GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

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Advisory Opinion

Outside Employment with Third-Party Delivery Business

This advisory opinion responds to your request for advice on whether a D.C. employee may engage in outside employment as a delivery person for a third-party delivery business. More specifically, the Alcoholic Beverage and Cannabis Administration (ABCA) requests a formal advisory opinion on the following questions:

> (1) *Whether an ABCA Investigator may obtain approval for outside employment as a delivery person for a third-party delivery service that holds a liquor license with ABCA such as Door Dash or Uber?*
>
> *(2) If so, could the agency approve the outside employment activity on the condition that the investigator refrain from working or operating in the District of Columbia and only accept orders outside the District?*

After reviewing the information you provided, I conclude that engaging in outside employment with a third-party delivery business would conflict with the ABCA Investigator's District employment, in violation of the ethics rules.

A. Background

ABCA issues liquor licenses to businesses such as restaurants to permit the sale and service of alcohol. The primary role of an ABCA Investigator is to investigate complaints and ensure that establishments comply with the District's alcohol and cannabis laws. As part of an Investigator's job duties, they are expected to enter licensed establishments and interact with patrons, staff, managers, and owners. The Investigator may issue citations for violations (e.g., no warning signs posted, sale to minors, after-hour violations) and produce case reports reporting on violations. Investigators are empowered to issue verbal and written warnings and testify in criminal or administrative proceedings. Investigators may also observe whether public notices are properly posted related to applications. Investigators may further compile protest reports and testify in

licensing hearings to assist the Board in determining whether to issue new or renewed licenses or permit changes to licenses.

Third-party delivery services, such as Uber Eats and DoorDash, that deliver alcohol are licensed and regulated by ABCA under D.C. Official Code § 25-130. ABCA's records currently show that Uber Eats holds a Third-Party Alcohol Delivery License (License No. 22LAP-000000-01304). Door Dash also holds a similar license with ABCA (License No. 22LAP-000000-01384). In addition, ABCA also regulates caterers, theaters, restaurants, stadiums, taverns, hotels, nightclubs, and similar hospitality businesses that sell or serve alcohol. Likewise, any business that provides food, alcohol, or entertainment may potentially be an applicant for a license.

As a delivery person with a third-party delivery service, it is expected that the Investigator will receive and obtain food, non-alcoholic beverage, and alcoholic beverage orders from customers and businesses in the District of Columbia. It is also expected that the Investigator would have to frequently enter and interact with ABCA licensed establishments as they provide contact delivery services.

B. Applicable Standards

1. Financial Conflicts of Interest

The Financial Conflicts of Interest law and outside employment and private representations rules form the basis of all guidance for employees engaging in work or activities not associated with the District government. The Financial Conflicts of Interest law "prohibits an employee from using their official position or title, or personally and substantially participating… [in a] particular matter, or attempt[ing] to influence the outcome of a particular matter, in a manner that [they] know is likely to have a direct and predictable effect on [their] financial interests or the financial interests of a person closely affiliated with [them]."[1] Therefore, employees must avoid engaging in outside employment or activities that create an actual or potential conflict of interest. For example, an employee whose duties would require them to make decisions that would financially benefit an outside employer should not obtain employment with that company. However, in the event that such outside employment occurs, recusal is the best method for avoiding any conflicts. Employees must recuse themselves from taking official action that would have a direct and predictable effect on their financial interests or the financial interests of family members, business partners, or potential or current employers.[2]

2. Outside Employment and Private Representations

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[1] D.C. Official Code § 1-1162.23(a); *see also* D.C. Official Code § 1-1161.01(43) (defining a person closely affiliated as a spouse, dependent child, general partner, a member of the employee's household, or an affiliated organization).

[2] *See* D.C. Official Code § 1-1162.23(c), An employee is required to immediately recuse themselves in writing should any matter described above come before the employee in their official capacity as a District government employee.

The outside employment rule is codified in Title 6B Chapter 18, Section 1807 of the District of Columbia Municipal Regulations (hereafter referred to as the Section 1807 of the District Personnel Manual ("DPM")) requires employees to ensure that their outside employment or other activity is not incompatible or conflicts with the full and proper discharge of their duties and responsibilities. The rule provides a non-exhaustive list of activities or actions that are not compatible with government employment, including engaging in outside employment that interferes with the efficient operation of the District government, maintaining a financial interest in an outside entity if there is a likelihood that entity will have business with the District, capitalizing on an official title or position, ordering a subordinate to perform personal services during regular hours, engaging in employment that impairs the employee's physical or mental capacity, and engaging in any outside employment or activity which is in violation of federal or District law, etc.[3]

3. Appearance

Pursuant to DPM § 1800.3(n), employees shall not take actions creating the appearance that they are violating the law, or the ethical standards set forth in chapter 18 of the DPM. In other words, conduct that creates the appearance of an ethics violation is itself a violation. Whether circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

C. Discussion

Whether an ABCA Investigator may obtain approval for outside employment as a delivery person for a third-party delivery service that holds a liquor license with ABCA such as Door Dash or Uber?

ABCA directly licenses and regulates third-party delivery services such as DoorDash and Uber Eats, which means that Investigators are tasked with investigating allegations of misconduct by these licensees. ABCA also regulates restaurants, nightclubs and other establishments that serve alcohol, cannabis and tobacco products. Engaging in outside employment with DoorDash or Uber Eats conflicts with District employment in violation of Section 1807.1 as the outside employment would cause interactions with prohibited sources that receive licensure through ABCA. The ABCA Investigator would essentially provide delivery services for the same establishments that they investigate regarding complaints and licensures. As a third-party delivery service employee, the ABCA Investigator may be involved in a regulatory matter against DoorDash or Uber Eats or involved in a matter that arises between a regulated establishment and DoorDash or Uber Eats. Such outside employment with those entities regulated by ABCA gives rise for potential conflicts of interest as those third-party delivery services and the licensed establishments which they provide

[3] *See* DPM 1807.1 for the full list of restrictions.

delivery for are engaged in activity with a nexus to the regulatory authority of ABCA. This presents the high probability the government work and the outside work of ABCA Investigators would impermissibly overlap.

Recusal cannot remedy the myriad ethical issues created by this impermissible overlap. The large majority of ABCA Investigators' assignments are to investigate complaints of alleged violations by licensees. These assignments result in frequent interactions with licensed establishments and licensed third-party delivery services. During the course of investigating a complaint, ABCA Investigators visit establishments, gather information from patrons and staff, make observations, produce reports on violations, and participate in matters that affect the issuance or renewal of licenses. ABCA Investigators take the same investigative steps when investigating third-party delivery services. ABCA Investigators who engaged in outside employment with third-party delivery services would have to recuse from investigating complaints that involve the delivery service. An Investigator having to frequently recuse themselves from their official duties undermines the employee's ability to fulfill their District responsibilities. If ABCA Investigators were permitted to work for third-party delivery companies, and elected to engage in this work, many Investigators would likely be required to recuse often; thereby causing disorganization at the agency; the activity, therefore, is incompatible with the full and proper discharge of ABCA Investigators' duties. Though recusals are encouraged and supported in certain circumstances, this potential for a conflict of interest outweighs any safeguard such recusal would put in place.

Additionally, such outside employment raises appearance concerns as an Investigator would also serve as a delivery person for the establishment in which his employing agency regulates. In the instant case, a reasonable person, who witnesses an ABCA Investigator who regulates DoorDash and licensed establishments during the day, driving around in the evening with a DoorDash sticker on their car or going in and out of restaurants and bars that they inspect could reasonably believe that the Investigator is behaving unethically. Such involvement could create the appearance that the Investigator is unable to impartially perform their official duties.

Could the agency approve the outside employment activity on the condition that the Investigator refrain from working or operating in the District of Columbia and only accept orders outside the District?

Further, you ask whether outside employment with the third-party delivery service could be approved if the ABCA Investigator refrained from working or operating in the District of Columbia and only accepts orders outside of the District. The ABCA Investigator only taking delivery orders outside of the District will not cure the established conflict because the employing third-party delivery service still carries the same licensure under ABCA no matter where the Investigator receives and delivers. As previously stated, ABCA Investigators handle complaints concerning third-party deliver services. An Investigator, who is employed by Door Dash or Uber Eats to deliver outside of the District of Columbia, would not be able to investigate a complaint or

make a recommendation regarding that entity's D.C. license. The frequency of recusals would be too great and not allow for the Investigators to effectively discharge their official duties as it involves their third-party delivery employer. The ABCA Investigator may not work for a third-party delivery business on the premise they accept only orders outside of the District, as the conflict of interest has already been established by the nature of their duties and ABCA's regulatory authority. In addition, appearance concerns would still exist even if the deliveries were only conducted outside the District.

Therefore, ABCA Investigators are prohibited from engaging in outside employment with third-party delivery services, such as DoorDash and Uber Eats, because such employment conflicts with their government service, and recusal would not absolve the conflict.

This advice is provided to you pursuant to section 219 of the Ethics Act (D.C. Official Code § 1-1162.19). The Ethics Act requires this opinion to be published in the District of Columbia register within 30 days of its issuance, but that your identifying information will not be disclosed unless you consent to such disclosure in writing. Pursuant to Chapter 3 of the D.C. Municipal Regulation Regulations § 5405.7, this proposed advisory opinion shall be published in the District of Columbia Register for a 30-day public comment period during which time a person may submit information or comment to bega@dc.gov.

Please let me know if you have any questions or wish to discuss this guidance.

Sincerely,

ASHLEY D. COOKS
Director of Government Ethics
Board of Ethics and Government Accountability