



MONTGOMERY COUNTY ETHICS COMMISSION

Susan Beard
Chair

Bruce Romer
Vice Chair

May 24, 2021

Waiver 21-05-007

On behalf of the Executive and Legislative branches of the Montgomery County Government, the County Attorney requested that the Ethics Commission issue a class waiver under § 19A-8 (a) of the County Code from the prohibitions of § 19A-11(a)(1) and (2) to allow public employees who hold a limited economic interest in certain large publicly traded entities to participate in matters that involve those entities. For the reasons stated below, the Ethics Commission grants the requested class waiver.

Section 19A-11(a)(1) prohibits a public employee from participating in a matter if the matter affects property or a business in which the employee has an economic interest worth \$1,000 or more; § 19A-11(a)(2) prohibits a public employee from participation in a matter if a party to the matter is an entity in which the employee has an economic interest worth \$1,000 or more.

On December 1, 2020, the County Council, at the request of the Ethics Commission, introduced Bill 47-20, Ethics, Ethics Commission - Conflicts of Interest – Financial Disclosure – Amendments. Bill 47-20 proposed to carve out an exception to § 19A-11(a)(1) and (2) to permit a public employee, who holds a limited economic interest in certain large publicly traded entities, to participate in a matter that involves those entities. The proposed amendment to § 19A-11(b) reads as follows:

(7) Subparagraph (a)(2) does not apply to an employee's participation in a matter affecting a business with a principal place of business outside of the County where the employee's economic interest is limited to ownership of publicly traded securities:

(A) issued by a company that is part of the Standard & Poor's 500 Index; and (B) the market value of the securities does not exceed \$25,000.

(8) Subparagraph (a)(1) does not apply to an employee's economic interest that is limited to the ownership of publicly traded securities issued by a company with a principal place of business outside the County if the market value of the securities does not exceed \$50,000.

The Ethics Commission proposed this amendment due to the extreme unlikelihood that an action of the Montgomery County government would impact a large publicly traded entity to such an extent that the entity's stock price would be materially impacted. At the insistence of the State Ethics Commission, the Council deleted this provision from Bill 47-20. The State Ethics Commission, however, suggested that the County Ethics Commission might accomplish the same outcome by issuing a class waiver.

Pursuant to § 19A-8, the Ethics Commission, after receiving a written request, may grant a class of public employees a waiver from the prohibitions of the Ethics Law if the Commission finds that: (1) the best interests of the County would be served by granting the waiver; (2) the importance to the County of a class of employees performing their official duties outweighs the actual or potential harm of any conflict of interest; and (3) granting the waiver will not give a class of employees an unfair economic advantage over other public employees or members of the public.

The proposed exemptions from the coverage of § 19A-11 in Bill 47-20 (described above) were modeled on exemptions in federal regulations from application of the federal conflict of interest law. See 18 U.S.C. Section 208 and 5 C.F.R. 2640.202. Given the national scope of federal action, the likelihood of federal action impacting public companies is immensely greater than action by a single Maryland county. Nonetheless, certain holdings of federal employees have been exempted from application of the federal conflict of interest law. As the County's proposal is limited to the very largest public companies as represented in the Standard and Poor's 500 Index, the proposal has an even narrower scope than what the federal regulation permits. Coverage by the County's Ethics Law of circumstances that are inherently not problematic trivializes the Ethics Law and the application of that law. An employee with a few shares of a major corporation's stock who is involved in a procurement involving that corporation's products would reasonably conclude that there is no conflict of interest, because, in fact, there is no actual conflict. It would be the extremely unusual case that an employee could affect the value of the employee's holding of the Company's stock through action as a County employee. Nonetheless, the County's Ethics Law imposes strict liability in this circumstance and makes the services of that employee unavailable to the County, unless a waiver is obtained from the Ethics Commission. Of course, the Ethics Commission could use "prosecutorial discretion" and decline to pursue a technical violation by an employee caused by the employee's holding of a small amount of stock of a major corporation. But it is preferable to create a general rule through the issuance of a class waiver rather than rely on the ad hoc use of prosecutorial discretion where inconsequential technical violations have occurred.

Granting this class waiver request is in the best interest of the County, because the importance of having County employees do their respective jobs without fear of inconsequential violations of the Ethics Law that might occur in the absence of the waiver outweighs any theoretical harm of such violations. Granting the waiver will not confer an economic advantage over other employees or members of the public. There simply is no economic advantage as the exempted holdings will not be materially affected by employee action; so, granting the waiver would not confer economic advantage on any person.

For these reasons, the Commission grants a class waiver to establish the exemptions from the law that the Ethics Commission proposed to the Council in Bill 47-20.

The Commission imposes the following condition on use of the waiver. In the event an employee wishes to assert entitlement to the waiver, when requested by the Ethics Commission, the employee must attest to the precise value and extent of the employee's holdings in the securities for the time period(s) for which the waiver is claimed to apply.

For the Commission:

A handwritten signature in cursive script that reads "Susan Beard".

Susan Beard, Chair