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May 1, 2006

Jennie Unger Eddy
Neilsen, Merksamer, et.al.
591 Redwood Highway
Suite 4000
Mill Valley, California 94941-3039

RE: REQUEST FOR ADVISORY OPINION 06-34

Dear Ms. Eddy:

The Commission on Ethics and Public Trust considered your request for an advisory opinion at its meeting on April 27, 2006 and rendered its opinion based on the facts stated in your letter.

You requested an opinion regarding the application of the contingency fee ban to commission payments for salespeople.

In your letter, you advised the Commission that your law firm represents several companies that do business with Miami-Dade County. The firms frequently compensate their sales personnel, regardless of the nature of the purchaser, on the basis of their sales figures. Salespeople are often required to meet a sales quota and bonuses and other forms of compensation are based on the total sales amount. Commissions often account for more than half of a salesperson's annual income. A salesperson might suffer significant financial detriment if sales to Miami-Dade County could not be used to determine the appropriate amount of compensation or other financial incentives.

Most states, such as Florida, Texas, Vermont and Connecticut, that ban contingency fees have an explicit exemption for salespersons who work on commission. In jurisdictions where the law does not contain an explicit waiver for salespeople, a waiver has been created by rule.

The Ethics Commission found that the Conflict of Interest and Code of Ethics ordinance permits salespeople, as defined herein, who fall within the definition of lobbyist, to receive a commission for sales to Miami-Dade County. Section 2-11.1(s)(1)(b) defines a lobbyist as "any person, firm or corporation employed or retained by a principal that seeks to encourage the passage, defeat or modification of 1) any ordinance, resolution, action or decision of the County Commission; 2) any action, decision, or recommendation of the County Manager or any County board or committee; or 3) any action, decision, or recommendation of County personnel during the time period of the entire decision-making process on such action, decision or recommendation which foreseeably will be heard or reviewed by the County Commission or a County board or committee. "Lobbyist" specifically includes the principal as well as any employee whose normal scope of employment includes lobbying activities."

Salespeople who meet with county staff or officials and seek to influence decisions fall within the definition of lobbyist. A "salesperson" for the purposes of Section 2-11.1(s), is a person whose duties ordinarily involve covering assigned territory for a particular principal on a regular basis, visiting potential customers on these routes and attempting to interest the customers in corporate products or services. The principal, governmental affairs personnel, contract lobbyists and individuals involved

in corporate policy-making would not fall within this definition.

Section 2-11.1(s)7) provides that "(n)o person may, in whole or in part, pay, give or agree to pay or give a contingency fee to another person. No person may on whole or in part, receive or agree to receive a contingency fee. As used herein contingency fee means a fee, bonus, commission or non-monetary benefit as compensation which is dependent on or in any way contingent on the passage, defeat or modification of: 1) an ordinance, resolution, action or decision of the County Commission; (2) any action, decision or recommendation of the County Manager of any County board or committee; or (3) any action, decision or recommendation of County personnel during the time period of the entire decision-making process regarding such action, decision or recommendation which foreseeably will be heard or reviewed by the County Commission or a County board or committee. "

Most procurement decisions involving salespeople, as defined herein, will not involve review by the Board of County Commissioners, a county board or committee.

Accordingly, Section 2-11.1(s) (7) is not intended to prohibit salespeople, who are lobbyists as defined herein, from receiving a commission pursuant to his or her customary compensation agreement when profits are generated from sales made to Miami-Dade County. A "salesperson" is defined as a person whose duties ordinarily involve covering assigned territory for a particular principal on a regular basis, visiting potential customers on these routes and attempting to interest the customers in corporate products or services. The principal, governmental affairs personnel, contract lobbyists and individuals involved

in corporate policy-making would not fall within this definition.

This opinion construes the Miami-Dade Conflict of Interest and Code of Ethics ordinance only and is not applicable to any conflict under state law. Please contact the State of Florida Commission on Ethics if you have any questions regarding possible conflicts under state law.

If you have any questions regarding this opinion, please call the undersigned at (305) 579-2594 or Ardyth Walker, Staff General Counsel at (305) 350-0616.

Sincerely Yours,

A handwritten signature in cursive script, appearing to read "Robert Meyers", followed by a horizontal line extending to the right.

ROBERT MEYERS
Executive Director