



## INSPECTOR GENERAL REPORT

2014-07-0154

November 19, 2014

### **LEGISLATIVE RECOMMENDATIONS** **FOR THE 2015 SESSION OF THE INDIANA GENERAL ASSEMBLY**

*Inspector General David O. Thomas and State Ethics Director Cyndi Carrasco, reports as follows:*

#### **Summary**

*The Indiana Office of Inspector General (OIG) is statutorily charged to make recommendations to the Indiana General Assembly to strengthen public integrity laws. Accordingly, the OIG respectfully makes the following recommendations for consideration during the 2015 legislative session:*

#### *Recommendation 1*

*That the ethics law governing conflicts of interests set forth in I.C. 4-2-6-9 be amended to clarify that an individual is prohibited from participating in activity related to a decision or vote that gives rise to a conflict of interest under this law.*

#### *Recommendation 2*

*That the ethics law governing conflicts of interests set forth in I.C. 4-2-6-9 be amended to establish a secondary, alternative written conflict of interest disclosure process.*

*Recommendation 3*

*That the ethics law governing conflicts of interests set forth in I.C. 4-2-6-10.5 be amended to establish a detailed, mandatory disclosure filing requirement for individuals who enter into contracts with any state agency. Failure to timely file the mandatory disclosure could subject the individual to the imposition of a fine.*

*Recommendation 4*

*That the law governing post-employment set forth in I.C. 4-2-6-11 be amended to: 1) require a mandatory reporting for individuals who form professional practices immediately upon leaving state employment; 2) establish that the one-year restriction only applies if an individual has negotiated or administered a contract with their intended employer within 2 years of commencing employment negotiations; 3) require the application of a one-year cooling off period to administrative law judges who preside over information gathering and order drafting in regulatory or licensing proceedings; and 4) require that post-employment waivers articulate specific criteria, be approved by the State Ethics Commission (SEC), be published online, and be limited to those who seek and file one with the SEC before engaging in the conduct that would give rise to the violation.*

*Recommendation 5*

*That the inspector general be prohibited from seeking a state elected office for 365 days upon leaving the inspector general position.*

## *Introduction*

The Indiana General Assembly statutorily created the OIG through P.L. 222 in 2005. At that time, the General Assembly charged the Inspector General to implement a code of ethics that governed the conduct of executive branch workers. I.C. 4-2-7-3(6). The OIG was also specifically directed to make recommendations to the Governor and the Indiana Legislature to strengthen public integrity laws and prevent wrongdoing. I.C. 4-2-7-3(9).

The OIG established and implemented a code of ethics in 2005. That code is codified at 42 I.A.C. 1-5-1 (“Code”) and is intended to establish the minimum standards of ethical conduct for state workers. The rules set forth in the Code regulate areas including conflicts of interest, gifts, and post-employment, among others. In addition to establishing the Code, the OIG created an online state-wide ethics training program that monitors compliance. The online ethics training program was, and continues to be, critical to the success of the implementation of the Code. For the first time ever, state officers, employees and special appointees across the entire State were 1) aware of the Code’s existence and 2) were trained on the standards of conduct they were expected to comply with. Most notably, the OIG established an advisory forum for state workers to seek advice on questions regarding the Code’s application to their intended activities. The success of the combination of these efforts is illustrated by the fact that the OIG has issued 3,006 informal advisory opinions and the State Ethics Commission (“SEC”) has issued 193 formal advisory opinions to date since 2005 to state workers seeking advice to ensure compliance with the Code.

The chart below lists the public integrity laws and procedures in the Executive branch of State government.

RULES	
Gifts required to be reported	✓
Gifts prohibited	✓
Honoraria prohibited	✓
Conflict of Interest filing required	✓
Conflict of Interest screen by another	✓
Conflict of Interest disclosure required	✓
Unofficial Use of Property limited	✓
Use of confidential information restricted	✓
Post-employment contact back restricted	✓
Post-employment particular matters restricted	✓
Post-employment actual employment restricted	✓
PROCEDURES	
Internal compliance training program	✓
Website devoted to compliance	✓
Annual conference for compliance	✓
Internal Advisory Opinions	✓
Adjudications published	✓
Investigative Reports published	✓
Investigators on staff	✓
Violations fined /penalized in past year	✓

The restrictive public integrity laws and robust procedures of the Executive branch reflected in the chart above are merited for two different reasons. First, the majority of individuals in the Executive branch of State government are appointed. They are not elected; a check and balance that is not afforded to the public in the Executive branch. Second, the Executive branch has by far the greatest number of employees and budgeted dollars of any of the three branches of government. Moreover, employees in the Executive branch are entrusted to make many discretionary decisions affecting all areas of state government operations. That authority merits a high level of scrutiny and oversight.

While the Code establishes specific parameters that state workers are expected to abide by, an element that is necessary when governing the ethical conduct of a large population, the body of advisory opinions established over the last ten years by the SEC and OIG has revealed areas of the Code where the rules could be amended to provide further clarity and promote efficiency. This report is intended to highlight the areas where the public integrity laws governing the Executive branch of state government could be enhanced. Accordingly, the OIG respectfully makes the following recommendations and supporting comments regarding the current public integrity laws.

**I. Conflicts of Interest – Decisions and Voting – Participation**

I.C. 4-2-6-9(a) prohibits members of the Executive branch including state officers, employees and special state appointees (state board and commission members) from participating in a decision or vote in which the individual or various others have a financial interest in the matter.<sup>1</sup> One of the primary goals of

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<sup>1</sup> I.C. 4-2-6-9 provides that:

(a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

this statute is to prevent an individual from being in a position to take action on matter(s) that they have a financial interest in, positive or negative, by taking part in a vote or a decision. To truly accomplish this goal, the prohibition must also apply to participation in all matters related to the ultimate decision or vote that gives rise to the conflict. An alternate interpretation would allow individuals to influence matters related to a decision or vote and simply recuse themselves from the actual decision or vote.

Over the years, the term “participation” has been interpreted broadly by the SEC to prohibit individuals from participating in any matters leading up to or related to the decision or vote that an individual is prohibited from participating in. The SEC and various state agencies have developed and implemented detailed screening mechanisms to ensure that individuals who have identified a potential conflict are not only screened from the matter at the time of the decision or vote, but from anything leading up to the vote such as planning discussions or logistics to matters that may arise after the decision or vote has been made.<sup>2</sup> Accordingly, the OIG recommends that the SEC’s broad interpretation of the term

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(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

<sup>2</sup> SEC Opinion No. 14-I-3([http://www.in.gov/ig/files/opinions/2014/s14-I-3\\_DFI-OE\\_COIdv\\_BCI\\_DCI\(1\).pdf](http://www.in.gov/ig/files/opinions/2014/s14-I-3_DFI-OE_COIdv_BCI_DCI(1).pdf)) ; SEC Opinion No. 14-I-13( [http://www.in.gov/ig/files/s14-I-13\\_DNR-COIdv\\_CI.pdf](http://www.in.gov/ig/files/s14-I-13_DNR-COIdv_CI.pdf)), SEC Opinion No. 12-I-17 ([http://www.in.gov/ig/files/s12-I-17\\_DNR-COI\\_CI.pdf](http://www.in.gov/ig/files/s12-I-17_DNR-COI_CI.pdf)).

“participates” be statutorily codified to ensure that an individual who identifies a potential conflict of interest is prohibited from participating in any and all aspects of the decision(s) or vote(s) that gives rise to the conflict.

## **II. Conflicts of Interest – Decisions and Voting – Disclosures**

The law that governs conflicts of interest in the Executive branch is a comprehensive law that establishes a prohibition intended to prevent individuals from making decisions or participating in votes when the public’s interest is secondary to their own. More importantly, the law requires that specific public disclosures be made if and when a potential conflict of interest is identified. I.C. 4-2-6-9(b) requires that an individual who identifies a potential conflict of interest (1) notify their appointing authority, (2) request an advisory opinion from the SEC by filing a written description detailing the nature and circumstances of the potential conflict and making full disclosure of any related financial interest in the matter, (3) appear at a public SEC meeting, (4) verbally disclose in detail and under oath the conflict, (5) be publicly questioned about the circumstances, and (6) receive a public screen (7) from the SEC, an entity separate from the disclosing employee’s agency.

The OIG does not recommend that this procedure be repealed. There is great value in retaining this procedure as it provides great transparency to a potential conflict of interest situation. However, we recommend that a secondary, alternative disclosure procedure be implemented for at least four (4) reasons.

First, conflicts of interest do not occur in neatly-defined time periods that correspond with monthly SEC meetings. Conflicts of interest can occur and/or be identified spontaneously. A common example is a conflict of interest that arises during a board or commission meeting and an individual must be screened on the spot. Alternatively, conflicts of interest may be identified several weeks before the next SEC monthly meeting, requiring the individual to be screened in advance of the meeting.

Second, and perhaps most importantly, conflicts of interest that should be disclosed are potentially not being disclosed now because of timing. Specifically, a situation that gives rise to a conflict of interest may have passed by the time that the next monthly SEC meeting takes place making the required disclosure of the conflict unnecessary.

Third, there is precedent for disclosing conflicts of interest in a quicker, more transparent way. Specifically, procedures adopted by the Judicial branch require the filing of a document that can be done at anytime when a conflict arises.<sup>3</sup>

Fourth, we believe the recommendation outlined below may provide a forum for individuals who wish to disclose circumstances that do not violate the conflict of interest rule, but who still wish to address the appearance of impropriety in an attempt to be transparent and avoid controversy.

For all of the aforementioned reasons, we recommend that the existing provisions in I.C. 4-2-6-9(b) remain intact, but that an alternative option be added

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<sup>3</sup> See e.g., Ind. R. Trial P. 76 (Change of venue) and 79 (Change of judge) and I.C. 33-39-1-6 (Appointment of special prosecutor).

to enable an individual to disclose a conflict of interest and screening procedure through a written filing. An alternative written disclosure procedure would require that an individual with a potential conflict of interest (1) disclose the potential conflict of interest to the individual's appointing authority and ethics officer in writing and (2) file a written document with the SEC detailing the conflict of interest and affirming the implementation of a screen established by the ethics officer no later than seven (7) days after the conduct that gives rise to the conflict. The written document filed with the SEC must be signed by the individual. It must also contain the signature of the agency ethics officer and include a copy of the disclosure provided to the appointing authority. The written document and written disclosure to the individual's appointing authority shall be posted on the OIG website.

We believe that the addition of the proposed alternative disclosure procedure will promote transparency by disclosing conflict of interests that would otherwise go undisclosed and improve efficiency by allowing screens to be implemented immediately and thereby allow state business to be conducted in a timely manner.

### **III. Conflicts of Interest – Contracts**

I.C. 4-2-6-10.5 prohibits a state officer, employee, or special state appointee from knowingly having a financial interest in a contract made by an agency. The application of this statute extends to a contract an individual may have with any state agency. The typical scenario that invokes consideration of

this rule occurs when a state agency board or commission member owns a business that performs work under contract for a state agency. This restriction, however, does not apply to an individual that does not participate in or have official responsibility for any of the activities of the contracting agency, provided that specific criteria are met.<sup>4</sup> The current provision requires an individual who learns of a prospective or actual violation to file a full written disclosure of any financial interests to the contracting agency and the SEC and terminate or dispose of all the financial interest. To promote compliance, transparency and efficiency we recommend that the underlying prohibition remain in place, but that the statute be amended to (1) require the mandatory filing of a disclosure statement prior to a state officer, employee or special state appointee entering into a contract with any state agency, (2) that the Indiana Department of Administration include a reference to I.C. 4-2-6-10.5 in their standard contract boilerplate language, and that the penalty be changed to the imposition of a fine of Ten Dollars (\$10) per day for a maximum of One Thousand Dollars (\$1,000) for failing to file a disclosure statement prior to the final execution of the contract. The mandatory disclosure form must include the following:

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<sup>4</sup> I.C. 4-2-6-10.5(b)(1) requires the following:

- (A) the contract is made after public notice, or where applicable, through competitive bidding;
- (B) the state employee files with the commission a statement making full disclosure of all related financial interests in the contract;
- (C) the contract can be performed without compromising the performance of the official duties and responsibilities of the state employee; and
- (D) in the case of a contract for professional services, the appointing authority of the contracting agency makes and files a written certification with the commission that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee.

- (1) information affirming that the individual does not have contracting responsibilities for the contracting agency;
- (2) an affirmation that the contract was made after public notice, or where applicable, through competitive bidding or a statement indicating why the contract was not subject to these requirements;
- (3) a statement making full disclosure of all related financial interests in the contract;
- (4) a statement indicating that the contract can be performed without compromising the performance of the official duties and responsibilities of the state employee; and
- (5) In the case of a contract for professional services, a statement by the appointing authority of the contracting agency affirming that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee or special state appointee.

We understand that the ultimate goal of this law is to give confidence to the public that individuals associated with the executive branch as officers, employees, or special state appointees are not in a position to secure an unwarranted advantage when it comes to receiving state contracts. To this end, we believe that these recommended changes will further the intent of this law.

#### **IV. Post-Employment**

The Post-Employment Rule (“PER”) adopted by the Indiana Legislature for the first time in state history instituted a 365-day cooling off period to state workers under certain circumstances and created a life-time ban for particular matters. The primary policy reason that supports the need for the post-employment restrictions adopted in 2005 is that the PER addresses the notion that state workers may be in positions to take actions that favorably affected their future employers through government contracting or regulatory actions in exchange for an offer of employment. On the other hand, it is imperative to recognize that while state workers may be in positions of authority, they are setting important policies and making decisions that affect all areas of life for the State. The State, as an employer, must be able to attract the “best and the brightest” to set those policies and make those decisions. Restricting post-employment to the point of virtually making an individual unemployable upon leaving state employment will limit the pool of qualified candidates who are willing to work for the Executive branch, which would be to the detriment of the State and the citizens of Indiana. While it is not our recommendation that the PER be eliminated or made less restrictive, it is necessary to strike the right balance between these two competing concerns when considering any changes to the PER to ensure that state workers are making decisions or taking actions that are intended to be in the interest of the public good instead of an individual’s personal gain while still allowing an individual to continue their career beyond their tenure with the State.

It is important to consider various factors when evaluating the status of the PER and potential amendments. First, the Executive branch imposes the most restrictive prohibitions. Unlike the other two state government branches, the Executive branch restricts both contact back with the government,<sup>5</sup> as well as imposing a 365 day restriction on the actual employment with an employer.<sup>6</sup>

Moreover, to fairly evaluate potential amendments to the PER, it is critical to understand its past. Prior to 2005, the PER only addressed “particular matters” had no post-employment restriction prohibiting the actual employment, and through an Executive Order, also did not apply equally to all state workers.<sup>7</sup>

Restriction	Pre-2005	Post-2005
1-year employment restriction	No	Yes
Life-time ban on particular matters	No	Yes
Applicable to all state workers	No	Yes
Lobbying restrictions	No	Yes

A second factor when considering the scope of the PER is the consequence if the employment restrictions are too broad. This is most often pursued through Judicial scrutiny.<sup>8</sup>

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<sup>5</sup> See the “lobbying” restriction set forth in I.C. 4-6-11(b)(1).

<sup>6</sup> In contrast, in the Judicial Branch, a Prosecuting Attorney who has “negotiated” or “administered” numerous plea agreements may the day after leaving a prosecutor’s office work in the opponent defense bar as long as he or she remains in compliance with the Rules of Professional Conduct. Likewise, the recent legislative post-employment rule restricts for 365 days the contact back with the Legislature either as a “lobbyist” or “legislative liaison.” It does not prohibit the actual and total employment of the new employment as does the Executive Branch in I.C. 4-2-6-11/42 I.A.C. 1-5-14.

<sup>7</sup> See Inspector General Report 2012-06-0165, p.7, at: [http://www.in.gov/ig/files/2008-06-0165.Recommendations\\_for\\_2012-2013\\_Legislative\\_Session\\_WEB.pdf](http://www.in.gov/ig/files/2008-06-0165.Recommendations_for_2012-2013_Legislative_Session_WEB.pdf).

<sup>8</sup> Although vilified as an overly-broad extension of “Substantive” Due Process, the United States Supreme Court in 1905 struck down a state law which regulated employment in *Lochner v. New York*, 198 U.S. 45 (1905). Again stressing that this is an overruled opinion, it does reflect the historic importance that some place on employment rights. See also *Coppage v. Kansas*, 23 U.S.

As we have reported previously,<sup>9</sup> the Indiana Supreme Court in a different context has warned of civil post-employment restrictions. We previously reported:

[A] reason to observe caution in restricting post-employment further may be seen in the Indiana appellate scrutiny of employment restrictions in the civil jurisdictions. Although contractual covenants-not-to-compete may have differences to those in governmental post-employment restrictions, the appellate scrutiny may be instructive. Specifically, the Indiana Supreme Court has said that “it is to the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract...” *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276, 279 (Ind.1983) (quoting *Hodnick v. Fid. Trust Co.*, 96 Ind.App. 342, 350, 183 N.E. 488, 491 (1932)). The court has more recently stated that “noncompetition covenants in employment contracts are in restraint of trade and disfavored by law” and will be construed strictly against the employer. *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 728-29 (Ind.2008).<sup>10</sup>

These authorities address the limits when private parties contract to restrict post-employment. When the government regulates and restricts post-employment, it is arguable that even more caution should be observed because of the vulnerability of “state action” and constitutional claims.

Indeed, in our neighboring state of Ohio, the United States District Court struck down as unconstitutional an entire post-employment rule which was determined to be too restrictive.<sup>11</sup> In this case, the specific provision of the Ohio PER that was found to be unconstitutional related to a prohibition against contact

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1 (1915); *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>9</sup> See Inspector General Report 2012-06-0165, p. 8, at: [http://www.in.gov/ig/files/2008-06-0165.Recommendations\\_for\\_2012-2013\\_Legislative\\_Session\\_WEB.pdf](http://www.in.gov/ig/files/2008-06-0165.Recommendations_for_2012-2013_Legislative_Session_WEB.pdf).

<sup>10</sup> *Id.*

<sup>11</sup> *Brinkman v. Budish*, 692 F.Supp.2d 855 (S.D. Ohio 2010).

back with the government. It did not even relate to the more severe restriction of the actual employment that is prohibited by Indiana's PER. Accordingly, we hesitate to recommend that Indiana's PER be amended to become even stricter, recognizing the detrimental impact to Indiana ethics if, similar to the result in Ohio, our entire PER were to be declared unconstitutional as too restrictive

For all of the above reasons, the OIG respectfully recommends the following amendments to the PER to strengthen the current PER restrictions that are applicable to members of the Executive branch of state government.

A. *Sole Proprietorship/Professional Practice*

In a recently published Inspector General Report,<sup>12</sup> the OIG addressed the definition of an "employer" as it relates to the PER and made a recommendation for more effective enforcement. Specifically, the OIG noted that the 365-day cooling off period set forth in the PER does not apply if the state worker leaves state employment and immediately engages in business, that would otherwise be prohibited by the 365-day cooling off period, if it was done through the former worker's own "sole proprietorship" or through a legitimate "professional practice." This practice is expressly permitted by statute in the definition of the term "employer."<sup>13</sup>

The OIG recognizes there may be a justifiable reason for allowing this conduct. For example, forming one's own sole proprietorship or working for a

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<sup>12</sup> See Inspector General Report 2014-07-0153, at: [http://www.in.gov/ig/files/2014-07-0153\\_Legislative\\_Rec\\_PER\\_sole\\_prop\\_12\\_WEB.pdf](http://www.in.gov/ig/files/2014-07-0153_Legislative_Rec_PER_sole_prop_12_WEB.pdf).

<sup>13</sup> I.C. 4-2-6-1(10) states: "'Employer' means any person from whom a state officer or employee or the officer's or employee's spouse received compensation. For purposes of this chapter, a customer or client of a self-employed individual in a *sole proprietorship* or a *professional practice* is not considered to be an employer) (emphasis added)."

professional practice is a step removed from immediately accepting full-on employment with an entity that the former worker regulated or interacted with in their execution of their state duties.

The OIG is not suggesting with this recommendation that this provision of the PER be eliminated. Instead, we recommend that a procedure be adopted that would allow a stricter enforcement of this existing provision of the PER rule. Specifically, we want a procedure that would ensure that an individual who claims to engage in employment with entities that would otherwise trigger the application of the 365-day cooling-off period is truly done so through a “sole proprietorship” or “professional practice” as opposed to doing so only in appearance to avoid the application of the PER 365-day restriction.

The proposed scrutiny over a former employee’s current employment status is similar to the scrutiny employed by the United States Internal Revenue Service (IRS) when examining similar situations for federal income tax purposes.<sup>14</sup> That analysis often examines the treatment of a worker’s benefits, such as insurance payments, and analyzes the manner in which federal income taxes are paid.<sup>15</sup>

Similarly, we believe that an examination of a former state employee who conducts business that would otherwise trigger the application of the 365-day cooling off period is in compliance with these two factors, benefits and tax

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<sup>14</sup> The IRS addresses these concerns on its website, which is attached to this report as Exhibit A and published on-line at: <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Defined>.

<sup>15</sup> These distinctions are further contrasted by the IRS through Exhibit B and published on-line at: <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee>.

withholdings, would help ensure that the PER is not being violated. Specifically, a former state employee who claims to operate as a “sole proprietor” or through a “professional practice” would be hard-pressed to justify PER compliance if the former state employee’s insurance benefits and tax withholdings are made through the vendor he or she formerly regulated. We also believe the burden imposed on the former state employee through the proposed disclosure in this report would be minimal, and certainly far less invasive than an OIG investigation. A commitment in a public disclosure document, even with personal identifying information redacted to prevent identity theft, might also reveal violations through a public review by others, and encourage and facilitate a report of violations to the OIG. At a minimum, such a procedure might also deter attempts to violate the PER if a violator knows there will be a disclosure document generated and publicly scrutinized.

For all the above reasons, the OIG respectfully recommends that the PER be amended to require that a written disclosure statement be filed by all state employees who leave state employment and within the following 365 days engage in a “business relationship”<sup>16</sup> with an entity that would otherwise trigger the application of the 365-day cooling off period. The statement should be filed

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<sup>16</sup> I.C. 4-2-6-1(5) for purposes of the Code of Ethics defines a “business relationship” as:  
(A) Dealings of a person with an agency seeking, obtaining, establishing, maintaining, or implementing:  
    (i) a pecuniary interest in a contract or purchase with the agency; or  
    (ii) a license or permit requiring the exercise of judgment or discretion by the agency.  
(B) The relationship a lobbyist has with an agency.  
(C) The relationship an unregistered lobbyist has with an agency.

within 180 days of separation of state employee service, be signed and certified<sup>17</sup> by the former state employee, and detail how the former state employee's treatment by the new employer (the state employee's own sole proprietorship or the professional practice) of benefits and taxes are within the parameters of the IRS publications addressed herein.<sup>18</sup>

Should this legislative change be adopted, the OIG is committed to immediately develop a concise template, approved by the State Board of Accounts, to post the same on the OIG website for easy access, and to include this new provision in future ethics training.

#### *B. One-Year Cooling Off Period*

The PER adopted in 2005, for the first time ever, implemented a one-year cooling off period for certain state workers. Specifically, the PER provides that an employee is prohibited from accepting employment from an employer until after 365 days from their last day of state employment have passed if they were

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<sup>17</sup> An example of certification language in another context can be found in I.C. 35-44.2-2-3, the violation of the itemization and certification rule. This provides that:

- (b) A disbursing officer (as described in I.C. 5-11-10) [and not exempted in subsection (a)] who knowingly or intentionally pays a claim that is not:
    - (1) fully itemized; and
    - (2) properly certified to by the claimant or some authorized person in the claimant's behalf, with the following words of certification: *I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid;*
- commits a violation of the itemization and certification rule, a Class A misdemeanor. (emphasis added).

<sup>18</sup> The OIG stands ready upon request to work with the Legislative Services Agency, as in the past, to draft this language. One suggestion is to add a subsection (h) to the existing provision in I.C. 4-2-6-11 with this language.

(1) engaged in the negotiation or administration of a contract with that employer on behalf of the State and (2) the individual was in position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration. The requirement of a cooling-off period for these individuals is intended to ensure that state workers make decisions regarding state contracts with the State's interest in mind and not because of a promise of future employment. In other words, the one-year waiting period is intended to insulate a state worker from influence. This objective is equally accomplished if an individual has not negotiated or administered a contract with their intended employer in the two years preceding the commencement of employment negotiations, the contract is completed/terminated and the individual has not had any interaction with the intended employer during that time period. We believe that an individual that meets these criteria is equally insulated from influence and the danger that the decisions surrounding the negotiations and/or administration of the contract were influenced by the promise of post-employment is remote. Adopting this legislative change would allow state employees who may have negotiated or administered a contract involving a potential employer many years ago, but have since had no interaction with the employer, to pursue future employment opportunities with that employer well after the period of possible influence has passed. This proposal is not novel. For example, the laws regulating post-employment in Kansas<sup>19</sup> and Connecticut<sup>20</sup> adopt some variation

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<sup>19</sup> KAN.STAT.ANN. §46-233(a)(2) provides that:

Except as otherwise provided in this subsection, whenever any individual has participated as a state officer or employee in the making of any contract with any person

of this proposal. In addition, it should be noted that I.C. 4-2-6-11(d) continues to be in effect and completely prohibits a former state worker from accepting employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that the employment or compensation was given or had been offered for the purpose of influencing the individual in the performance of his or her duties or responsibilities during their tenure with the State.

Accordingly, the OIG recommends that the PER rule be amended to indicate that the one-year cooling off period set forth in I.C. 4-2-6-11(b)(2) does not apply to an individual that has neither negotiated nor administered a contract with their intended employer in the two years preceding the commencement of employment negotiations, the contract is completed or terminated, and the individual has not had any interaction or contact with the intended employer in that time period.

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or business, such individual shall not accept employment with such person or business as an employee, independent contractor or subcontractor until two years after performance of the contract is completed or until two years after the individual terminates employment as a state officer or employee, whichever is sooner. This prohibition on accepting employment shall not apply in any case where a state officer or employee who participated in making a contract while employed by the state of Kansas is laid off or scheduled to be laid off from any state position on or after July 1, 2002. As used in this subsection (a)(2), "laid off" and "layoff" mean a state officer or employee in the classified service under the Kansas civil service act, being laid off under K.S.A. 75-2948, and amendments thereto.

<sup>20</sup> CONN. GEN. STAT. §1-84b(f) states that:

No former public official or state employee (1) who participated substantially in the negotiation or award of (A) a state contract valued at an amount of fifty thousand dollars or more, or (B) a written agreement for the approval of a payroll deduction slot described in section 3-123g, or (2) who supervised the negotiation or award of such a contract or agreement, shall accept employment with a party to the contract or agreement other than the state for a period of one year after his resignation from his state office or position if his resignation occurs less than one year after the contract or agreement is signed. No party to such a contract or agreement other than the state shall employ any such former public official or state employee in violation of this subsection.

*C. Administrative Law Judges*

We next recommend that the PER restriction imposing a one-year cooling off period to individuals that have made regulatory and licensing decisions affecting their intended employer<sup>21</sup> be clarified to include an Administrative Law Judge (ALJ) and/or individuals who preside over information gathering and order drafting proceedings related to regulatory or licensing decisions.

Many times the final regulatory or licensing decision is made by an entity separate from the ALJ. Yet it is inescapable that certain individuals participate in fact-finding, or sometimes even oversee the adjudication and draft the opinion for signature by the ultimate regulator/licensor. In many of these cases, these individuals have more influence or discretion in the regulatory or licensing

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<sup>21</sup> The PER set forth in I.C. 4-2-6-11, in relevant part, states:

- (b) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. A former state officer, employee, or special state appointee may not accept employment or receive compensation:
  - (1) as a lobbyist;
  - (2) from an employer if the former state officer, employee, or special state appointee was:
    - (A) engaged in the negotiation or the administration of one
      - (1) or more contracts with that employer on behalf of the state or an agency; and
      - (B) in a position to make a discretionary decision affecting the:
        - (i) outcome of the negotiation; or
        - (ii) nature of the administration; or
    - (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer; before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

decision. The OIG has encountered this situation both in our advisory and investigatory functions.<sup>22</sup>

#### *D. Waivers*

The SEC is the ultimate authority in interpreting the Code.<sup>23</sup> As such, the role of the SEC regarding post-employment is to issue advisory opinions, upon request, to state workers to determine whether an individual's intended post-employment opportunity triggers the application of a post-employment restriction (i.e. the 365-day cooling off period and/or the particular matter restriction). In issuing an advisory opinion, the SEC is not determining whether an exception should be made to exempt an individual from the application of a post-employment restriction. Instead, the SEC is merely determining whether a post-employment restriction applies or not. If the SEC finds that a restriction applies, an individual may take additional steps to request a waiver from their appointing authority. I.C. 4-2-6-11(g) permits an agency appointing authority to waive the application of the PER "when consistent with the public interest." A waiver does not invalidate a determination of the SEC that a post-employment restriction applies to an individual. Instead, a waiver provides a means to allow for an exception in specific instances where the SEC has determined that a restriction applies.

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<sup>22</sup> See e.g., Inspector General Report 2010-09-0233, at: [http://www.in.gov/ig/files/2010-09-0233\(Storms-Ethics\).pdf](http://www.in.gov/ig/files/2010-09-0233(Storms-Ethics).pdf) and September 2010 State Ethics Commission Formal Advisory Opinion No. 10-I-11 currently published on-line at: [http://www.in.gov/ig/files/opinions/2010/s10-I-11\\_IURC-PE.pdf](http://www.in.gov/ig/files/opinions/2010/s10-I-11_IURC-PE.pdf).

<sup>23</sup> *Ghosh v. Indiana State Ethics Comm'n*, 930 N.E.2d 23 ( Ind. 2010).

It is important to note that the waiver provision, when exercised judiciously, can serve as a tool to help strike a more harmonious balance between the interests of the public and the interests of an individual state worker. A waiver provision, for example, is an especially important option to have when an employee is involuntarily terminated because of the economy, consolidation or abolition of functions, curtailment of activities or other reduction in the State work force. In Indiana, the PER waiver provision has been exercised 106 times in the past 10 years. By comparison, over 55,975 persons have left the Executive branch in the past 10 years.<sup>24</sup> This amounts to .002% of individuals having received post-employment waivers. Moreover, a waiver provision in the PER is an instrument that it is based in precedent. The United States PER has such a provision set forth in 18 U.S.C. § 207. Accordingly, the OIG does not recommend a repeal of the PER waiver provision. However, we make three recommendations to enhance accountability and ensure that the waiver provision does not unnecessarily cut away at the PER.

a. Criteria and SEC Approval

The current PER allows an agency appointing authority, unilaterally, to waive the application of the 365-day cooling off period and particular matter restrictions when “consistent with the public interest.” As previously discussed, a waiver provision is an important and necessary component of any post-employment regulation. However, waivers should only be granted in limited situations. To ensure that waivers are only issued when and if the circumstances

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<sup>24</sup> Indiana State Personnel Department records show 55,975 persons have exited the Executive Branch since 2005.

truly merit it, we recommend that the following amendments be made to the post-employment waiver process.

First, a request for a post-employment waiver must be made to an individual's appointing authority. If the appointing authority is inclined to grant the waiver, the waiver must include the following criteria<sup>25</sup>:

1. Whether the employee's prior job duties involved substantial decision-making authority over policies, rule or contracts;
2. The nature of the duties to be performed by the employee for the prospective employer;
3. Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee;
4. Whether the prospective employment may be beneficial to the state or the public (e.g. specifically state how the intended employment is consistent with the public interest); and
5. The extent of economic hardship to the employee if the request for a waiver is denied.

The waiver must be signed by the agency ethics officer, attesting to form, and by the agency appointing authority. An agency appointing authority must then file

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<sup>25</sup> Various states require that a post-employment waiver request include specific criteria including New York (*see* N.Y. PUB. OFF. LAW §73(8)(b)(i) at <http://www.jcope.ny.gov/about/ethc/PUBLIC%20OFFICERS%20LAW%2073%20JCOPE.pdf>) and Nevada (*see* NEV. REV. STAT § 281A.550(6) at <http://www.leg.state.nv.us/nrs/NRS-281A.html>).

the waiver with the SEC for administrative review and appear at their monthly meeting to present the waiver. The SEC shall approve the waiver if the five (5) required criteria are specifically articulated.

b. Publication

A second recommendation is to require that all waivers be published on the OIG website.

c. Timing Restriction

A third recommendation is to require that post-employment waivers be limited to those who seek and obtain one before engaging in the conduct that would give rise to the violation of the PER.

*E. Inspector General Cooling-off Period*

A final recommendation to enhance public integrity within the Executive branch is to restrict the inspector general from seeking a state-elected office in Indiana for 365 days after leaving the inspector general position. While prohibiting any person from seeking an elected state office may be considered to be an infringement upon an individual's constitutional right to seek elected office, we believe that the need to ensure that an inspector general's actions are intended to further the public good outweighs the individual's desire to seek an elected state office. The OIG has jurisdiction over the Executive branch. Accordingly the proposed one-year cooling off period would only apply to state offices<sup>26</sup>, the jurisdiction that might be affected the most if an inspector general's decisions are

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<sup>26</sup> This recommendation would only apply to state-elected positions: Governor, Lieutenant Governor, Attorney General, Secretary of State, State Superintendent of Public Education, Auditor of State, and Treasurer of State.

driven by political aspirations. This proposal would not restrict the ability of a former inspector general to pursue a federal or local elected position.

Such a restriction would also be a check and balance on what is arguably a powerful position, an individual law enforcement officer with the authority to arrest, file ethics complaints, and make public recommendations against all persons within the Executive branch of state government, including the elected Governor.

In sum, we believe that the application of a one-year cooling off period from seeking state –elected office in the state of Indiana to an individual that serves as inspector general would promote the independence of the office and further insulate the individual the political process to give further confidence that the actions taken by the inspector general are to promote the public good.

Conclusion

For all the above reasons, the OIG respectfully reports the above recommendations and stands ready to provide additional information upon request.

Respectfully submitted,

/s/ David O. Thomas, Inspector General