

# Schulte Roth & Zabel LLP

## MEMORANDUM

### ATTORNEY-CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT

**To:** File **Date:** May 20, 2019

**From:** Adam Hoffinger  
Jeffrey F. Robertson

**Re:** Summary of WMATA Board Ethics Committee Investigation Regarding Jack Evans Compliance With the WMATA Code of Ethics and Compact

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## **I. Scope of Investigation**

In early March 2019, news reports appeared regarding efforts by Jack Evans to use his positions as a member of the D.C. Council and Chair of the WMATA Board of Directors to obtain outside employment and represent private clients. Following these reports, the Ethics Committee of the WMATA Board retained Schulte, Roth & Zabel (“SRZ”) to conduct an independent investigation. Our mandate from the Ethics Committee was to perform an expedited investigation focused on Evans’s conduct as a WMATA Board Member as governed by the WMATA Code of Ethics and the WMATA Compact. Our investigation did not concern matters related solely to Evans’s service on the D.C. Council (which we understand have been the subject of a separate investigation by “BEGA,” the D.C. Board of Ethics and Government Accountability), or regarding potential criminal activity (which we understand is the focus of a pending investigation by the U.S. Attorneys’ Office for the District of Columbia). Our investigation was conducted over the course of approximately six weeks.

### **A. Documents Collected and Reviewed**

We collected and reviewed documents from relevant custodians. From WMATA, we obtained copies of the Ethics Code and Compact, as well as internal documents such as emails, internal memoranda, Evans’s annual disclosures, WMATA Board materials and presentations, lists of active and approved WMATA vendors, and other materials. From Evans, through his attorney, Mark Tuohey, we obtained documents previously produced to the D.C. U.S. Attorneys’ Office investigation and to the BEGA, as well as copies of consulting agreements and billing records related to NSE Consulting, LLC (“NSE”) the company Evans established in July 2016 to provide consulting services for clients in exchange for annual retainers. Finally, we sought and obtained from the D.C. Council email correspondence involving Evans and his D.C. Council staff. The General Counsel’s Office for the D.C. Council refused to provide documents that overlapped with those produced to the U.S. Attorneys’ Office or BEGA. Although we did not gain access to all D.C. Council documents that likely are relevant to our investigation, we did obtain approximately 700 documents that we believe were sufficient for us to completed our investigation, make the findings we communicated to the Ethics Committee, and to fulfill the mandate we received from the Ethics Committee.

### **B. Witness Interviews**

We interviewed nine witnesses during our investigation:

- 1. *Jack Evans***<sup>1</sup>

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<sup>1</sup> Our interview of Evans lasted approximately seven hours, with few brief breaks. Evans brought to the interview and gave us copies of documents concerning the drafting and editing of the 2018 business plan that he submitted to Nelson Mullins. We provided Evans the opportunity to share with us any information he wanted to. At the conclusion of the interview, we asked Evans if there was anything else he wanted to tell us and invited him to have his lawyer, Mark Tuohey, contact us at any time with any additional information, which Tuohey did.

2. *Schannette Grant*, D.C. Council Chief of Staff
3. *Phil Staub*, WMATA Ethics Officer
4. *Jennifer Ellison*, WMATA Board Corporate Secretary
5. *Dennis Anosike*, WMATA Chief Financial Officer
6. *Nina Albert*, WMATA Director of Parking Management
7. *Tim Fitzgibbon*, Head of Nelson Mullins D.C. Office
8. *Rob Hawkins*, former D.C. government lawyer at Nelson Mullins who helped Evans prepare the 2018 business plan
9. *Michael Frisch*, Ethics Counsel, Adjunct Professor of Law: Georgetown Law Center, at Evans's lawyer's request.

In addition, we met separately with Evans's lawyer twice and spoke to him by telephone several times.

## **II. Relevant Ethics Provisions**

Our investigation of Evans's conduct focused primarily on violations of five provisions of the Ethics Code and one provision of the WMATA Compact. These provisions are discussed below.

### **A. WMATA Code of Ethics**

#### **1. Duty to Avoid Conflicts of Interest (Article II.D)**

Board Members are required to "avoid conflicts of interest or appearance thereof." Board Members must "place ethical principles and compliance with the law *above private gain and personal* interest inconsistent with their responsibility to WMATA and to their respective Jurisdiction." According to the Code, "regardless of whether specifically prohibited by this Code, Members shall":

- "[E]ndeavor to *avoid conflicts of interest* or the appearance of conflicts of interest";
- "[R]efrain from *using their positions for personal profit or gain*, or for any other personal advantage";
- "[R]efrain from the appearance of *favored treatment* to any person or entity";
- "[A]void *compromising independence or impartiality*"; and

- “[A]void any other action that is likely to *adversely affect the confidence of the public in the integrity of the Board* or of WMATA.”

The Conflicts of Interest provision derives its meaning from definitions included as part of the Ethics Code. Conflicts of Interest include both *Actual Conflicts of Interest* and *Apparent Conflicts of Interest*.

An *Actual Conflict of Interest* arises when “a Member or Household Member has a Substantial Interest or Duty” in: (a) an “Interested Party”; or (b) “any other Business or Property that may realize a reasonably foreseeable benefit or detriment as a result of an action or decision of the Board.” Art. IV.

As relevant here, *Substantial Interest or Duty* (Art. III.L) includes any of the following:

- Ownership of interest in a business;
- Ownership of interest in or employment by a business receiving income from an interested party;
- Income or potential income greater than \$1,000 annually;
- Personal Representation, defined as “personally representing or providing professional services to a Business, including legal ... and consulting services, regardless of the specific subject matter of the representation ...”; or
- Fiduciary duty owned by a director, officer or general partner of a business.

An *Interested Party* “means any Business that has or is seeking a contract or agreement with WMATA or that otherwise has interests that can be directly affected by decisions or actions of WMATA.” Art. III.G.

*Apparent Conflicts of Interest* include all potential conflicts that fall short of Actual Conflicts. Apparent Conflicts arise whenever a “a Member or Household Member has any other personal interest of which the Member is aware that could reasonably appear to conflict with the fair and objective performance of the Member’s official duties.” Art. IV.

Both Actual and Apparent Conflicts of Interest must be resolved. Board Members with an Actual Conflict “must recuse themselves from Participating in any matter in which they have an Actual Conflict of Interest.” Art. V.A. Board Members with Apparent Conflicts must also recuse themselves from Participating in matters involving Apparent Conflicts, *unless*: (1) the Member publicly declares that he is able to participate “fairly and objectively in the interest of WMATA notwithstanding the Apparent Conflict of Interest”; and (2) such declaration in lieu of recusal is approved by the Ethics Chair. Art. V.A.3 and V.B.

**2. Restricted Interests (Article VI)**

Board Members are prohibited from being “financially interested, either directly or indirectly, in any” transaction “to which the Board or the Authority is a party,” citing Compact §10. Art. VI.A. Likewise, Board Members “shall not knowingly have a Substantial Interest or Duty in an Interested Party” while serving on the WMATA Board. Art. VI.B.

**3. Duty of Loyalty (Article II.A)**

Board Members owe a Duty of Loyalty to WMATA. Pursuant to this duty, Members “shall act in the *best interest of WMATA* ... rather than in the Member’s interest or in the interest of another person or organization with which the Members are personally associated.” In addition, Board Members “shall not engage in *conduct that would bring discredit upon WMATA*.” Art. II.A (emphasis added).

**4. Prohibition on Seeking WMATA Staff Assistance (Art. IX.A.4)**

Board Members may not request assistance directly from WMATA staff for WMATA-related matters. Specifically, the Ethics Code states that Board Members shall not “seek assistance from other WMATA personnel, while in duty status, to assist them in connection with business enterprises (including ... consulting ...).” Art. IX.A.4.

**5. Use of Official Position (Article IX.A.1)**

Board Members are prohibited from using their official positions for their own gain, or for that of others with whom they are affiliated. Board Members “shall not use, nor give the appearance that they are using, their official position with WMATA in a manner inconsistent with their responsibilities to WMATA.” More specifically, Board Members shall not “[u]se their position with WMATA for”:

- “[T]heir own personal financial gain”;
- “[T]he endorsement of any ... enterprise in which they have a Substantial Interest or Duty”; or
- “[T]he private financial gain of friends, ... or individuals or entities with which they are affiliated, or with which they have or are seeking employment or business relations.” Art. IX.A.1.

**B. WMATA Compact**

Like the Code of Ethics, the WMATA Compact also governs Board Members’ conduct concerning Conflicts of Interests. Compact Section 10 prohibits Board Members from having “financial interests” in any WMATA transaction and from soliciting or accepting anything of value “in connection with” performing their official duties.

Pursuant to Section 10(a)(1), no Director, officer or employee shall “be *financially interested, either directly or indirectly*, in any contract, sale, purchase ... of real or personal property to which the Board or the Authority is a party.” Compact §10(a)(1) (emphasis added).

*Indirect* financial interest would include receiving consulting fees from an entity that is doing, or is seeking to do, business with WMATA. That is, Section 10(a)(1) applies where the entity paying consulting fees either (1) has an agreement or other business transaction with WMATA, or (2) would benefit from the termination of an existing agreement or other business transaction between a competitor of the entity and WMATA.

Pursuant to Section 10(a)(2), no Board Member, “*in connection with* services performed within the scope of his official duties, *solicit* or accept *money or any other thing of value* in addition to the compensation or expenses paid to him by the Authority.” Compact §10(a)(2) (emphasis added).

“[I]n connection with” would appear to be broader than “in exchange for” (which would be limited to *quid pro quo* circumstances); that is, “in connection with” would include instances in which consulting fees or other monetary benefits were not the “but for” cause of action taken by the Board member. Likewise, the use of “solicit” means the mere *request* for money or other items of value is prohibited, even if the party from which the thing of value is requested refuses the request, or for whatever other reason the Board Member who solicits the payment does not actually receive it.

### **III. Factual Findings**

Our investigation uncovered evidence of multiple violations of the Ethics Code and WMATA Compact by Evans related to three primary areas: (1) Evans’s efforts regarding WMATA on behalf of Colonial Parking; (2) Evans’s actions at WMATA to assist Digi Outdoor Communications & Digi Outdoor Media (collectively, “Digi”); and (3) Evans’s 2018 business plan used in connection with his efforts to obtain a job with a private law firm.

#### **A. Colonial Parking**

As a subsidiary of The Forge Company, Colonial Parking is a parking operator located in Washington, D.C. The CEO of both Colonial and Forge is Rusty Lindner, who has been a close personal friend of Evans’s for many years. Emails between Lindner and Evans and between Lindner and Evans’s D.C. Council staff demonstrate that Lindner and Evans communicated regularly about a range of professional and social matters. During Evans’s tenure with Squire Patton Boggs and Manatt Phelps, Forge/Colonial and/or Lindner were clients of these law firms.

##### **1. Colonial Consulting Agreement**

As of October 1, 2016, Colonial’s parent, Forge, became a client of NSE, Evans’s consulting firm. This consulting agreement was signed while a WMATA request for proposal

(“RFP”) to provide parking services for WMATA was pending. Initially, Colonial agreed to pay Evans \$25,000 per year, but the amount was doubled to \$50,000 a few months later, as of February 2017.<sup>2</sup>

The Colonial consulting agreement added two provisions that were not included in previous NSE consulting agreements. First, the Colonial agreement added a provision saying that Evans would recuse himself from D.C. Council matters involving Colonial. The addition of this provision is significant because it demonstrates that both Colonial and Evans acknowledged that Evans’s work for Colonial presented the possibility of a conflict of interest. A similar provision to address potential conflicts involving Colonial and WMATA was not added, even though, as discussed below, Evans had been actively advocating on Colonial’s behalf at WMATA since at least April 2015.

Second, the Colonial agreement also added a description of the “Services” that Evans would provide pursuant to the agreement. Specifically, Evans agreed to provide Colonial with “information and advice regarding the metropolitan Washington, D.C. business community, including strategic issues relating to jurisdictional competition, *transportation*, and real estate ...” [6C (emphasis added)]. This definition necessarily includes matters related to WMATA.

At no point did Evans disclose to WMATA the existence or subject matter of NSE’s consulting agreement with Colonial. Evans’s annual disclosures identified NSE, but not the names of NSE’s clients, including Colonial. Nor did Evans disclose his consulting relationship with Colonial or his close personal friendship with Lindner at any later point, including when he participated in discussions of parking-related matters at Board meetings or while Evans pursued his campaign against WMATA parking vendor Laz Parking.

Since he rejoined the WMATA Board in 2015, Evans has taken an active role in parking issues at WMATA. Our investigation uncovered evidence of a pattern of conduct by Evans designed to oust Laz as WMATA’s parking vendor. During our interview, Evans acknowledged that these efforts were prompted by Lindner and were based on information that Lindner provided to Evans for the purpose of discrediting Laz, a Colonial competitor. Evans pursued an anti-Laz campaign by, *inter alia*: raising issues concerning WMATA’s RFP processes; criticizing Laz and WMATA management involved in parking decisions; urging three investigations by WMATA’s Office of Inspector General (“OIG”) concerning allegations of fraud and corruption against Laz; and regularly sharing with Lindner updates on parking-related investigations, information and internal WMATA communications, often contemporaneously with the underlying events.

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<sup>2</sup> See Services Agreements dated as of August 1, 2016 between NSE Consulting and Digi, included in SRZ’s binder of Key Documents for WMATA Ethics Committee Investigation (“Key Document Binder”) at Tab 6C. Hereafter, documents that are cited in this memorandum will be referenced by their tab number in this Key Document Binder, which is being maintained as part of SRZ’s files.

## **2. Evans Raised Concerns About WMATA's 2015 Parking RFP**

On March 31, 2015, WMATA issued an RFP to provide a range of parking services that WMATA could (but was not obligated to) request from the vendor, with a response deadline of April 22, 2015. On or about April 21, 2015, Evans raised issues with WMATA General Manager Jack Requa and others concerning the manner in which the RFP was publicized, which he suggested favored the incumbent, Laz. [9A]. WMATA determined that Colonial was among the parking vendors that WMATA notified about the RFP, and was on the bidders list. According to documents we obtained from the D.C. Council, Evans also raised concerns about the RFP with the D.C. Council. [9A]. On April 22, 2015, the deadline to submit bids, the D.C. Department of Transportation requested that WMATA extend the bid deadline by four weeks. WMATA agreed to a one-week extension as “a courtesy to the Board Member who raised this issue” about the RFP. *Id.* WMATA “later determined that the request was on behalf of a WMATA Board Member, rather than an interested party.” [9I].<sup>3</sup> During our interview, Evans acknowledged that he had raised concerns on behalf of Colonial and based on information Evans received from Lindner. In addition, Board Secretary Jennifer Ellison shared with WMATA Inspector General Helen Lew the concerns that Evans had raised. [9A]. Colonial did not submit a bid in response to the RFP. Laz ultimately was awarded the four-year contract under which it continues to provide parking services to WMATA.

## **3. Evans's Efforts Concerning WMATA's 2016 Parking RFP**

On September 1, 2016, WMATA issued a broader parking RFP, this one to finance, operate and maintain WMATA's entire parking portfolio. The 2016 RFP was potentially quite lucrative—during 2015, WMATA generated nearly \$50 million in parking-related revenue.

On September 14, 2016, the WMATA OIG received a complaint about the RFP and Lew commenced an investigation. [9B]. Colonial was among the potential bidders that attended a September 15, 2016 informational meeting WMATA held about the RFP for interested bidders. [9H]. Colonial's attendance confirms that it was attempting to business with WMATA and, therefore pursuant to the Ethics Code, Colonial was an “Interested Party” with regard to the 2016 RFP. Colonial clearly was seeking to do business with WMATA.<sup>4</sup>

In November 2016, WMATA canceled the RFP and fired Patrick Schmitt, WMATA Parking Director, for improperly sharing internal WMATA information with Laz Parking. In December 2016, IG Lew issued a report regarding her investigation, which concluded that Schmitt's misconduct created the appearance of a conflict and tainted the 2016 RFP. [9B].

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<sup>3</sup> Although we do not know for a fact who the “Board Member” was, circumstantial evidence suggests it was Evans.

<sup>4</sup> Colonial representatives also had at least one meeting with Nina Albert, WMATA Director of Parking, about WMATA's parking operations.

#### **4. Evans Requested a Second Investigation By the New IG**

During the first half of 2017, Geoff Cherrington replaced Helen Lew as the WMATA IG. By this time, Evans was a paid consultant for Colonial (\$50,000 year). [6C]. Not satisfied with Lew's 2016 investigation, Evans asked the new IG to conduct his own investigation re: Laz, which he did. In his July 27, 2017 report, Cherrington concluded that no additional action was warranted for two reasons: first, the 2016 RFP had been withdrawn and WMATA had no plans to reissue it; and second, Schmitt had been terminated and replaced as WMATA Parking Director. [9C].

#### **5. Following the OIG Budget Request, Evans Requested Another Investigation**

On July 31, 2017 (a few days after issuing his July 27 report), Cherrington requested that WMATA's Board double the OIG's operating budget and change the reporting structure to give the OIG greater independence. Cherrington's request was emailed to Evans. [9D]. During the morning of August 3, 2017, Evans forwarded Cherrington's budget request directly to Lindner. *Id.* That afternoon, Evans again asked Cherrington to investigate Laz. The subject of Evans's email to Cherrington was "WMATA Parking Historical Problems." In it Evans complained about "*inappropriate emails between the Parking Department and Laz representatives while the RFP was underway. To me, where there's smoke, there's often fire.*" *Id.* (emphasis added). Evans concluded his email by requesting a meeting with Cherrington "to discuss this serious matter further." *Id.* Cherrington responded that same day from a family vacation and agreed to meet with Evans after Cherrington returned from vacation. *Id.* Just after midnight (at 12:16 a.m.), Evans forwarded Cherrington's response to Lindner. *Id.*

The following day, Cherrington again responded to Evans's email requesting another OIG parking investigation. In this email, which he sent on August 4, 2017 at 12:25 pm, Cherrington told Evans that he had reviewed the information Evans sent, discussed it with his OIG staff, and would be opening an investigation. *Id.* Twenty minutes later (at 12:46 pm), Evans forwarded Cherrington's email to Lindner. *Id.*

#### **6. May 2018 Board Discussions About Parking Issues**

During May 24, 2018 WMATA Board meetings, the Board heard a presentation by an outside consultant regarding its analysis of WMATA's parking portfolio. [9E]. Evans attended and participated in these Board discussions. [9F]. At no time did he disclose his consulting agreement with Colonial, his close friendship with Colonial's CEO, his efforts on behalf of Colonial at WMATA, or any potential conflict of interest.

## 7. Evans's Efforts On Behalf of Colonial Were Not Limited to RFPs

As noted, Colonial had been a client at Manatt when Evans worked there, including in late 2015, and Evans has been a close friend of Lindner's for many years. In November 2015, Lindner emailed Evans requesting average weekday WMATA ridership, comparing 2013 to 2015. [9G]. In response, Evans's D.C. Council staff (Communications Director Tom Lipinsky) emailed to Lindner what Lipinsky described as "rich data on daily ridership from WMATA from 2011-2014." *Id.* While the response was from Lipinsky, Evans was copied on it. Several days later, Lipinsky forwarded additional and "updated" WMATA daily ridership data to Lindner, in a spreadsheet titled "Rail Ridership by Day and Half Hour – May 2011 – 2015." *Id.* Again, Lipinsky copied Evans on his email to Lindner. Our investigation uncovered evidence that at least some of the information Evans's staff provided to Lindner was not publicly available.<sup>5</sup>

## 8. WMATA Code and Compact Violations Regarding Colonial

Based on the foregoing conduct, Evans violated the following provisions of the Ethics Code and the WMATA Compact:

- Code Violations
  - Evans violated his Duty to Avoid Conflicts (Art. II.D):
    - Evans did not disclose his consulting agreement with Colonial (i.e., an Actual Conflict of Interest).
      - Colonial was an "Interested Party" under Code Art. III.G as a party "seeking a contract or agreement with WMATA or otherwise has interests that can be directly affected by decisions or actions of WMATA."
    - Evans did not disclose close personal friendship with Lindner (i.e., an Apparent Conflict of Interest).
  - Evans violated his Duty of Loyalty (Art. II.A):
    - By working to benefit his friend Lindner and consulting client Colonial, Evans placed the best interests of these parties above the best interests of WMATA.
  - Evans violated the ban on Seeking Assistance of WMATA Personnel (Art. IX.A.4):

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<sup>5</sup> Had Lipinsky been providing publicly available ridership data, it seems likely that he would have simply provided a link to the data on the WMATA web site.

- By, among other things, waging a campaign against Laz, including repeatedly initiating investigations by WMATA’s OIG, and seeking information from WMATA personnel to be shared with Colonial (ridership, etc.).
- Evans used his Official Position for Personal or Private Gain (Art. IX.A.1):
  - By repeatedly and proactively taking action that would benefit Colonial and Lindner, at or during the same time that Evans was being paid \$50,000 per year, Evans improperly used his position at WMATA for his own personal financial gain and/or for the private financial gain of his close friend Lindner and Colonial by virtue of Evans’s consulting agreement.
- Evans violated the prohibition regarding Restricted Interests as set forth in the Compact (Art. VI):
  - By being financially interested and having a Substantial Interest in an Interested Party.
- Compact Violations
  - Through his Colonial consulting agreement:
    - Evans had a financial interest in WMATA’s existing business relationship with Laz Parking, in violation of Compact Section 10(a)(1).
    - Evans solicited and accepted money “in connection with” his official duties, in violation of Compact Section 10(a)(2).

## **B. Digi**

Our investigation also uncovered evidence of Evans’s conduct concerning Digi Outdoor Communications and Digi Outdoor Media (together, “Digi”), related companies affiliated with Don MacCord that were in the business of installing and operating signs to display digital advertisements. In some respects, the Digi situation is similar to Colonial. Both involved undisclosed consulting agreements and efforts Evans undertook directly or indirectly with WMATA on behalf of his consulting client. The primary difference is that the duration of the consulting agreement with Digi and Evans’s WMATA-related efforts for Digi were more abbreviated than for Colonial.

## 1. Digi Consulting Agreements

On or about August 1, 2016, Digi executed two consulting agreements that Evans prepared and under which Digi agreed to pay NSE \$50,000 per year. [6A]. With checks dated August 11, 2016, Digi paid NSE \$50,000. *Id.* Evans departed for vacation on August 12, 2016, and returned on August 21, 2016. On August 18, 2016, Evans's D.C. Council staff emailed Barbara Richardson, a WMATA employee, and requested that WMATA personnel help Digi with after-hours access to Metro property to install signs. Evans was copied on the emails to and from WMATA. [11]. By letter dated August 25, 2016, Evans returned the \$50,000 in checks to Digi without cashing them. [6A].<sup>6</sup>

## 2. Request For WMATA Assistance For Digi

The timing of the request for assistance on Digi's behalf is significant for two reasons. First, the request was after Digi signed the consulting agreement and issued checks to Evans, but before Evans returned the checks and notified Digi that he would not move forward with a consulting arrangement. Second, we understand that during this same period of time WMATA was taking steps to erect its own digital signs and was competing with Digi for advertising revenue. To the extent Evans's staff was seeking to assist Digi to install its signs, it was placing the interests of Evans and Digi above those of WMATA.

Evans did not disclose to WMATA—on his annual disclosures or otherwise—his consulting arrangement with Digi. For reasons that are not clear, in October 2016 Digi issued to NSE a stock certificate for 200,000 Digi shares. According to Evans, he returned the stock certificate to Digi.

## 3. WMATA Code and Compact Violations Regarding Digi

Based on the foregoing conduct, Evans violated the following provisions of the WMATA Ethics Code and Compact:

- Code Violations
  - Evans violated his Duty to Avoid Conflicts based on his undisclosed consulting agreement with Digi (Art. II.D).

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<sup>6</sup> Evans's letter claims that he had only recently discovered a controversy involving Digi and the D.C. government, and that dispute created a "potential conflict" that precluded his moving forward with a consulting relationship with Digi. According to news accounts, however, the D.C. government's dispute with Digi had been brewing for much of 2016. *See, e.g.,* "Ethics Officials Examine D.C. Lawmaker's Business Ties to Digital Sign Company," WASH. POST, May 7, 2018; "D.C. Council Member Jack Evans Received Stock Just Before Pushing Legislation That Would Benefit Company," WASH. POST, Dec. 20, 2018. Several days after Evans returned the checks, the D.C. Attorney General filed a lawsuit against Digi in D.C. Superior Court.

- Evans violated the ban on Seeking Assistance of WMATA Personnel by requesting WMATA's assistance on behalf of Evans's client Digi (Art. IX.A.4).
- Evans used his Official Position for Personal or Private Gain (Art. IX.A.1).
- Evans violated his Duty of Loyalty (Art. II.A).
- Evans violated the prohibition regarding Restricted Interests (Art. VI).
- Compact Violations
  - Evans violated Compact Section 10(a)(2) by soliciting or accepting money "in connection with" his official duties through his consulting agreement.

### **C. Evans's Other Consulting Agreements**

According to Evans, in 2016, he asked his friend, Ron Paul, the CEO of Eagle Bank, for a job. At the time, Eagle Bank was an existing vendor of WMATA (and still is to this day). Evans indicated that he was not aware that Eagle Bank had a banking relationship with WMATA, or that WMATA had increased the funds it maintained at Eagle Bank from \$4 million to approximately \$24 million as of 2019.

Paul declined to hire Evans as an employee. Instead, he suggested that Evans become a consultant. In July 2016, Evans formed NSE, through which he intended to provide consulting services. As of August 1, 2016, Eagle Bank and a corporation owned by Paul signed consulting agreements with NSE. [6B]. Pursuant to those agreements, NSE would receive more than \$50,000 per year. *Id.* A year later, the amount was increased to \$100,000 per year. *Id.*

Evans approached other friends/clients and requested they pay him as a consultant. Ultimately Evans had consulting agreements with ten separate entities. Each of NSE's consulting clients was owned by, or affiliated with, one of six individuals with personal, business and/or social relationships with Evans. At least one client (i.e., Eagle Bank) was a WMATA vendor, and others (i.e., Colonial and Digi) sought to do business with WMATA. In total, Evans's consulting clients agreed to pay him \$325,000/year.<sup>7</sup> [6A-6F]. At no time did Evans disclose any of these consulting agreements to WMATA.

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<sup>7</sup> This amount includes the \$50,000 checks that Evans returned to Digi.

<b>EVANS’S NSE CONSULTING AGREEMENTS</b>			
<i>Key Individual</i>	<i>Entities</i>	<i>Agreement Date(s)</i>	<i>Amount</i>
Don MacCord	Digi Media Digi Comm.	8/1/16	\$50,000
Ron Paul	Eagle Bank RDP Mgmt.	8/1/16 8/1/17	\$100,000
Rusty Lindner	Forge	10/1/16 2/20/17	\$50,000
Anthony Lanier	EastBanc Inc. EastBanc Tech. Squash on Fire	11/1/16 1/1/17 1/1/18 7/1/18	\$25,000
Richie Cohen	Willco	12/1/16 12/1/17	\$50,000
Steven Fischer	Fischer Holdings	3/1/18	\$50,000

**D. Consulting Services Provided by Evans**

During our interview, Evans was vague about what services he actually provided pursuant to his consulting agreements. According to Evans, the agreements permitted clients to consult with Evans as needed. In some instances, he said the client did not consult him at all, while in others, he regularly provided advice.

Beyond the evidence related to Evans’s WMATA-related efforts for Colonial and Digi, our investigation uncovered an email between Evans and his accountant that demonstrates Evans was providing some kind of services to his clients. In connection with Evans’s 2016 tax return, Evans’s tax preparer asked Evans via email “were there any expenses incurred to offset the [NSE] income”? [7B]. Evans responded, “I believe these expenses could be used to offset NSE income” and listed the following expenses totaling \$34,560:

- Car (\$11,315)
- Chevy Chase Country Club (\$8,427)
- Economic Club (\$3,487)
- Metropolitan Club (\$3,300)
- Gas (\$2,194)
- Travel (\$2,000)
- Restaurant (\$2,000)
- Clothes (\$1,302)
- Papers (\$534)

To the extent that these were legitimate NSE business expenses, this correspondence suggests that Evans must have performed services for clients with whom he had consulting agreements.

Perhaps the best evidence of what Evans intended to do and did for his consulting clients, however, is the business plan he submitted to Nelson Mullins in 2018 in order to obtain employment.

#### **E. Evans's 2018 Business Plan**

Since he was first elected to the D.C. Council, Evans has worked part-time at private law firms. From 2002 to 2015, Evans worked at Squire Patton Boggs. From 2015 until 2017, Evans worked at Manatt Phelps. As of November 2017, Evans was no longer employed at Manatt and was searching for a similar position.

In late 2017 or early 2018, Evans attempted to convince Nelson Mullins, a South Carolina-based firm with a D.C. office, to hire him. After Evans's initial discussions with the firm, Nelson Mullins remained uncertain about what Evans would bring to the firm or offer to its clients. As a result, Nelson Mullins asked Evans (as the firm says it typically does for lateral candidates) for a written business plan describing how Evans intended to develop business, attract clients to the firm and help with the firm's existing client base. In essence, the business plan was intended to convince firm management outside D.C., who would not be familiar with Evans, why hiring Evans made sense.

A Nelson Mullins lawyer, Rob Hawkins, was enlisted to help Evans prepare a business plan. Hawkins knew Evans from working at the D.C. Council and for Mayor Bowser. Hawkins prepared a draft entitled "Business Development Strategy," which he forwarded to Evans on January 29, 2018. [3B].

In the email sending the draft to Evans, Hawkins stated:

"the narrative portion is mostly complete but there are some blanks for you to fill out, which are highlighted. Feel free to edit as you please, or to suggest major revisions, if necessary."

Evans reviewed the draft and made edits throughout the document. [3C]. But he did not edit, alter or delete any of the specific statements that on their face are improper under WMATA ethics provisions. During our interview, Evans acknowledged his responsibility for the language in the plan, and with the benefit of hindsight, expressed regret for the language.

### **1. Improper Statements Contained in Evans’s Business Plan**

On its face, the 2018 business plan Evans submitted to Nelson Mullins on January 31, 2018 violates the WMATA Ethics Code and Compact. The plan makes clear Evans’s intent to use his position at WMATA for his own private gain. For instance, Evans says he intends to “leverage[e] my contacts and relationships” “developed as the Chairman of WMATA.” [D3, p. 3]. The plan also claims that Evans was “uniquely positioned” to “cross-market[] my relationships and influence” developed as the Chairman of WMATA. *Id.* Moreover, the plan contemplates that Evans would solicit potential clients including WMATA active and prospective vendors such as Colonial Parking. *Id.* The plan states that Evans planned to develop business by partnering with other law firms including active WMATA vendors Arent Fox, Venable and Holland & Knight. *Id.*

Recently, the D.C. Council reprimanded Evans and found ethics violations on the face of Evans’s business plan—without conducting any investigation, and without the benefit of knowing that Evans was invited and had multiple opportunities to modify the facially violative language but did not do so. [18].

### **2. WMATA Code and Compact Violations Regarding Evans’s 2018 Business Plan**

Based on the foregoing conduct, Evans violated the following provisions of the Ethics Code and the WMATA Compact:

- Code Violations
  - By offering his services to leverage his WMATA connections for Nelson Mullins, Evans violated the prohibition on using his official position for his financial gain, or the private financial gain of others with whom he was affiliated (Art. IX.A).
  - Evans violated the prohibition regarding Restricted Interests by violating Compact Section 10(a) (Art. VI).
- Compact Violations
  - The business plan violated Compact Section 10(a)(2) by soliciting something of value (a job) “in connection with” Evans’s official duties.

## F. Evans Knowingly Violated the WMATA Code and Compact

The evidence uncovered through our investigation demonstrates that Evans's ethical violations occurred not by accident, but "knowingly."<sup>8</sup> Numerous factors support this conclusion about Evans's state of mind. For example, Evans has been a practicing lawyer for nearly 40 years, during which time he has completed regular ethics training courses. After rejoining the WMATA board, Evans has received annual in-person ethics training from 2015 through 2018. Since January 2016, Evans has served as the Chairman of the WMATA Board of Directors, the Executive Committee and the Ethics Committee. Through the Ethics Committee, Evans has been personally involved in WMATA ethics investigations, as he repeatedly noted to us and the Ethics Committee.<sup>9</sup>

In addition, the Ethics Code requires WMATA directors to complete annual disclosure forms reporting "employment, fiduciary positions, and substantial interests." Art. X.A. The WMATA Ethics Officer reviews these disclosures and advises each Director how to monitor and avoid potential Conflicts of Interest and other ethical issues based on the Directors' individual disclosures. Among other things, the Ethics Officer memoranda:

- Remind Directors of their obligations to (i) monitor for potential Conflicts of Interest and (ii) update their disclosures as necessary;
- Note that the Appearance of a Conflict of Interest may arise from "matters unrelated to Substantial Interest or Duties, such as close friendships and past business relationships"; and
- Observe that "[i]nterests that fall just shy of being reportable on your disclosure form" may also create the Appearance of a Conflict of Interest.

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<sup>8</sup> Black's Law Dictionary defines "Knowingly" as "With knowledge; consciously; intelligently; willfully; intentionally. A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result."

<sup>9</sup> These include a 2016 investigation related to Patrick Schmitt and Laz Parking (regarding sharing WMATA parking information with Laz) and a 2015 investigation concerning Mort Downey (concerning his consulting relationship with Parkinson & Brinckerhoff). Evans was also aware of a highly-publicized ethics investigation concerning former WMATA Board Member and D.C. Council member Jim Graham's efforts to circumvent normal channels and to barter WMATA's Florida Avenue project with a D.C. Lottery project pending before the D.C. Council.

The Ethics Officer memoranda to Evans (which we reviewed) specifically state:

“[T]he Code of Ethics includes personal representation as a type of interest. This means [*any party for which*] [*anyone for whom*] you provide professional services, regardless of the matter or compensation received, can give rise to a conflict. Please ensure you have reported [*all parties*] [*all people and businesses*] for which you provide professional services, or, if that is impractical, update your disclosures and recuse yourself whenever such a party [*becomes a prospective party to a WMATA financial transaction*] [*seeks a contract or agreement with WMATA*], has interests that can be directly affected by WMATA or may realize a benefit or detriment from Board Action. It is also possible that personal representation will result in the Appearance of a Conflict of Interest.”

Moreover, the Ethics Code and the Ethics Officer memoranda make clear that Board Members have a continuing obligation to update their disclosures as their circumstances change.

During our interview, Evans said he had no recollection of having seen the Ethics Officer’s memoranda regarding his annual disclosures. He surmised that he did not recall these memoranda because they may have sent to him through Diligent, the information-sharing platform WMATA uses to circulate materials to Board Members, which Evans said he rarely used. However, both the WMATA Ethics Officer and Board Secretary told us that the Ethics Officer’s memoranda were delivered to Evans by email, not through Diligent.

Combined with the general guidance already discussed, the discussion of personal representation issues in the Ethics Officer’s memoranda put Evans on notice that:

- Even though Evans was not required to list on his annual disclosures the names of the clients for whom Evans provided legal, consulting or other professional services, those clients nonetheless could give rise to potential Conflicts—Actual or Apparent;
- For conflict purposes, it did not matter whether Evans’s work for a client was related to that client’s WMATA-related interests;
- In light of these possible Conflicts of Interest, Evans could either disclose the names of his individual clients OR update his disclosures and recuse himself whenever a client developed interests that may be impacted by WMATA; and
- The Code requires recusal whenever there is an Actual Conflict or an Apparent Conflict.

Notwithstanding the extensive evidence of his knowledge of his ethical obligations, Evans never recused himself while serving on the WMATA Board.

#### **IV. Conclusion**

Our investigation, conducted in accordance with the mandate we received from the Ethics Committee of the WMATA Board, provides a snapshot of Evans's conduct, and how it violated WMATA's ethics rules. His personal representations—of his clients and close personal friends—violated his ethical duties as the Chair of the WMATA Board. He solicited and accepted money to serve the interests of his clients and friends—putting their interests above those of WMATA—like Colonial Parking/Rusty Lindner, Digi and perhaps others (e.g., Eagle Bank/Ron Paul), many of whom were actual or potential WMATA vendors, with business interests that intersected with WMATA's interests, and could be served by certain actions or decisions of WMATA or its Board.

Our investigation uncovered a pattern of conduct in which Evans attempted to and did help his friends and clients and served their interests, rather than the interests of WMATA. For example, he waged an extensive campaign against Laz Parking on behalf of Colonial Parking. He repeatedly urged and caused the WMATA OIG to investigate Laz Parking, for which efforts Colonial was the natural beneficiary. He shared WMATA communications regarding parking issues, ridership data and other information with Lindner, Colonial's CEO, on a regular basis, sometimes virtually contemporaneously with the events themselves. He sought assistance for Colonial and Digi from WMATA personnel.

Any questions about Evans's intentions are answered by his 2018 business plan which he used to try and convince a law firm to hire him. He represented to that firm, Nelson Mullins, that he could generate work for the firm by "leveraging" his contacts and relationships developed as the Chairman of WMATA, and by cross-marketing his "relationships and influence" developed as the Chairman of WMATA.

And any questions about what clients Evans was proposing and intending to bring to that law firm are answered in the business plan where Evans specifically lists these clients, with Colonial Parking at the top, as well as other current and potential WMATA vendors. [*See* 3D, p. 3].

What Evans offered and was selling to Nelson Mullins (and presumably to the law firms he previously worked for) was precisely the type of services he performed for his friends and clients while serving as a WMATA Board Member—as the Chairman of its Board, Executive Committee and Ethics Committee.

Evans did not disclose his consulting and personal relationships, and he did not recuse himself from any WMATA-related transactions, discussions, or issues.

Through this conduct, Evans violated the WMATA Code of Ethics and the WMATA Compact.