



## MONTGOMERY COUNTY ETHICS COMMISSION

**Waiver 22-04-008**

**April 19, 2022**

County Code Section 19A-13(b) prohibits a former public employee from working for another person or business for one year after leaving County service if that employee significantly participated in regulating or contracting with that person or business.

Mr. Taggart Hutchinson, an Attorney in the Office of County Attorney (OCA), submitted a request for an advisory opinion on the question of whether employment pursuant to a job offer he received from Miller, Miller and Canby (MM&C) is barred for one year by 19A-13(b) and, in the event the Commission determined that it is, Mr. Hutchinson sought a waiver from the Commission from the prohibition.

### Factual Background

Miller, Miller & Canby (MM&C), a Rockville based law firm, offered Mr. Hutchinson a position as an Associate Attorney in their Real Estate Financing and Settlement Services group. The position requires advising clients on real estate transactions, including acquisitions and dispositions, commercial leasing, property management, and construction financing. MM&C is an agent of Fidelity National Title Insurance and Commonwealth Land Title Insurance Company. Mr. Hutchinson will be expected to conduct commercial real estate settlements and underwrite and issue title insurance policies for both owners and lenders.

In his role with the OCA, he serves as agency counsel to the Department of Finance. He has held this position for about 5 years. His role includes providing legal advice to the Director of Finance on the imposition and collection of various State and County taxes. These taxes include real property tax, personal property business tax, transfer and recordation tax, development impact tax, and various local excise taxes enacted under the County's general taxing authority. The imposition of these taxes is based on State and County statutes, and the County and the Maryland Office of the Attorney General regularly provide legal opinions and memorandums to help guide taxpayers. Mr. Hutchinson regularly communicates with his counterparts at the Office of the Attorney General to apply State recordation tax and County transfer tax consistent with the State's application of the State transfer tax on the same documents. He also regularly communicates with his counterparts who represent the taxing authorities in Baltimore County, Baltimore City, Howard County, Prince George's County, and Frederick County to maintain

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**100 MARYLAND AVENUE, ROOM 204, ROCKVILLE, MARYLAND 20850**  
**OFFICE: 240.777.6670 FAX: 240.777.6672**

consistency in application of all three of these taxes throughout the State. The County's policies, practices, and legal application of the relevant statutes are all public information.

Mr. Hutchinson submits that he has not participated in regulating MM&C. In his view, the imposition of taxes does not flow from the County's police power to regulate conduct but from the power to tax delegated to the County by the State. He also submits that the statutory requirements to pay applicable taxes is on the taxpayers and not on MM&C as its legal representative.

In his capacity as agency counsel for Finance he submits that he has never worked on any matters that have involved MM&C in their capacity as a taxpayer. He has, though, worked on matters where MM&C represented taxpayers in recording documents with the local land records office. The documents submitted by MM&C on behalf of its clients included deeds, leases, and security instruments, on which the County imposed the applicable transfer and recordation tax or were confirmed to be exempt from such taxes under an applicable statutory exemption. During the three-year look-back period in 19-13(b), Mr. Hutchinson was not involved in any tax appeals filed by MM&C on behalf of themselves or their clients, and he stated he was not aware of any such pending or threatened litigation.

To provide insight to his role as an attorney for the Department of Finance, Mr. Hutchinson explained the scope of the legal matters in which he has come into dealings with MM&C:

The clerk of the Circuit Court for Montgomery County is required to maintain local land records- compilations of all the changes in ownership of real property in the court's county, along with a "a full and complete" index. Md. Code Ann., Real Prop §§ 3-101, 3-102, 3-301, 3-302. Some of the documents that are recorded with the land records office are taxable, such as deeds, leases, and security instruments. Recordation and transfer taxes are progressive taxes in that they depend on the amount paid for the property interest conveyed that the instrument commemorates. Tax-Prop §§ 12-103, 13-203; Mont. Co. Code § 52-29(a). Each tax is paid on a percentage of "the consideration payable for" the "instrument of writing" submitted for recording.

Prior to a taxable instrument of writing being recorded with the local land records, the County's Department of Finance, through its Transfer Office, imposes and collects the State recordation tax and the local County transfer tax. Md. Code Ann., Tax-Prop §12-110; Mont. Co. Code § 52-31. After the County collects these taxes, the documents receive a stamp indicating the amount of the applicable tax that was paid. The property owner, or their representatives, then take the documents to the clerk of the Court where they pay the State transfer tax and record the documents with the local land records office. Md. Code Ann., Tax-Prop §13-209.

The majority of these transactions are handled pro forma by the County's Transfer Office and the Clerk of the Circuit Court for Montgomery County. However, when a proposed transaction is particularly complex, the County provides a pre-approval process for the County to review and confirm the total amount of tax that would be due upon recording. The pre-approval process is a regular part of the Transfer Office's operations, and it

prevents additional back-and-forth between the recording parties and the State and local taxing authorities. Most of the pre-approvals are similarly handled by the Transfer Office and do not require [his] legal interpretation. However, the Transfer Office will seek [his] legal interpretation when a proposed transaction creates a new or unique set of circumstances that they have not considered, or when the taxpayer disputes a rejection based on the amount of the tax imposed. If the taxpayer files a request for refund of the tax collected, [Mr. Hutchison] will assist the Transfer Office in drafting a final decision and litigate the matter from the Maryland Tax Court through all applicable appeals.

Issues that often rise to [his] attention during the pre-approval process for complex transactions include: (1) the amount of actual consideration paid by the buyer to the seller in return for an interest in the property (i.e. the applicable taxable base under Tax-Prop §12-103 and Mont. Co. Code § 52-29(a)), (2) The applicability of various statutory exemptions pursuant to Tax-Prop §12-108 and Mont. Co. Code § 52-34, (3) multijurisdictional transactions where more than one County is required to allocate and collect recordation tax on secured property based on the relative property values between the counties (Tax-Prop §12-110(b)), (4) the applicable statutory calculation on leases and ground leases based on the manner in which the rent payments are calculated (Tax-Prop §12-105(d)), and (5) exemptions for security instruments known as Indemnity Deeds of Trust (IDOTs) when the amount of the underlying loan "or series of loans" is less than \$3 million (Tax-Prop §12-105(f)(7)).

The volume of these transactions processed by the Transfer Office varies based on the economic climate. Over the past three years the Transfer Office processed between 29,000 and 68,000 land transactions annually where State recordation tax was imposed, and between 14,000 and 17,000 transactions where County transfer tax was imposed. [Note omitted.] Of those transactions, [he] . . . estimate[s] that [he] reviewed and provided legal advice on complex pre-approvals or Transfer Office rejections on between 20 and 40 transactions every month. [He is] aware of 12 transactions over the past three years where [he] provided the County's Transfer Office with legal advice on recording documents submitted by MM&C on behalf of their clients.

## Analysis

The County's ethics laws ensure public integrity with respect to County employees negotiating with or taking jobs with vendors of the County. The law's framework includes the conflict of interest prohibition in 19A-11 on a public employee working on a matter affecting an entity with which the employee has an application or is negotiating for employment; the post-employment permanent bar of 19A-13(a) on assisting anyone other than the County with respect to a specific matter that the employee significantly participated in as a public employee; and the one-year bar of 19A-13(b) on a former employee being employed by a person or entity where the public employee significantly participated in regulating or in contractual activity with the person or entity. A former employee also is prohibited from using confidential information gained while a public employee for private gain. To complement the restrictions on public employees and former public employees, vendors to the County are prohibited by the procurement integrity provisions of County procurement law at 11B-52(a) from employing or offering to employ a

public employee if the duties of the public employee include significant participation in the procurement matter with the vendor.

This framework of laws is generally intended to assure that County employees are objective and impartial in the execution of their duties. More specifically, these laws are intended to prevent real or apparent corruption associated with the “revolving door” between government service and private entities. Dealings with vendors and regulated persons are not to be, in effect, one long job interview where County employees are "feathering their nests" and seeking opportunities with the very persons who are affected by the conduct of their County jobs. And the provision of 11B-52(a), applicable to vendors, is to keep them from engaging in actions that are likely to result in questions regarding the impartiality and independence of public employees or inducing employees to violate the ethics provisions that are applicable to the employees.

With respect to its responsibility to interpret the ethics law, the Ethics Commission’s charter is set forth in the law: 19A-2 states:

the Council intends that this Chapter, except in the context of imposing criminal sanctions, be liberally construed to accomplish the policy goals of this Chapter.

And the policy goals are also stated:

The people have a right to public officials and employees who are impartial and use independent judgment.

The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

The prohibitions of 19A-13 provide:

(a) A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter if the employee significantly participated in the matter as a public employee.

(b) For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business if the public employee significantly participated during the previous 3 years:

(A) in regulating the person or business; or

(B) in any procurement or other contractual activity concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).

At the Ethics Commission meeting where this matter was considered (in closed session), the four members present split 2-2 on the question of whether the proposed employment of MM&C would be barred by 19A-13(b).

The Ethics Commission believes “regulating” as it is used in 19A-13(b) should be viewed “liberally” to effect the purposes of the ethics law to assure impartiality, independence, and prevent the appearance of improper influence. The Commission generally interprets “regulating” as meaning, consistent with the Merriam-Webster definition of regulate, “to govern or direct according to rule” rather than the narrower subsequent definition “to make regulations for or concerning.”<sup>1</sup> This interpretation suits the Commission’s mandate of liberal interpretation. It also makes sense independent of that as most of the County’s agencies are not regulatory. Adopting a narrow interpretation of “regulating” would limit the one-year bar of 19A-13(b) to procurement matters covered under 19A-13(b)(2) and the few County employees administering regulations.

In applying the Commission view of “regulating”, two Commissioners were of the opinion that Mr. Hutchinson’s employment is, without a waiver, barred by 19A-13(b) (for a year). In their view, Mr. Hutchinson was involved in regulating MM&C. The two other Commissioners at the meeting were of the view that the law firm, whose role in matters before Mr. Hutchinson was as counsel, was not subject to being regulated by Mr. Hutchinson. As the 2-2 decision was inconclusive as to whether the bar of 19A-13(b) applied to Mr. Hutchinson’s proposed employment with MM&C, the Commission considered Mr. Hutchinson’s request for a waiver.

County Code Section 19A-8(c)(2) authorizes the Commission to waive the prohibitions of Section 19A-13(b) if it finds that: (1) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or (2) the proposed employment is not likely to create an actual conflict of interest. If either of these standards are met, a waiver can be issued. Mr. Hutchinson requested a waiver of Section 19A-13(b) to be employed by MM&C on the basis that the statutory standard for issuance of a waiver is met.

In applying the waiver standard regarding hiring and retention of employees, the Commission places considerable weight on the position of the requesting employee’s agency head. In this instance, John Markovs, the Acting County Attorney, provided the following statement:

Upon review of the waiver request of Taggart Hutchinson, I concur in and support the request and recommend that the waiver be granted. I support Mr. Hutchinson's conclusion that this waiver should be granted pursuant to 19A-8(c)(2) because no actual conflict of interest exists between his current and proposed future employment. I would also note that failing to grant this waiver may reduce the ability of the Office of the County Attorney (OCA) to hire and retain highly qualified attorneys for certain roles pursuant to 19A-8(c)(1). In order to provide timely and specialized legal advice to our clients, many of OCA's attorneys are embedded within the departments that they represent. Preventing an OCA attorney who currently serves as agency counsel to a County department from seeking private employment in the same field of law would

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<sup>1</sup> “regulate.” Merriam-Webster.com, April 15, 2022.

likely have a chilling effect on the quality and quantity of applicants that we receive to serve in those positions.

Based on the position of the Acting County Attorney and the Commission's assessment, the Commission grants the requested waiver on the basis that Mr. Hutchinson's employment by MM&C meets both standards for issuance of a waiver pursuant to 19A-8(c): that failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; and that the proposed employment is not likely to create an actual conflict of interest. The waiver is conditioned on Mr. Hutchinson's compliance with 19A-13(a).

The prohibition contained in 19A-13(a) is not subject to waiver by the Ethics Commission. Accordingly, were Mr. Hutchinson to work at MM&C, he would be prohibited from working on the same specific matters that he worked on while an employee with the County. The bar of 19A-13(a) is permanent. Compliance with 19A-13(a) provides a measure of assurance that an "actual conflict of interest" in Mr. Hutchinson's work with MM&C is unlikely.

The issuance of the waiver is based on the facts presented by Mr. Hutchinson in his request for a waiver.

For the Commission:

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

Susan Beard, Chair