurer for his or her services. A licensee that receives compensation from an insurer, regardless of whether the licensee actually engages in an insurance transaction, would have a financial interest prohibited by Section 302.

However, a licensed producer who is not acting as an agent of an insurer is *not required* to become appointed. 36 O.S.Supp.2017, § 1435.15(A). Further, the Code’s definition of “license” provides that “[t]he license itself does not create any authority, actual, apparent or inherent, in the holder to represent or commit an insurance carrier.” *Id.* § 1435.2(9). Thus, a Commissioner with an active license who is not an appointed agent of any insurer—and does not otherwise receive any financial benefit from an insurer, insurance agency, or insurance transaction—would not run afoul of Section 302. The Commissioner is permitted to maintain a license with no appointments, but may not use that license to engage in any activity resulting in the direct or indirect receipt of a financial benefit. The determination of whether a Commissioner who holds any particular type of insurance license while in office has a prohibited financial interest involves questions of fact and is therefore not answerable in an official Attorney General Opinion. *See* 74 O.S.Supp.2017, § 18b(A)(5).

This conclusion notwithstanding, there are other potential conflicts of interest for a Commissioner who maintains an insurance license while in office, including those prohibited by the Ethics Rules.⁷ In addition, the unique regulatory structure of the Department—which involves the Commissioner, not a board,⁸ being solely responsible for overseeing the Department—may create conflict-of-interest concerns as well. If a Commissioner were to maintain a license while in office, he or she

⁴ *See* https://www.ok.gov/oid/Licensing_and_Education/Insurance_License_Types.html (last visited July 26, 2018).

⁵ An insurance consultant “offers advice, counsel, opinion, or service with respect to the benefits, advantages, or disadvantages promised under any policy of insurance that could be issued or delivered in this state.” 36 O.S.Supp.2017, § 1435.2(6). Insurance consultants are prohibited from being employed by, in partnership with, or receiving any remuneration from any licensed producer, broker or insurer. *Id.* § 1435.30(E).

⁶ As used in the Code, the term “insurance producer” means “a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance.” 36 O.S.Supp.2017, § 1435.2(7).

⁷ State officers and employees must avoid conflicts of interest as proscribed by the Ethics Rules. *See* 74 O.S.Supp.2016, Ch. 62, App. I, R. 4.4. However, the interpretation and application of those rules falls within the purview of the Ethics Commission, not this office. *See* A.G. Opins. 2017-11, 2013-1, at 13 n.2, 2003-52, at 306 n.1; *see also* OKLA. CONST., art. XXIX, § 5.

⁸ *See* 36 O.S.2011, §§ 107, 301. The Code was amended in 2006 to eliminate the State Board for Property and Casualty Rates, which together with the Commissioner constituted the Insurance Department. *See* 2006 Okla. Sess. Laws ch. 264, §§ 1, 3. Prior to the amendment, the Commissioner exercised only those powers and duties created by the Code and not otherwise reserved to the Board. *Id.* § 3. The Commissioner further carried out such duties as requested by the Board. *Id.*

would be the ultimate authority for the regulation of that license. However, we do not reach any conclusions with regard to those issues in this Opinion.

B. An Insurance Commissioner may not receive commissions while in office, even if those commissions are the result of transactions effectuated prior to holding office.

The payment of commissions for sales of insurance policies is governed by contracts between the insurer issuing the policy and the individual or company selling the insurance policy, subject to the relevant provisions of the Code and Department regulations. *See Wagner v. Land*, 1931 OK 634, 4 P.2d 81; *Stickney v. Kansas City Life Ins. Co.*, 2006 OK CIV APP 146, 149 P.3d 1048. Depending upon the terms of the contract, an agent/producer may continue to receive commissions for several years after the termination of the agent's contract with the insurer. *See, e.g., Roush v. Nat'l Old Line Ins. Co.*, 453 F. Supp. 247, 253 (W.D. Okla. 1978) (describing "the interest of an agent, who has devoted many years to selling policies of insurance for one company...[and] has come to rely upon renewal commissions to provide financial security for his later years"). Thus, the Code authorizes the payment of renewal or deferred commissions to unlicensed persons who were licensed at the time of sale, solicitation, or negotiation, and to persons no longer selling insurance in Oklahoma, unless the payment otherwise violates the Code. 36 O.S.2011, § 1435.14; *see also id.* § 6071 (authorizing the payment and receipt of life insurance renewal and other deferred commissions to persons who are no longer a licensed agent).

The restrictive language of Section 302 serves as a bar to the Commissioner's receipt of such commissions while in office. As explained above, Section 302 provides that the Commissioner "shall not be financially interested, directly or indirectly, in *any* insurer, agency or *insurance transaction* except as a policyholder or claimant under a policy." 36 O.S.2011, § 302 (emphasis added). "Transact' with respect to insurance includes," among other things, the "[e]ffectuation of a contract of insurance" as well as the "[t]ransaction of matters *subsequent to* the effectuation of the contract *and arising out of it.*" *Id.* § 105 (emphasis added). If a Commissioner were contractually entitled to receive continuing commissions based on transactions effectuated prior to taking office, and the Commissioner in fact received those commissions while in office, the Commissioner would have a financial interest in that insurance transaction. Such a scenario is prohibited by the plain language of Section 302.

C. Placing commissions to which the Insurance Commissioner is entitled in a trust during the Commissioner's term of office does not satisfy the requirements of Section 302.

Although the federal government and several states have laws expressly authorizing the use of certain trusts, particularly blind trusts, as a means for public officials to avoid financial conflicts of interest, Oklahoma has no such laws.⁹ This office previously considered whether a Corporation Commissioner could avoid a conflict of interest by placing prohibited oil and gas interests in a

⁹ For example, the federal Ethics in Government Act authorizes executive branch officials to establish two types of trusts in which the public official establishes the trust and is the beneficiary of the trust proceeds, but may not participate in or have knowledge of the management of the trust's assets. 5 C.F.R. § 2634.401. However, some commentators have expressed skepticism that such trusts have the intended curative effect. *See, e.g., Megan J. Ballard, The Shortsightedness of Blind Trusts*, 56 U. KAN. L. REV. 43, 59 (2007).

blind trust or another type of trust over which the Corporation Commissioner had no control. *See* A.G. Opin. 1991-29, at 92. While the Oklahoma Constitution provides that a Corporation Commissioner, in the case of an involuntary interest, could cure the conflict by divesting the interest, the opinion concluded that placing the interest in a blind trust would not satisfy the divestiture requirement because divestiture requires the interest to be sold in a cash sale. *Id.* at 99. This conclusion, coupled with the absence of any statutory provision authorizing a public official's use of trusts to avoid financial conflicts of interest, suggests that in cases where the Commissioner's receipt of commissions constitutes a prohibited "financial interest," the Commissioner may not eliminate the conflict by placing the commission in a trust.

It is, therefore, the Official Opinion of the Attorney General that:

- 1. The Insurance Commissioner has a financial interest prohibited by 36 O.S.2011, § 302 when he or she has any connection with an insurer, insurance agency, or insurance transaction, as defined by the Insurance Code, from which the Commissioner receives any direct or indirect financial benefit.**
- 2. The Insurance Commissioner is not prohibited by 36 O.S.2011, § 302 from maintaining an active insurance license while in office, provided that holding the license does not result in the Commissioner having a direct or indirect financial interest in an insurer, insurance agency, or insurance transaction as defined by the Insurance Code.**
- 3. The Insurance Commissioner is prohibited by 36 O.S.2011, § 302 from receiving commissions while in office, even if those commissions are the result of transactions effectuated prior to holding office. Receipt of such commissions amount to having a "financial interest" in an "insurance transaction."**
- 4. Placing commissions resulting from insurance transactions effectuated prior to an Insurance Commissioner's term of office in a trust does *not* avoid the prohibition of 36 O.S.2011, § 302 on the Insurance Commissioner having a "financial interest" in an "insurance transaction." *See* A.G. Opin. 1991-29.**



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