

January 14, 2008

Michael J. Renner, Executive Director  
Ohio Tobacco Use Prevention and Control Foundation  
300 East Broad Street, Suite 310  
Columbus, Ohio 43215-3704

SYLLABUS:

2008-003

1. Neither R.C. 183.061 nor R.C. Chapter 1702 requires the Tobacco Use Prevention and Control Foundation to exercise governance over a nonprofit corporation it forms under R.C. 183.061 by providing for the overlapping of boards of directors or other representation of the Foundation's board on the board of the nonprofit corporation. The Foundation, having been given authority to form the nonprofit corporation, may exercise that authority in any manner permitted under R.C. Chapter 1702 and other applicable provisions of law.
2. If the nonprofit corporation formed under R.C. 183.061 is an alter ego of the Foundation, the Foundation might be responsible for the nonprofit corporation in various respects and the nonprofit corporation might be subject to certain requirements that apply to the Foundation.
3. A nonprofit corporation formed under R.C. 183.061 must be created only for the purpose of raising money to aid the Foundation in the conduct of its duties under R.C. Chapter 183 and not for the purpose of performing those duties itself. Therefore, the Foundation is not permitted to provide the nonprofit corporation with grants under which the nonprofit corporation carries out tobacco control activities.
4. A nonprofit corporation formed under R.C. 183.061 may raise money in any reasonable manner that is authorized under its articles of incorporation and regulations and may transfer that money to the Foundation in any reasonable manner that is authorized under its articles of incorporation and regulations. If the nonprofit corporation receives for the Foundation grants or other moneys subject to limited uses, the nonprofit corporation may transfer those moneys to the Foundation subject to the limitations

upon their uses, provided that the articles and regulations of the nonprofit corporation so permit. Apart from funds received by the nonprofit corporation subject to restrictions upon their use, the nonprofit corporation cannot be authorized to impose upon the Foundation restrictions on the use of moneys raised by the nonprofit corporation.

5. The Foundation's grant of authority to form a nonprofit corporation under R.C. 183.061 authorizes the Foundation to expend such amounts as are reasonably necessary to create the nonprofit corporation and provide for its initial operation.
6. A nonprofit corporation formed under R.C. 183.061 may seek exemption from federal income taxation under § 501(c)(3) of the Internal Revenue Code and may also seek qualification under § 170 of the Internal Revenue Code to allow the donations it receives to be deductible to the donors. Depending upon its organization and operation, the nonprofit corporation might seek to be recognized as a nonprivate foundation (public charity).
7. A nonprofit corporation formed under R.C. 183.061 will be subject to audit by the Auditor of State under R.C. 117.10 either as a public office or as a private corporation receiving public money for its use.
8. Depending upon the manner in which it is formed and operated, the nonprofit corporation formed under R.C. 183.061 might be subject to the public records law in R.C. 149.43, the open meetings law in R.C. 121.22, or particular contracting controls governing state agencies.



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January 14, 2008

OPINION NO. 2008-003

Michael J. Renner, Executive Director  
Ohio Tobacco Use Prevention and Control Foundation  
300 East Broad Street, Suite 310  
Columbus, Ohio 43215-3704

Dear Executive Director Renner:

We have received your request, submitted on behalf of the Board of Trustees of the Ohio Tobacco Use Prevention and Control Foundation, for an opinion concerning the Board's authority under R.C. 183.061 to "form a nonprofit corporation pursuant to Chapter 1702. of the Revised Code for the purpose of raising money to aid the foundation in the conduct of its duties under Chapter 183. of the Revised Code." You have raised numerous questions, as follows:

What type and whether governing control is necessary for a state agency with this statutory authority to exercise governance over the non-profit? In particular, does the board of the non-profit need to be the board of TUPCF [Tobacco Use Prevention and Control Foundation]; does there need to be overlap of the boards so as the majority of the non-profit board is composed of TUPCF board members; does there need to be at least some representation on the non-profit board by one or more board members of TUPCF? Since it is anticipated that this non-profit will receive IRS 501(c)(3) status, please answer these questions with consideration to IRS requirements for qualification. Can or should the non-profit board be completely independent of the TUPCF board? What problems could arise with the issue of a non-profit as an "alter ego" of the TUPCF Board? Such as:

1. Are there any requirements in Ohio law which would prohibit the non-profit to be set up in a manner which would qualify it to receive IRS tax status as a 501(c)(3)?

2. Are there any circumstances where a non-profit corporation established under the above statutory authority could engage in activities which would create liability upon TUPCF?
3. Can TUPCF make grants to this non-profit to carry out tobacco control activities mutually agreed upon by TUPCF and the non-profit?
4. Can the non-profit make grants to TUPCF to assist in programmatic activity engaged in by TUPCF?
5. Are there any limitations upon the role that TUPCF can play in the establishment of the non-profit such as, but not limited to: Can TUPCF draft the Articles of Incorporation and draft the initial Bylaws? Can TUPCF select the initial board of trustees for the non-profit? Can TUPCF apply for tax status for the non-profit? Can TUPCF supply capacity building funds to support the launch of the non-profit? (Note: OTPF has supplied capacity building funds through the grant process under R.C. 183.07 to a number of non-profits across the state to allow them to become established and in a position to carry out tobacco control programming)
6. Will the non-profit be subject to the Open Meetings Act under R.C. 121.22? Will the non-profit be subject to Ohio's public records laws under R.C. 149.43? Will the non-profit be subject to audits or contracting controls governing state agencies?

Ohio statutes provide for a nonprofit corporation to be formed by *articles of incorporation*, see R.C. 1702.01(E); R.C. 1702.04, and to have its affairs conducted by a *board of directors* (who may also be known as trustees or by other names), see R.C. 1702.01(K); R.C. 1702.30. *Regulations* (which may also be known as a constitution, rules, or by other names) for the government of the corporation may be adopted by the incorporators or by the members. R.C. 1702.10-11. The directors, for their own government, may adopt *bylaws* that are not inconsistent with the articles or regulations. R.C. 1702.30. We are aware that the statutory terms italicized above are commonly replaced by other terminology. For purposes of this opinion, we use the terms as they are used in the Ohio Revised Code.

For the reasons set forth below, we reach the following conclusions:

1. Neither R.C. 183.061 nor R.C. Chapter 1702 requires the Tobacco Use Prevention and Control Foundation to exercise governance over a nonprofit corporation it forms under R.C. 183.061 by providing for the overlapping of boards of directors or other representation of the Foundation's board on the board of the nonprofit corporation. The Foundation, having been given authority to form the nonprofit corporation, may exercise that authority in any manner permitted under R.C. Chapter 1702 and other applicable provisions of law.

2. If the nonprofit corporation formed under R.C. 183.061 is an alter ego of the Foundation, the Foundation might be responsible for the nonprofit corporation in various respects and the nonprofit corporation might be subject to certain requirements that apply to the Foundation.
3. A nonprofit corporation formed under R.C. 183.061 must be created only for the purpose of raising money to aid the Foundation in the conduct of its duties under R.C. Chapter 183 and not for the purpose of performing those duties itself. Therefore, the Foundation is not permitted to provide the nonprofit corporation with grants under which the nonprofit corporation carries out tobacco control activities.
4. A nonprofit corporation formed under R.C. 183.061 may raise money in any reasonable manner that is authorized under its articles of incorporation and regulations and may transfer that money to the Foundation in any reasonable manner that is authorized under its articles of incorporation and regulations. If the nonprofit corporation receives for the Foundation grants or other moneys subject to limited uses, the nonprofit corporation may transfer those moneys to the Foundation subject to the limitations upon their uses, provided that the articles and regulations of the nonprofit corporation so permit. Apart from funds received by the nonprofit corporation subject to restrictions upon their use, the nonprofit corporation cannot be authorized to impose upon the Foundation restrictions on the use of moneys raised by the nonprofit corporation.
5. The Foundation's grant of authority to form a nonprofit corporation under R.C. 183.061 authorizes the Foundation to expend such amounts as are reasonably necessary to create the nonprofit corporation and provide for its initial operation.
6. A nonprofit corporation formed under R.C. 183.061 may seek exemption from federal income taxation under § 501(c)(3) of the Internal Revenue Code and may also seek qualification under § 170 of the Internal Revenue Code to allow the donations it receives to be deductible to the donors. Depending upon its organization and operation, the nonprofit corporation might seek to be recognized as a nonprivate foundation (public charity).
7. A nonprofit corporation formed under R.C. 183.061 will be subject to audit by the Auditor of State under R.C. 117.10 either as a public office or as a private corporation receiving public money for its use.
8. Depending upon the manner in which it is formed and operated, the nonprofit corporation formed under R.C. 183.061 might be subject to the public records law in R.C. 149.43, the open meetings law in R.C. 121.22, or particular contracting controls governing state agencies.

### **Organization and Powers of the Ohio Tobacco Use Prevention and Control Foundation**

The Ohio Tobacco Use Prevention and Control Foundation (Foundation) was created by the General Assembly and given the task of preparing “a plan to reduce tobacco use by Ohioans, with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco.” R.C. 183.07; *see* R.C. 183.04. The Foundation is empowered to implement its plan by carrying out programs and research related to tobacco use prevention and cessation, and by making grants for private or public agencies to carry out these programs and research. R.C. 183.07. The Foundation is required to make annual reports of its activities and is authorized to contract for evaluations of the effectiveness of various programs and of the progress it is making in reducing tobacco use by Ohioans. R.C. 183.07; R.C. 183.09. The Foundation is required to provide financial reports that include information comparing overhead and administrative expenses with programmatic expenses and also include an independent auditor’s report on the financial statements of the Foundation. R.C. 183.09.

The Foundation is the trustee of the Tobacco Use Prevention and Control Endowment Fund (the Endowment Fund), which consists of amounts appropriated from the Tobacco Use Prevention and Cessation Trust Fund (the Trust Fund) as well as grants and donations made to the Foundation and investment earnings of the Endowment Fund. R.C. 183.03; R.C. 183.08. The Endowment Fund is used by the Foundation to carry out its duties. R.C. 183.08. The Endowment Fund is in the custody of the Treasurer of State but is not part of the state treasury. Disbursements from the Endowment Fund are made only upon instruments duly authorized by the Board of Trustees of the Foundation. *Id.*

As initially created, the Tobacco Use Prevention and Cessation Trust Fund was designated as a recipient of moneys from the Tobacco Master Settlement Agreement Fund, which contained all payments received by the state pursuant to the Tobacco Master Settlement Agreement.<sup>1</sup> This arrangement was recently modified by the General Assembly, which repealed the statute that had created the Tobacco Master Settlement Agreement Fund and established a schedule for transferring money to various trust funds. The modified statutory scheme authorizes the assignment and sale by the state of all or a portion of the amounts to be received by the state under the Tobacco Master Settlement Agreement and the issuance of obligations by the Buckeye Tobacco Settlement Financing Authority, thereby providing for the securitization of

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<sup>1</sup> The Tobacco Master Settlement Agreement is defined as “the settlement agreement (and related documents) entered into on November 23, 1998 by the state and leading United States tobacco product manufacturers.” R.C. 183.01(A). That agreement provides for Ohio to receive settlement payments from the tobacco industry each year in perpetuity. Ohio Legislative Service Comm’n, Final Analysis, at 482, Am. Sub. H.B. 119, 127th Gen. A. (eff. June 30, 2007, with certain provisions eff. other dates).

the state's interest in payments under the Tobacco Master Settlement Agreement. As a result, payments to the Tobacco Use Prevention and Cessation Trust Fund from the Tobacco Master Settlement Agreement Fund will cease, thereby eliminating the Trust Fund as a source of income for the Endowment Fund, which funds the Foundation. *See* Am. Sub. H.B. 119, 127th Gen. A. (2007) (eff. June 30, 2007, with certain provisions eff. other dates) (among other amendments, repealing R.C. 183.02 and enacting R.C. 183.51-.52); Ohio Legislative Service Comm'n, Final Analysis, at 479-80, 482-90, Am. Sub. H.B. 119, 127th Gen. A. (eff. June 30, 2007, with certain provisions eff. other dates).

The Foundation is managed by a Board of Trustees consisting of twenty-three members. Eleven members are appointed by the Governor, six members are appointed by legislative leaders, four nonvoting members are members of the legislature appointed by legislative leaders, and two public officials – the Executive Director of the Commission on Minority Health (or a designee) and the Director of Health – serve as *ex officio* members. R.C. 183.04; *see* R.C. 3701.78. The members serve without compensation but are reimbursed for reasonable and necessary expenses incurred in the conduct of Foundation business. R.C. 183.04. The Foundation is an administrative agency of the state, created by the General Assembly through statutory enactment. As such, it has only those powers conferred upon it by statute, either expressly or by necessary implication, and cannot extend its authority beyond that granted in its enabling statutes. *See, e.g., Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 320 N.E.2d 693 (1975).

The Board is authorized to appoint an executive director and other employees needed to carry out the duties of the Foundation, all of whom are in the unclassified service of the state. R.C. 183.06. Compensation of these employees is made from the Tobacco Use Prevention and Control Operating Expenses Fund, which (upon request by the Foundation to the Treasurer of State) receives money from the Endowment Fund. R.C. 183.06. Except as provided in a spending plan approved by the Controlling Board, the Foundation may not, in any fiscal year, spend more than five percent of the total disbursements, encumbrances, and obligations of the Foundation for administrative expenses of the Foundation. R.C. 183.30.

The Foundation was created as a self-sustaining entity and, upon its creation, was directed by the General Assembly that it “should not expect to receive funding from the state beyond the amounts appropriated to it from the tobacco use prevention and cessation trust fund.” R.C. 183.08. R.C. 183.33 prohibits the appropriation or transfer of money from the general revenue fund to the Tobacco Use Prevention and Cessation Trust Fund or the Tobacco Use Prevention and Control Endowment Fund, and also prohibits any other appropriation or transfer of money from the general revenue fund for the use of the Foundation.

Funds of the Foundation are public funds, held in trust for the benefit of the public. *See State v. Hale*, 60 Ohio St. 3d 62, 66, 573 N.E.2d 46 (1991) (a public office is a public trust, and public property and public money under the control of a public officer constitute a public trust fund, for which the officer as trustee should be held responsible to the same degree as the trustee of a private trust fund); R.C. 183.08. Public funds may be expended only by clear authority of

law. *See State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1) (“[a]ll public property and public moneys . . . constitute a public trust fund . . . . Said trust fund can be disbursed only by clear authority of law”). Any doubt as to the authority to expend public funds must be resolved against the grant of authority to make the expenditure. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917) (syllabus, paragraph 3); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916); 2002 Op. Att’y Gen. No. 2002-031, at 2-206 to 2-207.

### **Authority of the Foundation to Form a Nonprofit Corporation**

The same legislation that eliminated the Foundation’s income from the Tobacco Master Settlement Agreement authorized the Foundation to form a nonprofit corporation to raise money to aid the Foundation in the conduct of its duties. The relevant language appears in R.C. 183.061, as follows:

The board of trustees of the tobacco use prevention and control foundation may form a nonprofit corporation pursuant to Chapter 1702. of the Revised Code for the purpose of raising money to aid the foundation in the conduct of its duties under Chapter 183. of the Revised Code. (Emphasis added.)

*See* Am. Sub. H.B. 119, 127th Gen. A. (2007) (eff. June 30, 2007, with enactment of R.C. 183.061 eff. Sept. 29, 2007).

The Legislative Service Commission described the reason for the enactment of R.C. 183.061 in these words:

Since Tobacco Master Settlement Agreement payments are eliminated as a funding source for the Tobacco Use Prevention and Control Foundation, the act permits the Foundation to form a nonprofit corporation under Ohio’s Nonprofit Corporation Law for the purpose of raising money to aid the Foundation in the conduct of its duties under Ohio Law to reduce tobacco use by Ohioans.

Ohio Legislative Service Comm’n, Final Analysis, at 483, Am. Sub. H.B. 119, 127th Gen. A. (eff. June 30, 2007, with certain provisions eff. other dates). Hence, the nonprofit corporation authorized by R.C. 183.061 will be a fundraising operation, and the fundraising capacity of the nonprofit corporation will substitute for continuing payments under the Tobacco Master Settlement Agreement. Had the General Assembly intended that the nonprofit corporation be authorized to perform functions other than raising money it could easily have so stated. The absence of such authorization indicates that the nonprofit corporation is limited to the purpose expressly named – that is, raising money to aid the Foundation. *See generally Webster’s Third New International Dictionary* 1877 (unabridged ed. 1993) (including among definitions of “raise”: “**8**: to bring together: COLLECT, GATHER, LEVY <the government raised large sums for highway construction by a tax on gasoline sales> <the budget . . . is raised by registration fees, ticket sales, and grants –Hartzell Spence> <difficult to ~ enough money to pay for campaign expenses>”); *cf. State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 65 Ohio

St. 3d 258, 261, 602 N.E.2d 1159 (1992) (according to its articles of incorporation, the foundation's "sole purpose is to receive, hold, invest and administer property and to spend funds for the benefit of the university").

The legislation providing for formation of the nonprofit corporation under R.C. Chapter 1702 does not contain any other language providing details about the manner in which the nonprofit corporation is to be formed, to operate, or to raise money. *Cf.*, e.g., R.C. Chapter 1724 (providing for the creation of nonprofit community improvement corporations, addressing their powers, and establishing a means by which they may enter into contracts as agencies of certain political subdivisions). Therefore, the Board may form the nonprofit corporation as it deems appropriate in the exercise of its statutory authority, subject to any applicable restrictions contained in R.C. Chapter 1702 or in other provisions of law. *See, e.g., State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty"); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E.2d 138 (1915) (syllabus, paragraph 4) ("[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"), *aff'd sub nom. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner").

### **Formation of a Nonprofit Corporation Under R.C. 183.061**

R.C. 183.061 provides authority for the Board of Trustees of the Foundation to form a nonprofit corporation pursuant to R.C. Chapter 1702 for the purpose of raising money to aid the Foundation in the conduct of its duties. Ohio law defines a nonprofit corporation as "a domestic or foreign corporation that is formed otherwise than for the pecuniary gain or profit of, and whose net earnings or any part of them is not distributable to, its members, directors, officers, or other private persons, except that the payment of reasonable compensation for services rendered and the distribution of assets on dissolution as permitted by section 1702.49 of the Revised Code is not pecuniary gain or profit or distribution of net earnings."<sup>2</sup> R.C. 1702.01(C). A nonprofit corporation may be formed "for any purpose or purposes for which natural persons lawfully may associate themselves," unless a special provision of the Revised Code provides for formation of a designated class of corporations under its provisions. R.C. 1702.03.

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<sup>2</sup> If all the members of the nonprofit corporation are nonprofit corporations, the distribution to members does not deprive it of the status of a nonprofit corporation. R.C. 1702.01(C).

“Any person” may form a nonprofit corporation by signing articles of incorporation and filing them with the Secretary of State. R.C. 1702.04(A).<sup>3</sup> The articles of incorporation must include the name of the corporation, the location in Ohio of its principal office, and the purpose or purposes for which the corporation is formed.<sup>4</sup> The articles may include various other matters, including the names of initial directors and members, qualifications of membership, and provisions regulating the exercise of the authority of the corporation, the incorporators, the

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<sup>3</sup> “‘Person’ includes, but is not limited to, a nonprofit corporation, a business corporation, a partnership, an unincorporated society or association, and two or more persons having a joint or common interest.” R.C. 1702.01(I). It has been stated that this definition does not include a governmental body or official. *See, e.g.*, 1996 Op. Att’y Gen. No. 96-028, at 2-102; 1981 Op. Att’y Gen. No. 81-092, at 2-351 to 2-352; 1979 Op. Att’y Gen. No. 79-055, at 2-184 to 2-185. It is more accurate, however, to state that this definition does not authorize a governmental body or official to create a nonprofit corporation, but that when the enabling statutes of a governmental body or official provide the authority to create a nonprofit corporation, the governmental body or official is included as a person for purposes of R.C. Chapter 1702. *See, e.g.*, 1991 Op. Att’y Gen. No. 91-007, at 2-35 to 2-38. The General Assembly is not permitted to enact legislation that creates a corporation because of Ohio Const. art. XIII, § 1, which prohibits the General Assembly from passing a special act conferring corporate powers. *Cf.* Ohio Const. art. XIII, § 2 (corporations may be formed under general laws).

<sup>4</sup> R.C. 1702.38 provides for the amendment of articles of incorporation to change various provisions, including the purpose or purposes of the nonprofit corporation. The articles and regulations may establish the means by which voting members may adopt such amendments. To assure that a nonprofit formed under R.C. 183.061 continues to exist for the purpose of raising money to aid the Foundation in the conduct of its duties under R.C. Chapter 183, it would be appropriate to include in the articles of incorporation a clear statement of the statutory authority under which the nonprofit is created. It may also be appropriate for the articles of incorporation to provide connections between the Foundation and the management structure of the nonprofit, to place restrictions on membership or impose voting requirements, or to contain other provisions designed to preserve the continuity of the purpose and operation of the nonprofit. *See, e.g.*, R.C. 1702.04 (articles of incorporation); R.C. 1702.11 (contents of regulations).

The possibility of amendment illustrates the existence of a nonprofit corporation as a separate entity and the limitations on the ability of the Foundation to control the operations of a nonprofit it creates. The 1955 Committee Comment to R.C. 1702.38 states, in part: “[A] nonprofit corporation has members as soon as the articles are filed, because the articles must set forth the names of the initial trustees and the articles may also provide for members in addition to the trustees. It follows that, as soon as the articles of a non-profit corporation are filed, the incorporators have no further functions, except that they may adopt regulations as provided in new Sec. 1702.10.” *See also* R.C. 1702.41-46 (merger or consolidation of nonprofit corporations); R.C. 1702.47-52 (dissolution of nonprofit corporation).

directors, the officers, and the members, or governing the distribution of assets on dissolution. R.C. 1702.04(A), (B). The incorporators or members may adopt regulations that further govern the corporation and address such matters as the voting rights of members or classes of members, the manner in which the authority of the corporation may be exercised, and the method for amending the regulations. R.C. 1702.10-11 Any matter that may be addressed in the regulations may be included in the articles of incorporation. R.C. 1702.04(B)(6). A corporation is required to keep books and records, and provision is made for calling and holding meetings. R.C. 1702.13-18. The directors, for their own government, may adopt bylaws that are not inconsistent with the articles or regulations. R.C. 1702.30. A nonprofit corporation also has officers, who are elected by the directors or elected or appointed as prescribed in the articles or regulations. R.C. 1702.34.

Within the statutory directives, there is an opportunity for the incorporators to exercise a considerable amount of discretion in establishing the corporation as they deem appropriate. For example, R.C. 1702.27(A)(1) states that the number of directors, as fixed by the articles or regulations, shall be not less than three, and if no number is fixed there shall be three, unless there are fewer than three members, in which case the number of directors may be less than three but not less than the number of members. Unless the articles or regulations fix the number of directors or provide for the manner of changing the number, the number may be changed at a meeting of the voting members. R.C. 1702.27(A)(2). Further, the qualifications of the directors, if any, are those stated in the articles or the regulations. R.C. 1702.27(A)(3). Division (A)(4) of R.C. 1702.27 states: “The articles or the regulations may provide that persons occupying certain positions within or without the corporation shall be *ex officio* directors, but, unless otherwise provided in the articles or the regulations, such *ex officio* directors shall not be considered for quorum purposes and shall have no vote.” Hence, R.C. 1702.27 permits the possible inclusion of representatives of the Foundation on the nonprofit corporation’s board of directors and allows the articles and regulations to define the manner in which the participation of Foundation representatives is implemented. *See also, e.g.,* R.C. 1702.28-.30.

General powers of a nonprofit corporation are set forth in R.C. 1702.12. Like the organizational matters, these general powers may, in many respects, be limited or modified by provisions of the corporation’s articles or regulations. For example, R.C. 1702.12(F) states that a corporation’s authority, in carrying out the purpose stated in its articles, to acquire or invest in property, make contracts, or participate in other enterprises is “subject to limitations prescribed by law or in its articles.” *See also, e.g.,* R.C. 1702.12(C), (D), (E)(6); R.C. 1702.12(F)(9) (“[i]n carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles, a corporation may . . . (9) Do all things permitted by law and exercise all authority within the purposes stated in its articles or incidental to those purposes”); R.C. 1702.12(I) (limiting instances in which it may be asserted in a legal action that a corporation lacked authority or had limited authority). Particular powers are discussed later in this opinion as relevant to specific questions.

### **Relationship Between Management of the Foundation and Management of the Nonprofit Corporation**

You have asked, initially, what type and whether governing control is necessary for a state agency with the authority to form a nonprofit corporation to exercise governance over the nonprofit corporation. R.C. 183.061 does not require the Foundation to exercise government over the nonprofit corporation. It requires only that if the Foundation chooses to form a nonprofit corporation pursuant to R.C. Chapter 1702, the purpose of the nonprofit corporation be to raise money to aid the Foundation in the conduct of its duties under R.C. Chapter 183. R.C. Chapter 1702 limits the activities of a nonprofit corporation to activities that implement the purpose or purposes set forth in its articles of incorporation. *See* R.C. 1702.12(F) (specified powers of a nonprofit corporation may be exercised only “[i]n carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles”). Even without any governance by the Foundation, the nonprofit corporation’s purpose would be clear and the nonprofit corporation would be limited to carrying out that purpose. In forming the nonprofit corporation, however, the Foundation may exercise its discretion to empower the nonprofit corporation to carry out this purpose in a manner that the Foundation deems suitable to the purpose and efficacious for the Foundation, within the limits established in R.C. Chapter 1702 and other provisions of law.

You have asked whether the board of the nonprofit corporation needs to be the board of the Foundation, whether there needs to be overlap of the boards so that the majority of the nonprofit corporation’s board is composed of Foundation board members, and whether there needs to be at least some representation on the nonprofit corporation’s board by one or more board members of the Foundation. Again, these matters are not addressed by R.C. 183.061.

You have asked also whether there are any limitations upon the role that the Foundation may play in the establishment of the nonprofit corporation. You have asked, in particular, whether the Foundation may draft the articles of incorporation and the initial regulations of the nonprofit corporation and select the nonprofit corporation’s initial board of directors. There does not appear to be any impediment to the Foundation’s drafting the articles of incorporation. The Foundation is given authority to form the nonprofit corporation, and the preparation of the articles of incorporation is an integral part of that process. *See* R.C. 1702.04. Similarly, the initial regulations may be drafted by anyone, provided only that they are adopted in the manner provided in R.C. Chapter 1702 or set forth in the articles of incorporation. R.C. 1702.10. The initial board of directors is also selected in the manner provided in R.C. Chapter 1702 or set forth in the articles of incorporation, and the names of those directors may appear in the articles of incorporation. R.C. 1702.04. Thus, the Foundation, having been given authority to form the nonprofit corporation, may exercise that authority in any manner permitted under R.C. Chapter 1702 and other provisions of law.

The Foundation is entrusted with the responsibility of determining how to establish and organize the nonprofit corporation within the framework established by R.C. Chapter 1702. That chapter sets forth certain technical requirements for the formation of a nonprofit corporation, and

the Foundation must comply with these requirements in establishing a nonprofit corporation. R.C. Chapter 1702 does not, however, establish standards that control the relationship between a public body and the nonprofit corporation it creates. Many of the questions you have raised involve matters that require the exercise of judgment to determine not what is legally required, but what will best enable the nonprofit corporation to effectively carry out the purpose of raising money to aid the Foundation in the conduct of its duties. The Foundation has implied authority under R.C. 183.061 to take whatever actions are reasonably necessary to form the nonprofit corporation and provide it with a sound foundation to begin its operations.

We conclude, accordingly, that neither R.C. 183.061 nor R.C. Chapter 1702 requires the Tobacco Use Prevention and Control Foundation to exercise governance over a nonprofit corporation it forms under R.C. 183.061 by providing for the overlapping of boards of directors or other representation of the Foundation's board on the board of the nonprofit corporation. The Foundation, having been giving authority to form the nonprofit corporation, may exercise that authority in any manner permitted under R.C. Chapter 1702 and other applicable provisions of law.

### **Ethical Concerns**

In exercising its discretion to form the nonprofit corporation in a manner that serves the purposes of R.C. 183.061, there are various factors that the Foundation should consider, including ethical concerns. It has been established as a general rule that an officer or employee of a public body may not, in an official capacity, serve as a director, officer, or member of a nonprofit corporation that contracts with the public body because of common law and statutory ethical principles against having a private interest in a public contract. A public officer owes loyalty to the public body served and a representative of a nonprofit corporation has duties to protect the interests of the corporation, so any relationship between a public body and a nonprofit corporation presents a clear basis for a conflict of interests. *See, e.g.*, 1991 Op. Att'y Gen. No. 91-007, at 2-35 to 2-38 (citing various cases, statutes, and Attorney General opinions); *see also* 1984 Op. Att'y Gen. No. 84-097; 1979 Op. Att'y Gen. No. 79-055.

Opinions of both the Ohio Ethics Commission and the Ohio Attorney General have concluded, however, that public entities or public officials may participate in the formation or management of nonprofit corporations when the authority to so participate is provided by statute. 1991 Op. Att'y Gen. No. 91-007; Ohio Ethics Comm'n, Advisory Op. No. 94-001; *accord* 1996 Op. Att'y Gen. No. 96-007. These opinions have set forth the following four criteria that must be met before it may be determined that a public official who also serves a private nonprofit organization does not face a prohibited conflict of interests: (1) the governmental entity must create or be a participant in the nonprofit corporation; (2) any public official or employee may be designated to serve on the nonprofit corporation, but the governing body must formally designate the official or employee to represent the governmental entity; (3) the public official or employee must be formally instructed to represent the governmental entity and its interests; and (4) there must be no other conflict of interest on the part of the designated representative. 1991 Op. Att'y Gen. No. 91-007, at 2-37. The essence of these requirements is that "an individual does not have

a prohibited personal interest in a contract by virtue of serving a nonprofit corporation when his service to the nonprofit corporation is performed in his official capacity, as a formal representative of a governmental entity – for then his interest in the nonprofit corporation is public and official, rather than private; he represents and serves the governmental entity and not his own interests.” 1991 Op. Att’y Gen. No. 91-007, at 2-37; *cf.*, *e.g.*, 1979 Op. Att’y Gen. No. 79-055 (syllabus, paragraph 5) (a board of county commissioners that selects the board of trustees of a nonprofit corporation and then contracts with the corporation for the administration of a grant program may not participate in the management or control of the affairs of the nonprofit corporation).

R.C. 183.061 plainly authorizes the Foundation to form a nonprofit corporation that will have a close and possibly contractual relationship with the Foundation. The Foundation’s express authority to form the nonprofit corporation insulates the Foundation from findings of impermissible conflicts on that basis. Should the Foundation desire to have any of its board members or employees participate in the operation of the nonprofit corporation, it should give attention to the ethical considerations outlined above. *See also, e.g.*, 1988 Op. Att’y Gen. No. 88-041 (a county commissioner may serve on the board of directors of a community action agency, which is a nonprofit agency designated under R.C. 122.69 and federal law to receive community services block grant funds and provide services). *See generally* R.C. 1724.10 (a community improvement corporation may be designated as an agency of one or more counties, townships, or municipal corporations, or a combination of those bodies).

Although there is no express statutory authority for trustees or employees of the Foundation to serve as directors, officers, or members of the nonprofit corporation, the authority granted to the Board of Trustees by R.C. 183.061 to form a nonprofit corporation to raise money to aid the Foundation provides implied authority for the Foundation to incorporate its representatives into the management and operation of the nonprofit corporation to enable the nonprofit corporation to carry out its purpose, to the extent that this is permitted under other provisions of law and principles of ethics. However, attention should be given to the statutes governing particular offices to avoid violation of specific provisions. For example, the Director of Health (who under R.C. 183.04 is an ex officio member of the Foundation’s Board of Trustees) is among the officers subject to R.C. 121.12, which provides that each such officer “shall devote the entire amount of time for which he receives compensation from that office to the duties of the office, and shall hold no other office or position of profit” and provides that the officer may serve as a member of a board or commission as appointed by the governor. It is not clear that there is authority for the Director of Health to serve as a director of a nonprofit corporation as part of the duties of office, and the Director clearly may not accept a paid position on a nonprofit board.

Members of the General Assembly are prohibited by the Ohio Constitution from holding another public office, with limited exceptions. *See* Ohio Const. art. II, § 4. Members of the General Assembly are prohibited by R.C. 101.26 from holding certain public or private positions, including trustee, officer, or manager of a benevolent, educational, or correctional institution that is authorized, created, or regulated by the state and that is supported in whole or

in part by funds from the state treasury, but are permitted to serve as trustee, officer, or manager of a private institution that receives funds from the state treasury only in exchange for services rendered.

Under R.C. 183.04, four legislators serve as nonvoting members of the Foundation, reflecting an apparent determination by the General Assembly that this participation does not constitute holding a public office. *Cf.* R.C. 3750.02(A) (legislators serving as nonvoting members on the State Emergency Response Commission); R.C. 4906.02(A) (legislators serving as nonvoting members on the Power Siting Board). Service on a nonprofit corporation is permitted if there are no violations of statutes or ethical principles and if service on the nonprofit corporation is not considered the equivalent of a public position. *See generally Meshel v. Keip*, 66 Ohio St. 2d 379, 387-88, 423 N.E.2d 60 (1981) (a legislator serving as a member of the Controlling Board does not hold another public office in violation of Ohio Const. art. II, § 4); R.C. 101.26.

In addition to receiving advice from the Attorney General pursuant to this opinion, the Foundation may wish to seek guidance from the Ohio Ethics Commission or the Joint Legislative Ethics Committee. These bodies have jurisdiction over questions of ethics or conflicts of interest arising under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43, and are empowered to render advisory opinions upon which persons may reasonably rely. *See* R.C. 102.01(F); R.C. 102.08; 2007 Op. Att’y Gen. No. 2007-011, at 2-83 n.1; *see also* R.C. 1702.301 (subject to modifications by the articles or regulations, describing instances (involving such matters as disclosure and fairness) in which a contract, action, or transaction is not void with respect to a corporation due to a conflict of interest on behalf of a director or officer).

### **Nonprofit Corporation as Alter Ego of the Board of Trustees of the Foundation**

You have expressed concern about problems that might arise with the issue of a nonprofit corporation as an alter ego of the Board of Trustees of the Foundation. The term “alter ego” (meaning “second self”) is used to describe a corporation that, instead of acting as a separate entity, is used to conduct the business of another person, with the result that a court may pierce the corporate veil and impose liability upon that other person if the corporate form is used to perpetrate fraud or other illegal behavior. *See Black’s Law Dictionary* 78 (7th ed. 1999); *Webster’s Third New International Dictionary* 63 (unabridged ed. 1993). Courts are capable of scrutinizing the corporate form closely if there is concern that it is used to mask a fraudulent or improper purpose or to evade state policy. *See, e.g., Ohio Mining Co. v. Public Utilities Comm’n*, 106 Ohio St. 138, 147-51, 140 N.E. 143 (1922).

The relationship between the Foundation and the nonprofit corporation is significant in many respects, as discussed throughout this opinion. If the nonprofit corporation is so dominated and controlled by the Foundation that it has no separate mind, will, or existence of its own, the corporate form of the nonprofit may be disregarded. In that case, the nonprofit corporation could be subject to the same constitutional and statutory limitations as the Foundation, and personal liability of board members could be an issue.

With regard to matters of liability, it is possible to discuss general principles, but there always remains the possibility that an attempt to impose liability might occur in unexpected circumstances. Questions of liability are ultimately decided by the courts in particular contexts and with consideration of specific facts, and those decisions cannot be predicted with certainty. *See, e.g.*, 2003 Op. Att’y Gen. No. 2003-037, at 2-311.

Members, directors, and officers of a nonprofit corporation are not personally liable for any obligation of the corporation, but may be liable to the corporation for unauthorized distributions or certain other actions. R.C. 1702.55. R.C. 1702.12 includes among the powers of a nonprofit corporation the power to indemnify or agree to indemnify a director, officer, employee, agent, or volunteer of the corporation in various circumstances and also allows for indemnification rights granted by the articles, the regulations, an agreement, a vote of the members or directors, or otherwise. R.C. 1702.12(E). R.C. Chapter 1702 does not directly address any possible liability of the incorporators for actions of the corporation, though liability might be a possibility if an alter ego relationship exists.

We conclude, accordingly, that if the nonprofit corporation formed under R.C. 183.061 is an alter ego of the Foundation, the Foundation might be responsible for the nonprofit corporation in various respects and the nonprofit corporation might be subject to certain requirements that apply to the Foundation.

### **Constitutional Restrictions on Actions of the Foundation and the Nonprofit Corporation**

The Ohio Constitution imposes restrictions upon the financial involvement of governmental entities with private enterprises, prohibiting the lending of credit to a private entity or the purchase of stock or creation of a joint venture with a private entity. *See* Ohio Const. art. VIII, §§ 4 (the state) and 6 (a county, city, town, or township); *State ex rel. Ryan v. City Council of Gahanna*, 9 Ohio St. 3d 126, 459 N.E.2d 208 (1984); *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 197 N.E.2d 328 (1964); 1996 Op. Att’y Gen. No. 96-051, at 2-194 to 2-195. These restrictions have been found to apply to public money received from various sources, including fees, operating receipts, and gifts, as well as to tax proceeds. *See State ex rel. Saxbe v. Brand*; 1986 Op. Att’y Gen. No. 86-067, at 2-370; 1973 Op. Att’y Gen. No. 73-006, at 2-17. As a state entity, the Foundation is subject to these restrictions. *Cf.* Ohio Const. art. VIII, § 13 (authorizing laws that permit the state or a political subdivision or their agencies or instrumentalities to make or guarantee loans or provide moneys for the acquisition, construction, enlargement, improvement, or equipment of property, structures, equipment, and facilities within Ohio for industry, commerce, distribution, and research, and to make loans or guarantees, provided that no moneys raised by taxation are obligated or pledged to pay any bonds or other obligations or

guarantees); Ohio Const. art. VIII, §§ 21, 14, 15, 16 (authorizing debt and expenditures for certain other purposes that would not be permitted under Const. art. VIII, § 4).<sup>5</sup>

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<sup>5</sup> It has been found by former Attorneys General that certain categories of money that are held by the state in trust are not moneys held by the state for purposes of Ohio Const. art. VIII, § 4. The relevant characteristics of these moneys are that the moneys are held in a custodial fund by the Treasurer of State and are not part of the state treasury. Further, they are obtained for the benefit of defined classes of persons from sources limiting their use to benefiting those persons – that is, from employers contributing moneys to form the state insurance fund, *see* 1999 Op. Att’y Gen. No. 99-002, from employees setting aside as deferred compensation amounts they have earned, *see* 1974 Op. Att’y Gen. No. 74-102, or from specific federal programs, *see* 1973 Op. Att’y Gen. No. 73-006 (Rural Rehabilitation Corporation Trust Liquidation Act) – and not from appropriation by the General Assembly. *See* 1999 Op. Att’y Gen. No. 99-002, at 2-13 to 2-15; *see also* 2004 Op. Att’y Gen. No. 2004-014, at 2-107 (“[t]he term ‘state funds’ generally refers to funds that are held in the state treasury and appropriated by the General Assembly pursuant to Ohio Const. art. II, § 22 for expenditure by a state agency or political subdivision,” and contrasts with moneys that are held by the Treasurer of State in the contingent fund or in custodial funds).

The Foundation’s Endowment Fund is a custodial fund that is restricted to purposes designated by statute. R.C. 183.08. However, the moneys from the Tobacco Master Settlement Agreement placed in that fund were received by the state as general state moneys, subject to expenditure by the General Assembly for any purpose, and the General Assembly determined whether and to what extent to devote a portion of the proceeds to the purposes of the Endowment Fund. Under R.C. 183.02 prior to its repeal by Am. Sub. H.B. 119, “[a]ll payments received by the state pursuant to the tobacco master settlement agreement shall be deposited into the state treasury to the credit of the tobacco master settlement agreement fund, which is hereby created. . . . [Subject to certain exceptions], payments and interest credited to the fund shall be transferred by the director of budget and management as follows,” including the payment of a stated percentage to the Tobacco Use Prevention and Cessation Trust Fund under R.C. 183.03 and from there into the Tobacco Use Prevention and Control Endowment Fund under R.C. 183.08. *See* Am. Sub. H.B. 119, 127th Gen. A. (2007) (appropriations eff. June 30, 2007, with certain provisions eff. other dates) (among other amendments, repealing R.C. 183.02 and enacting R.C. 183.51-.52). The moneys are not received from a source that connects them intrinsically with the rights of particular persons. Under R.C. 183.32 prior to its repeal by Am. Sub. H.B. 119, the General Assembly provided for a legislative committee to periodically reexamine the use of Tobacco Master Settlement Agreement funds and to recommend changes to reflect the state’s priorities. *See also* R.C. 183.08 (“[t]he endowment fund shall consist of amounts appropriated from the tobacco use prevention and cessation trust fund”). The securitization of the tobacco settlement money illustrates the General Assembly’s continuing authority to expend that money as it deems fit.

It has been established, however, that governmental entities may provide financial support to a nonprofit corporation if the support is limited to a use directly connected to a public purpose. *See, e.g., State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955); *State ex rel. Leaverton v. Kearns*, 104 Ohio St. 550, 136 N.E. 217 (1922); *State ex rel. Pugh v. Sayre*, 90 Ohio St. 215, 107 N.E. 512 (1914); 1985 Op. Att’y Gen. No. 85-047, at 2-173. The nonprofit corporation’s purpose of raising money to aid the Foundation in the conduct of its duties, as provided in R.C. 183.061, constitutes a public purpose. Therefore, the Foundation may constitutionally provide financial assistance to the nonprofit corporation. *See* 2004 Op. Att’y Gen. No. 2004-002, at 2-11 (“care must be taken to avoid entanglements between public and private interests that are prohibited by the lending credit provisions of Ohio Const. art. VIII, §§ 4 and 6; however, that issue is not of concern when the lease is with a nonprofit corporation for a public purpose”).

Because of Ohio Const. art. VIII, § 4, the Foundation is not permitted to enter into joint ventures with for-profit entities for fundraising or other purposes. A nonprofit corporation is not subject to the constitutional restrictions imposed by Ohio Const. art. VIII, §§ 4 and 6 and may be authorized to enter into joint ventures and share risks with for-profit enterprises. If the nonprofit corporation formed under R.C. 183.061 is given this authority, it may act without constitutional restriction, unless it is so formed that it serves as an alter ego of the Foundation, lacking the independence ordinarily attributed to a nonprofit entity, as discussed above. Such lack of independence may be demonstrated by such factors as joint membership on the governing boards of the Foundation and the nonprofit corporation. If the nonprofit corporation is found to serve as an alter ego, the Foundation could be found to be attempting to do indirectly that which it may not do directly, and the constitutional restrictions might be applied to the nonprofit corporation that acts as the alter ego of the Foundation. *See State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972); *Taylor v. Comm’rs of Ross County*, 23 Ohio St. 22 (1872); 1998 Op. Att’y Gen. No. 98-034, at 2-201 (for purposes of Ohio Const. art. VIII, § 4, the state “clearly includes the Department of Development, and it might also include a private entity, if that entity acts as the agent of the Department. It is clear that the Department cannot do indirectly what it cannot do directly – that is, use a private enterprise to acquire interests in stock for or on behalf of the state” (citations omitted)); 1985 Op. Att’y Gen. No. 85-016, at 2-64 n.3 (a governmental entity “may not do indirectly that which it may not do directly”).

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The initial status of the tobacco settlement money as general money of the state subject to Ohio Const. art. VIII, § 4 is not negated by placing the money in a custodial account with limited purposes. *See Taylor v. Comm’rs of Ross County*, 23 Ohio St. 22 (1872) (syllabus, paragraph 2) (“[w]hat the general assembly is thus prohibited from doing directly, it has no power to do indirectly”). Hence, moneys in the Endowment Fund must be distinguished from the moneys that have been found to be excluded from the coverage of Ohio Const. art. VIII, § 4.

### **Grants by the Foundation to the Nonprofit Corporation to Carry Out Tobacco Control Activities**

You have asked whether the Foundation can make grants to the nonprofit corporation to carry out tobacco control activities mutually agreed upon by the Foundation and the nonprofit corporation. Under R.C. 183.061, the sole purpose of the nonprofit corporation must be to raise money to aid the Foundation in the conduct of its duties under R.C. Chapter 183. The Board of Trustees of the Foundation is not authorized to form a nonprofit corporation that has any other purpose. Thus, the nonprofit corporation must be a fundraising operation only, and may not be empowered to carry out tobacco control activities. *See* note 4, *supra*.

The Foundation is authorized by R.C. 183.07 to make grants to private or public agencies to carry out research and programs related to tobacco use prevention and cessation. Because the nonprofit corporation cannot be empowered to carry out these tobacco control activities, the Foundation is not authorized to provide grants to the nonprofit corporation for these purposes.

We conclude, therefore, that a nonprofit corporation formed under R.C. 183.061 must be created only for the purpose of raising money to aid the Foundation in the conduct of its duties under R.C. Chapter 183 and not for the purpose of performing those duties itself. Therefore, the Foundation is not permitted to provide the nonprofit corporation with grants under which the nonprofit corporation carries out tobacco control activities.

### **Grants by the Nonprofit Corporation to the Foundation to Assist in Programmatic Activity of the Foundation**

You have asked whether the nonprofit corporation can make grants to the Foundation to assist in programmatic activity engaged in by the Foundation. Under R.C. 183.061, the purpose of the nonprofit corporation must be to raise money to aid the Foundation in the conduct of its duties under R.C. Chapter 183. Neither R.C. 183.061 nor R.C. Chapter 1702 specifies how the money raised by the nonprofit corporation is to be paid or transferred to the Foundation. *Cf.* R.C. 1702.12(D) (permitting a nonprofit corporation, subject to limitations prescribed by law or in its articles, to make donations for the public welfare, for religious, charitable, scientific, literary, or educational purposes, or in furtherance of any of its purposes). To comply with R.C. 183.061, the nonprofit corporation's authority must be restricted to aiding the Foundation in the conduct of its duties. Within this purpose, there is discretion for money raised by the nonprofit corporation to be paid or transferred to the Foundation in any reasonable way. The use of grants for programmatic activity is not precluded, provided that the use of grants for programmatic activity is permitted under the articles of incorporation and regulations of the nonprofit corporation.

The inclusion of grant moneys in funds transferred to the Foundation by the nonprofit corporation might occur, for example, if in raising money the nonprofit corporation seeks to obtain grant moneys for the purposes of the Foundation. Grant moneys are frequently accompanied by restrictions upon their use and by agreements to expend them in a particular manner. *See generally* 2004 Op. Att'y Gen. No. 2004-014, at 2-119 (“[a] grant recipient may be

required to agree to abide by the conditions of the grant”); 2000 Op. Att’y Gen. No. 2000-013, at 2-76 (“the grantee may expend grant moneys only in accordance with the agreement under which the grant is accepted, and that agreement must be consistent with applicable provisions of law”). If the nonprofit corporation is successful in obtaining grants for use by the Foundation, it must be empowered to transfer to the Foundation the grant moneys subject to any applicable conditions. *See* R.C. 1702.12(F)(9) (a nonprofit corporation may exercise all authority incidental to the purposes stated in its articles).

Apart from funds received by the nonprofit corporation subject to restrictions upon their use, it does not appear that the nonprofit corporation may be empowered to impose upon the Foundation restrictions on the use of moneys raised by the nonprofit corporation. Thus, the nonprofit corporation cannot be authorized to exercise judgment regarding the use of the funds it raises and to provide them to the Foundation in the form of grants limited by the nonprofit corporation to particular purposes but, instead, must transfer the money it raises to the Foundation for the Foundation to expend as the Foundation deems appropriate in the performance of its functions. The statutory language defining the nonprofit corporation’s purpose as “raising money to aid the foundation in the conduct of its duties” under R.C. Chapter 183 indicates that the duties for which the money may be spent are those of the Foundation and, accordingly, that discretion remains with the Foundation to determine how to allocate to the performance of its various duties the money it receives, including money raised by the nonprofit corporation, unless the source of the money has imposed some restriction.

As stated above, the Tobacco Use Prevention and Control Endowment Fund consists of amounts appropriated from the Tobacco Use Prevention and Cessation Trust Fund, as well as grants and donations made to the Foundation and investment earnings of the Endowment Fund. R.C. 183.08(A). It appears, accordingly, that grants or donations paid or transferred by the nonprofit corporation to the Foundation should be placed in the Endowment Fund.

We conclude, therefore, that a nonprofit corporation formed under R.C. 183.061 may raise money in any reasonable manner that is authorized under its articles of incorporation and regulations and may transfer that money to the Foundation in any reasonable manner that is authorized under its articles of incorporation and regulations. If the nonprofit corporation receives for the Foundation grants or other moneys subject to limited uses, the nonprofit corporation may transfer those moneys to the Foundation subject to the limitations upon their uses, provided that the articles and regulations of the nonprofit corporation so permit. Apart from funds received by the nonprofit corporation subject to restrictions upon their use, the nonprofit corporation cannot be authorized to impose upon the Foundation restrictions on the use of moneys raised by the nonprofit corporation.

### **Financial Assistance by the Foundation to the Nonprofit Corporation**

You have asked whether the Foundation may supply capacity-building funds to support the launch of the nonprofit corporation. In the context of this question, you have noted that the Foundation, through the grant process under R.C. 183.07, has supplied capacity-building funds

to a number of nonprofit corporations across the state to allow them to become established and in a position to carry out tobacco control programming.

As discussed above, the Foundation may expend money only pursuant to clear statutory authority. *See, e.g., State ex rel. Smith v. Maharry; State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916). The Foundation is authorized by R.C. 183.061 to “form” a nonprofit corporation. The enabling statutes do not specify how much money the Foundation may expend on this project or precisely what expenditures are authorized.

The Foundation is guided by the general principle that, when a public body is given authority to perform a task, it has implied authority to take the action necessary to accomplish the task. *See, e.g., Jewett v. Valley Ry. Co.* Therefore, the Foundation may expend such amounts as are reasonably necessary to create the nonprofit corporation and provide for it to begin functioning. Whether or to what extent the provision of capacity-building funds is reasonably necessary for the formation of the nonprofit corporation is a matter of judgment that must be decided in light of particular circumstance and the available alternatives.

It should be noted that the Foundation is authorized to “form” the nonprofit corporation, but not to operate or support the nonprofit corporation. Thus, once the nonprofit corporation is formed and operating, it would be expected to be self-supporting and, rather than drawing upon the resources of the Foundation, to provide the Foundation with the money that it raises, after providing for its own necessary expenses. The Foundation’s enabling statutes do not authorize expenditures for continuing operational activities of the nonprofit corporation, and the Foundation cannot expand its statutory powers *See, e.g., Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 320 N.E.2d 693 (1975).

In determining how many resources may be expended upon the formation of the nonprofit corporation, it is important to remember that expenditures from the Endowment Fund are restricted to the purposes prescribed by statute, pertaining to the duties of the Foundation. R.C. 183.08; *see also* R.C. 183.06 (moneys in the Tobacco Use Prevention and Control Operating Expenses Fund (obtained by the Foundation from the Endowment Fund upon request to the Treasurer of State) “shall be used by the foundation solely to pay the compensation of the state employees of the foundation”); R.C. 183.30 (limiting amounts that may be spent on administrative expenses). The Foundation may expend funds only as authorized by statute, and there is no authority for the Foundation to expend moneys in support of the nonprofit corporation except as necessarily required to permit the Foundation to “form” the nonprofit corporation under R.C. 183.061.

We conclude, therefore, that the Foundation’s grant of authority to form a nonprofit corporation under R.C. 183.061 authorizes the Foundation to expend such amounts as are reasonably necessary to create the nonprofit corporation and provide for its initial operation.

### **Federal Income Tax Exemption Under 26 U.S.C.A. § 501(c)(3)**

You have asked that we answer your questions with consideration of IRS requirements for qualification as a § 501(c)(3) corporation and we are providing a discussion of this issue. Clearly, however, we cannot speak for the federal government and we are not able to provide definitive opinions on matters of federal law. *See, e.g.*, 1999 Op. Att’y Gen. No. 99-034, at 2-226 n.7. You have asked that legal counsel who is expert in this area be appointed to assist in the set up of a nonprofit corporation. That legal counsel may be better able to answer specific questions regarding IRS requirements for qualification as a § 501(c)(3) corporation.

As your letter indicates, it is anticipated that the nonprofit corporation formed by the Foundation will seek status as a § 501(c)(3) organization and exemption from federal income taxation under § 501(a). 26 U.S.C.A. § 501 (West Supp. 2007). Section 501(c)(3) status is available to a corporation “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes” if no part of its net earnings inure to the benefit of any private shareholder or individual, no substantial part of its activities consist of carrying on propaganda or attempting to influence legislation (with certain exceptions), and it does not participate in any political campaign on behalf of or in opposition to any candidate for public office. 26 U.S.C.A. § 501(c)(3) (West Supp. 2007).

A nonprofit corporation is organized exclusively for one or more exempt purposes if its articles of organization limit the purposes of the organization to one or more exempt purposes and do not expressly empower the organization to engage (except insubstantially) in activities that are not in furtherance of those purposes. The articles may not authorize activities that do not further the exempt purposes, such as the operation of a business. A statement that the organization is created solely to receive contributions and pay them over to § 501(c)(3) organizations is sufficient. 26 C.F.R. § 1.501(c)(3)-1(b)(1) (2007). The articles must also provide that the assets of the nonprofit corporation are dedicated to an exempt purpose – for example, that upon dissolution of the nonprofit corporation, its assets will be distributed to another § 501(c)(3) organization or to a governmental body engaged in exempt functions. 26 C.F.R. § 1.501(c)(3)-1(b)(4) (2007). To retain its § 501(c)(3) status, the nonprofit corporation must be operated exclusively for the purposes for which it is organized. 26 C.F.R. § 1.501(c)(3)-(1)(c) (2007); *see, e.g., National Foundation, Inc. v. United States*, 13 Cl. Ct. 486, 87-2 USTC ¶9602 (1987) (a nonprofit corporation that was organized and operated exclusively for the purpose of raising and distributing money to other nonprofit organizations and funding charitable projects was an exempt organization under § 501(c)(3)). It thus appears that a nonprofit corporation formed to raise money to aid the Foundation in the conduct of its duties may qualify as a § 501(c)(3) organization. 26 C.F.R. § 1.501(c)(3)-(1)(d) (2007).

An entity seeking § 501(c)(3) status must determine whether to proceed as a private foundation or seek recognition as a nonprivate foundation, also known as a public charity. 26 U.S.C.A. § 508 (West Supp. 2007). Status as a public charity is generally preferred, because private foundations must abide by rules against self-dealing, must maintain standards for distributing annual income, face the prospect of excise taxes on net investment income, and offer

their donors less favorable standards for deductibility of donations. 26 U.S.C.A. §§ 170(b), 508, 509 (West Supp. 2007). Ohio statutes also impose restrictions upon private foundations. R.C. 1702.12(H).

With limited exceptions, a § 501(c)(3) organization is deemed to be a private foundation unless it establishes that it fits within one of the following categories of public charities set forth in § 509(a): (1) public institutions as described in § 170(b)(1)(A)(i)-(v); (2) publicly supported institutions; (3) supporting organizations; and (4) organizations that test for public safety. 26 U.S.C.A. §§ 508, 509 (West Supp. 2007). A nonprofit corporation formed by the Foundation under R.C. 183.061 would not be operated exclusively to test for public safety and therefore could not come within the fourth category. It is necessary to examine the first three categories more closely.

Public institutions described in § 170(b)(1)(A)(i)-(v) are considered public charities regardless of their sources of support or their relationships with other exempt organizations. They include churches, educational institutions, certain medical care and research organizations, and governmental units. The only category in which the nonprofit corporation might even arguably fit is as a “governmental unit.” As established above, the Foundation is an instrumentality of the state and, therefore, is a governmental unit. It might be argued that a nonprofit corporation that is an alter ego of the Foundation could also be considered a governmental unit. However, the provision defining governmental units for this purpose includes only “[a] State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes,” thereby indicating that the concept of “governmental unit” would not extend to a nonprofit corporation. 26 U.S.C.A. § 170(c)(1) (West Supp. 2007).

A more likely classification would be that of supporting organization. A supporting organization is one that is operated exclusively for the benefit of one or more named public or publicly supported organizations and is controlled or supervised by the organization or organizations that it supports. 26 U.S.C.A. § 509(a)(3) (West Supp. 2007). Entities that may be supported organizations are described in § 509(a)(1) and (2) and include governmental units under § 170(b)(1)(A)(v) and (c)(1), where contributions are made exclusively for public purposes. The Foundation thus might be a supported organization and the nonprofit corporation might be formed to fit within the category of supporting organizations. A supporting organization would have its independence restricted by the supported organization, as provided in its articles of incorporation and regulations.

The final category, that of a publicly supported institution, is also a possibility. To be a publicly supported institution, an organization should normally receive more than one-third of its annual support from gifts, grants, contributions, membership fees, admission fees, merchandise sales, and service revenues and no more than one-third of its support from investment income and unrelated business income. 26 U.S.C.A. § 509(a)(2) (West Supp. 2007). The nonprofit corporation might well come within this category if it receives a substantial portion of its income

from gifts and grants. No relationship with the Foundation is required, though the nonprofit corporation's purpose would of necessity link it to the Foundation.

It thus appears that there is more than one classification in which the nonprofit corporation might seek exempt status. Accordingly, the Foundation and the nonprofit corporation may exercise discretion to determine which of these classifications will best suit their purpose.

In seeking tax exemption status, the nonprofit corporation will also seek to be included as a qualified organization under § 170(c) so that donations to the nonprofit corporation will be deductible to the donors as prescribed by federal income tax law. 26 U.S.C.A. § 170 (West Supp. 2007).<sup>6</sup> Different standards of deductibility apply to some private foundations. 26 U.S.C.A. §§ 170(b), 508(e), 509 (West Supp. 2007).

You have asked whether the Foundation may apply for tax status for the nonprofit corporation. As discussed above, the Foundation has authority to take whatever actions are reasonably necessary to form the nonprofit corporation and provide it with a sound foundation to begin its operations. The tax status of the nonprofit corporation is an appropriate factor for consideration in forming the nonprofit corporation. Under federal income tax law, the Application for Recognition of Exemption (Form 1023) requires that it be signed by an officer, director, trustee, or other official who is authorized to sign for the organization. Thus, the application for § 501(c)(3) status of the nonprofit corporation formed by the Foundation must be signed by an officer, director, or trustee of the nonprofit corporation or by another official authorized by the nonprofit corporation to act on its behalf. Although it does not appear that the Foundation may undertake this task, an individual who serves the Foundation might also be authorized to act on behalf of the nonprofit corporation, subject to the ethical concerns and other factors discussed above.

We conclude, accordingly, that a nonprofit corporation formed under R.C. 183.061 may seek exemption from federal income taxation under § 501(c)(3) of the Internal Revenue Code and may also seek qualification under § 170 of the Internal Revenue Code to allow the donations it receives to be deductible to the donors. Depending upon its organization and operation, the nonprofit corporation might seek to be recognized as a nonprivate foundation (public charity).

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<sup>6</sup> It appears that donations to the Foundation are deductible for individual or corporate taxpayers under the conditions prescribed in federal income tax law. The Internal Revenue Code includes as a charitable contribution "a contribution or gift to or for the use of – (1) A State . . . or any political subdivision of . . . the foregoing . . ., but only if the contribution or gift is made for exclusively public purposes." 26 U.S.C.A. § 170(c) (West Supp. 2007). Deductibility in particular circumstances may depend upon factors pertaining to a particular taxpayer, and a tax advisor should be consulted.

### **Application of State Audits to the Nonprofit Corporation**

You have asked whether a nonprofit corporation formed by the Foundation will be subject to state audits. The relevant statute is R.C. 117.10, which requires the Auditor of State to audit all public offices, and provides discretionary authority for the Auditor of State to audit the accounts of private corporations receiving public money for their use. R.C. 117.10. The statutory relationship between the Foundation and the nonprofit corporation requires the conclusion that, regardless of the manner in which the nonprofit corporation is formed and operated, the nonprofit corporation will be subject to audit by the Auditor of State pursuant to R.C. 117.10.

Under R.C. 117.10, the Auditor of State has a mandatory duty to “audit all public offices as provided in this chapter.” *See also* R.C. 117.11; *Oriana House, Inc. v. Montgomery*, 108 Ohio St. 3d 419, 422, 844 N.E.2d 323 (2006) (“[s]tatutes authorizing the State Auditor to audit the use of public funds should be liberally construed and applied to achieve those purposes”). “Public office” is defined as “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” R.C. 117.01(D). The Foundation is established by statute for the exercise of governmental functions. Therefore, the Foundation comes within this definition and is subject to audit as a public office. *Cf.* R.C. 183.09 (requiring the Foundation to provide the Governor and the General Assembly with an annual financial report including an independent auditor’s report on the financial statements and required supplementary information of the Foundation).

It appears that the nonprofit corporation formed by the Foundation may also be a public office subject to audit by the Auditor of State under R.C. 117.10. As prescribed by R.C. 183.061, the nonprofit corporation will be an entity established by express statutory authority for the purpose of raising money for the Foundation, which is an agency of the state. The nonprofit corporation may thus be considered an entity established by the laws of Ohio for the exercise of a function of government, for purposes of the definition of a public office. *See generally State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 65 Ohio St. 3d at 263-64 (for purposes of public records law, the solicitation and receipt of donations for a public institution is a governmental function); *see also Oriana House, Inc. v. Montgomery*, 108 Ohio St. 3d at 422 (community-based correctional facilities are public offices subject to audit because they are established by the laws of Ohio to exercise a governmental function and receive public funds for their operation); 2004 Op. Att’y Gen. No. 2004-003, at 2-25 (community-based correctional facilities are public offices subject to audit under R.C. 117.10 and R.C. 2301.56). Under this analysis, the nonprofit corporation will be subject to audit as a public office.

If for any reason it is found that the nonprofit corporation is not a public office for purposes of R.C. 117.10, the nonprofit corporation will be subject to audit under the portion of R.C. 117.10 applicable to private corporations. This provision grants the Auditor of State discretionary authority to “audit the accounts of private institutions, associations, boards, and corporations receiving public money for their use and [to] require of them annual reports in such

form as the auditor of state prescribes.” See *Oriana House, Inc. v. Montgomery*, 108 Ohio St. 3d at 422 (“[i]ndividuals or entities who control public funds have a duty to account for their handling of those funds”).

“Public money” is defined by R.C. 117.01(C) to mean “any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.” The creation of the nonprofit corporation by the Foundation and the use of Foundation moneys to pay start-up costs of the nonprofit corporation will provide the nonprofit corporation with public money for its use and thus make the nonprofit corporation subject to discretionary audit by the Auditor of State. In addition, because the purpose of the nonprofit corporation as prescribed by R.C. 183.061 is to raise money to aid the Foundation in the conduct of its duties, money collected by the nonprofit corporation must be collected on behalf of the Foundation (which is a public office) or by the nonprofit corporation as a representative or agent of the Foundation and will be considered public money under R.C. 117.01(C). The nonprofit corporation’s performance of the governmental function of raising money for the Foundation and its corresponding obligation to transfer that money to the Foundation will thus bring the money it receives within the definition of public money for purposes of R.C. 117.10. See R.C. 117.01(G) (defining “[a]udit” to include “[a]ny examination, analysis, or inspection of records, documents, books, or any other evidence” relating to the “collection, receipt, accounting, use, or expenditure of public money . . . by a private institution, association, board, or corporation”); *Oriana House, Inc. v. Montgomery*, 108 Ohio St. 3d at 422; 2004 Op. Att’y Gen. No. 2004-032, at 2-297. See generally *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*. Therefore, if it is found that the nonprofit corporation does not itself constitute a public office, the nonprofit corporation will be subject to audit by the Auditor of State as a private corporation receiving public money for its use.

Therefore, a nonprofit corporation formed under R.C. 183.061 will be subject to audit by the Auditor of State under R.C. 117.10 either as a public office or as a private corporation receiving public money for its use.

### **Application of Public Records Law to the Nonprofit Corporation**

Whether Ohio’s public records law will apply to the nonprofit corporation may depend upon the precise manner in which the nonprofit corporation is established and the facts surrounding its relationship to the Foundation. It is possible that the relationship between the nonprofit corporation and the Foundation will bring the records of the Foundation within the reach of the public records law. See *State ex rel. Strothers v. Wertheim*, 80 Ohio St. 3d 155, 156, 684 N.E.2d 1239 (1997) (“R.C. 149.43 must be construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records”).

The public records law applies generally to records kept by any public office, defined to include a state agency, public institution, political subdivision or other organized body, office, agency, institution or entity established by the laws of the state for the exercise of any function of

government. R.C. 149.011(A); R.C. 149.43(A)(1). The public records law has been found to apply to a private nonprofit corporation that performs a public function and is supported by public funds. *See, e.g., State ex rel. Strothers v. Wertheim*, 80 Ohio St. 3d at 156-57; *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n*, 40 Ohio St. 3d 10, 531 N.E.2d 313 (1988).

In *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, it was held that a nonprofit corporation that had as its sole purpose “to receive, hold, invest and administer property and to spend funds for the benefit of the university” was required to disclose the names of its donors under the public records disclosure provisions, even though the foundation claimed that it played no policy-making role in the university, employed and paid its own staff, paid rent to the university for its office space, and was supported by private donations. *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 65 Ohio St. 3d at 261. The court held that the foundation was a “public office” under R.C. 149.011(A), finding that predecessor entities had received public tax support and “operated essentially as gift-receiving and soliciting arms of the university” and that the close relationship between the foundation and the university had continued. *Id.* at 262. This conclusion was reached even though the foundation was currently not supported by or in control of public funds and had no members of the university upon its board of trustees or staff. *Id.* at 267 (Holmes, J., dissenting). The court also noted that, even if the foundation were not found to be a public office, its records might be subject to mandatory disclosure under R.C. 149.43(B), citing cases in support of the proposition that records must be disclosed “when a private entity performs the duties of a public office, the public office is able to oversee the private entity, and the public office has access to the records produced by the private entity.” *Id.* at 263.

In a more recent case, the Ohio Supreme Court adopted a functional equivalency test for determining whether a private entity is a public office for purposes of public records law. The syllabus to *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St. 3d 456, 854 N.E.2d 193 (2006), states:

1. Private entities are not subject to the Public Records Act absent a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office.
2. In determining whether a private entity is a public institution under R.C. 149.011(A) and thus a public office for purposes of the Public Records Act, R.C. 149.43, a court shall apply the functional-equivalency test. Under this test, the court must analyze all pertinent factors, including (1) whether the entity performs a governmental function, (2) the level of governmental funding, (3) the extent of governmental involvement or regulation, and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.

In the instant case, the nonprofit corporation will be created under R.C. 183.061 by the Foundation (an agency of the state) and will perform the function of raising money for the

Foundation, which has been recognized as a governmental function. *See State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 65 Ohio St. 3d at 262-63 (for purposes of public records law, the solicitation and receipt of donations for a public institution is a governmental function). As discussed above, the start-up of the nonprofit corporation will be funded with moneys of the Foundation, which are public funds. Further, money collected by the nonprofit corporation will be collected on behalf of the Foundation (which is a public office) or by the nonprofit corporation as a representative or agent of the Foundation and will be considered public money under R.C. 117.01(C). Hence, it appears that a number of the factors set forth in functional-equivalency test will be met. *Cf. State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St. 3d at 465 (finding that Oriana House (a private nonprofit corporation receiving public funding to operate a community-based correctional facility and program) was not subject to the public records law and stating that nothing in the record indicated that Oriana House “was created as the alter ego of a governmental agency to avoid the requirements of the Public Records Act”).

Therefore, depending upon the manner in which it is formed and operated, the nonprofit corporation formed under R.C. 183.061 might be subject to the public records law in R.C. 149.43.

### **Application of Open Meetings Law to the Nonprofit Corporation**

Ohio’s open meetings law declares all meetings of any public body to be public meetings open to the public at all times, subject to limited exceptions. R.C. 121.22(C). The law is to be liberally construed to require public officials to take official action and conduct deliberations upon official business only in open meetings. R.C. 121.22(A); *see State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Ass’n of Greater Toledo*, 61 Ohio Misc. 2d 631, 640, 582 N.E.2d 59 (C.P. Lucas County 1990) (the open meetings law “is to be given a broad interpretation to ensure that the official business of the state is conducted openly. Consistent with that critical objective, a governmental decision-making body cannot assign its decisions to a nominally private body in order to shield those decisions from public scrutiny”).

For purposes of the open meetings law, “[p]ublic body” is defined to include “[a]ny board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority.” R.C. 121.22(B)(1). A private body has been found to come within this definition if it is organized pursuant to state statute and is authorized to receive and expend governmental funds for a governmental purpose. *See, e.g., State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Ass’n of Greater Toledo*, 61 Ohio Misc. 2d at 640-41 (nonprofit corporation designated as a community action agency under R.C. 122.69 is subject to the open meetings law).<sup>7</sup>

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<sup>7</sup> Although the standards for determining applicability of the public records law and the open meetings law are similar, they are not identical, and each must be considered separately.

The nonprofit corporation formed by the Foundation will be organized pursuant to state statute and thus may be considered a public body for purposes of the open meetings law if it is authorized to receive and expend governmental funds for a governmental purpose or if it is formed in a manner that makes it, in fact or in effect, a decision-making body of the Foundation. The initial funding of the corporation with Foundation moneys and the ability of the nonprofit corporation to raise money to aid the Foundation may be sufficient to establish this relationship. Additional factors establishing such a relationship might include, for example, substantial overlap in the governing bodies of the Foundation and the nonprofit corporation, or the authority of the nonprofit corporation to make decisions to seek grants to be used for particular purposes or to otherwise influence the manner in which the Foundation may use the funds received from the nonprofit corporation.

Thus, depending upon the manner in which it is formed and operated, the nonprofit corporation formed under R.C. 183.061 might be subject to the open meetings law in R.C. 121.22.

### **Application of State Contracting Controls to the Nonprofit Corporation**

Various statutes govern contracts of state agencies. Whether the nonprofit corporation formed by the Foundation will be subject to contracting controls governing state agencies may depend upon the precise manner in which the nonprofit corporation is formed, the functions it performs, and the particular laws under consideration. Because of the number and diversity of these laws, we are unable to address them comprehensively in this opinion and instead provide a general discussion of some provisions that might be relevant.<sup>8</sup>

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*See Sabo v. Hollister Water Ass'n*, No. 93 CA 1582, 1994 Ohio App. LEXIS 33 (Athens County Jan. 12, 1994) (private nonprofit corporation operating a private water system is subject to public records law but not to open meetings law).

<sup>8</sup> Ohio Const. art. II, § 22 provides that “[n]o money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law, and no appropriation shall be made for a longer period than two years.” This restriction limited the ability of the General Assembly to appropriate tobacco settlement moneys to the Trust Fund and from there to the Endowment Fund. *See State v. Medbery*, 7 Ohio St. 522 (1857) (syllabus, paragraph 2) (“no officers of the State can enter into any contract, except in cases specified in the constitution, whereby the General Assembly will, two years after, be bound to make appropriations either for a particular object or a fixed amount”). The status of the Endowment Fund as a custodial fund, however, removes those moneys from the restriction imposed by Ohio Const. art. II, § 22. *See* R.C. 183.08. Because the money is no longer in the state treasury, it may be expended without an appropriation. *See* 1982 Op. Att’y Gen. No. 82-082 (syllabus, paragraph 1) (“[t]he General Assembly may create custodial accounts which are maintained by the Treasurer of State but are not part of the state treasury for purposes of appropriation as provided for by Ohio Const. art. II,

For purposes of Title I of the Ohio Revised Code, the term “state agency” is defined, except as otherwise provided, to mean “every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.” R.C. 1.60.<sup>9</sup> Title I includes various statutes governing state contracting. *See, e.g.*, R.C. Chapter 125 (Department of Administrative Services—Office Services); R.C. Chapter 126 (Office of Budget and Management); R.C. 153.01-.20 (state buildings). Provisions of Title I apply to various public entities and various situations. For example, R.C. 126.07, requiring a certification of balance in an appropriation, applies to contracts or orders for expenditures chargeable to an appropriation and to payments from the state treasury, and does not appear to apply to expenditures made by a nonprofit corporation from money its raises. *See* note 8, *supra*. In contrast, the provisions of R.C. 125.111(A) requiring discrimination provisions in contracts apply to “[e]very contract for

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§ 22”); *see also* 1999 Op. Att’y Gen. No. 99-001, at 2-5. Thus, the Foundation is not subject to Ohio Const. art. II, § 22 in its expenditures from the Endowment Fund, and the restrictions of Ohio Const. art. II, § 22 would not extend to a nonprofit corporation formed under R.C. 183.061. Certain statutory provisions pertaining to appropriations would also be inapplicable. *See, e.g.*, R.C. 126.07. As discussed above, the Foundation is empowered to expend funds in the limited manners and for the limited purposes provided by statute. R.C. 183.06-.08; *cf.* note 5, *supra* (concluding that moneys in the Endowment Fund remain state moneys subject to Ohio Const. art. VIII, § 4).

State agencies are restricted from incurring debt in excess of the limitations established in the Ohio Constitution and, for this reason, may not include in a contract a provision for indemnification unless the contract establishes a maximum dollar amount of obligation and a source of funds to cover the potential liability. 2005 Op. Att’y Gen. No. 2005-007, at 2-69 n.1; 1996 Op. Att’y Gen. No. 96-060. These restrictions apply whenever the credit of the state may be at risk and thus would apply to the Foundation or the nonprofit corporation if a contractual relationship could impose such a risk.

<sup>9</sup> The same definition appears in R.C. 9.66, which requires a person who applies to the state, a state agency, or a political subdivision for economic development assistance to indicate on the application any outstanding liabilities owed to the state, a state agency, or a political subdivision, and also applies to R.C. 9.24, which prohibits a state agency or a political subdivision from awarding certain contracts for goods, services, or construction, paid for in whole or in part with state funds, to a person against whom there remains an unresolved finding for recovery. *See also* 2004 Op. Att’y Gen. No. 2004-014 (syllabus, paragraph 1) (for purposes of R.C. 9.24, state funds are moneys other than federal funds that are held in the state treasury and appropriated by the General Assembly in accordance with Ohio Const. art. II, § 22 for expenditure by a state agency or political subdivision); note 8, *supra*. Similar definitions have been found, for some purposes, to include certain nonprofit corporations. *See* R.C. 149.011 and R.C. 149.43 (public records law); *see also State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 65 Ohio St. 3d 258, 259-63, 602 N.E.2d 1159 (1992).

or on behalf of the state or any of its political subdivisions for any purchase.” A contract of a nonprofit corporation raising money for the Foundation might, as in *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, be considered a contract “on behalf of the state.” Hence, the applicability of particular provisions depends upon their precise terms and the circumstances at hand. In many cases neither prior judicial decisions nor existing Attorney General opinions provide clear direction.

For example, provisions of R.C. 9.23 to R.C. 9.239 establish restrictions on government contracts for the provision of services for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity. R.C. 9.23; R.C. 9.231. These provisions apply to state agencies, defined as “any organized body, office, agency, institution, or other entity established by the laws of the state for the exercise of any function of state government.” R.C. 9.23(H). There may be a question as to whether this definition includes nonprofit corporations created by state agencies. However, it may not be necessary to decide that question in the instant case because the nonprofit corporation will be created to raise money and not to provide services of the sort addressed in these provisions. *See generally* 2006 Op. Att’y Gen. No. 2006-050.

In general, if the nonprofit corporation is the alter ego of the Foundation, it might be subject to contracting controls that govern the Foundation. If the nonprofit corporation is not an alter ego, the applicability may depend upon the terms of a particular provision. Some controls upon contracts may simply not apply to the nonprofit corporation because of the limited nature of its authority or the narrow scope of the controls. *See generally, e.g.*, R.C. Chapter 153 (public improvements); R.C. 3517.13(I) and (J) (contractual restriction relating to campaign contributions); 2006 Op. Att’y Gen. No. 2006-027; 2003 Op. Att’y Gen. No. 2003-037 (syllabus, paragraph 2) (when buying, selling, or leasing real or personal property or services, a nonprofit community improvement corporation formed under R.C. 1702.04 and R.C. Chapter 1724 and designated as the agency of a county is not required to follow competitive bidding requirements or other restrictions that apply to a board of county commissioners but are not expressly made applicable to a community improvement corporation by statute or agreement); 2000 Op. Att’y Gen. No. 2000-037, at 2-231 (when a nonprofit community improvement corporation formed under R.C. 1702.04 and R.C. Chapter 1724 “is designated by a political subdivision as its agency, the CIC may be subject to certain statutory provisions that apply to that political subdivision”).

Thus, depending upon the manner in which it is formed and operated and upon the provisions under consideration, the nonprofit corporation formed under R.C. 183.061 might be subject to particular contracting controls governing state agencies.

## **Conclusions**

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Neither R.C. 183.061 nor R.C. Chapter 1702 requires the Tobacco Use Prevention and Control Foundation to exercise governance over a nonprofit corporation it forms under R.C. 183.061 by providing for the

overlapping of boards of directors or other representation of the Foundation's board on the board of the nonprofit corporation. The Foundation, having been given authority to form the nonprofit corporation, may exercise that authority in any manner permitted under R.C. Chapter 1702 and other applicable provisions of law.

2. If the nonprofit corporation formed under R.C. 183.061 is an alter ego of the Foundation, the Foundation might be responsible for the nonprofit corporation in various respects and the nonprofit corporation might be subject to certain requirements that apply to the Foundation.
3. A nonprofit corporation formed under R.C. 183.061 must be created only for the purpose of raising money to aid the Foundation in the conduct of its duties under R.C. Chapter 183 and not for the purpose of performing those duties itself. Therefore, the Foundation is not permitted to provide the nonprofit corporation with grants under which the nonprofit corporation carries out tobacco control activities.
4. A nonprofit corporation formed under R.C. 183.061 may raise money in any reasonable manner that is authorized under its articles of incorporation and regulations and may transfer that money to the Foundation in any reasonable manner that is authorized under its articles of incorporation and regulations. If the nonprofit corporation receives for the Foundation grants or other moneys subject to limited uses, the nonprofit corporation may transfer those moneys to the Foundation subject to the limitations upon their uses, provided that the articles and regulations of the nonprofit corporation so permit. Apart from funds received by the nonprofit corporation subject to restrictions upon their use, the nonprofit corporation cannot be authorized to impose upon the Foundation restrictions on the use of moneys raised by the nonprofit corporation.
5. The Foundation's grant of authority to form a nonprofit corporation under R.C. 183.061 authorizes the Foundation to expend such amounts as are reasonably necessary to create the nonprofit corporation and provide for its initial operation.
6. A nonprofit corporation formed under R.C. 183.061 may seek exemption from federal income taxation under § 501(c)(3) of the Internal Revenue Code and may also seek qualification under § 170 of the Internal Revenue Code to allow the donations it receives to be deductible to the donors. Depending upon its organization and operation, the nonprofit corporation might seek to be recognized as a nonprivate foundation (public charity).

7. A nonprofit corporation formed under R.C. 183.061 will be subject to audit by the Auditor of State under R.C. 117.10 either as a public office or as a private corporation receiving public money for its use.
8. Depending upon the manner in which it is formed and operated, the nonprofit corporation formed under R.C. 183.061 might be subject to the public records law in R.C. 149.43, the open meetings law in R.C. 121.22, or particular contracting controls governing state agencies.

Respectfully,

A handwritten signature in black ink, appearing to read "Marc Dann". The signature is fluid and cursive, with a long horizontal stroke at the end.

MARC DANN  
Attorney General