



California Fair Political Practices Commission

January 10, 1989

Lawrence A. Augusta
Assistant Chief Counsel
State Board of Equalization
P. O. Box 942879
Sacramento, CA 94279-0001

Re: Your Request for Informal
Assistance
Our File No. I-88-449

Dear Mr. Augusta:

This is in response to your request for our review of two Board of Equalization (the "Board") documents that pertain to the activities of former employees of the Board. You request our advice as to whether these documents are consistent with provisions of the Political Reform Act (the "Act").^{1/}

Your question does not involve a specific pending decision. Therefore, we treat your request as one for informal assistance.^{2/}

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

One of the submitted documents is for inclusion in the Board of Equalization Manual (hereafter, "manual document"). The other is for distribution to the Board's employees (hereafter "employee document"). Both summarize provisions of the Act that pertain to activities of former Board employees commonly known as the Act's "revolving door" provisions.^{3/} They also set forth Board procedures in response to possible violations of the Act's "revolving door" provisions.

Having reviewed these documents, we offer the following comments and suggestions:

(1) With the exception of the items below, we find the summarization of provisions of the Act in both documents to be accurate. The exceptions are:

(a) At the top of page two in the manual document you state that a former employee who is found to be in violation of the applicable provisions of the Act can be barred from participation "in any proceeding then pending before the agency or officer." (Emphasis added.) Similar language is found on page two, under the section entitled "Board Employees are Covered by Restrictions," in the employee document.

The prohibitions set forth in Sections 87401 and 87402 extend only to proceedings in which the former employee participated when he or she worked for the Board. Therefore, a prohibition that extends to "any" proceedings, regardless of prior participation, does not comply with the Act.

(b) On pages two and three of the employee document you define the term "Proceedings of the Board." Under the definition a Board "proceeding" is any activity:

... in furtherance of the tax administration responsibilities of the Board, including, but not limited to, audits, collection matters, rulings and opinions on tax matters, appraisals and preliminary and other hearings relating to a specific party or parties

We believe that this definition of "proceeding" differs in some respects from the statutory definition and the Commission's construction of that term. Section 87400(c) defines "judicial, quasi-judicial or other proceeding" as:

^{3/} See Sections 87400-87405.

[A]ny proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency

The Board's definition deviates from the statutory definition by not including court actions as "proceedings."

Furthermore, the Commission has interpreted the word "proceeding" in connection with Coastal Commission permit applications to refer to a specific permit application, including all of the procedural stages involved in the application. A new permit application, even if it involves the same tract of land or some of the same issues as a previous application, ordinarily is considered a new proceeding. (See enclosed copies of the following advice letters: Berrigan, No. A-86-045 and Galanter, No. A-82-079.) In the Witz Advice Letter, No. A-88-382 (copy enclosed), the Commission determined that an investigative proceeding leading to the issuance of a water clean up order was separate from a proceeding in which the subject company was attempting to comply with the order.

On the basis of these interpretations, the Commission could find that a Board tax determination concerning a specific party for a particular tax year is a different proceeding from a Board tax determination concerning the same party with different tax issues in another tax year. However, from the Board's definition above, any tax matter which concerns the same party, regardless of the tax year or issues, is considered to be the same "proceeding" for purposes of the Act. This is inconsistent with the Commission's application of Section 87400(c).

(c) On pages three and four of the employee document you define and explain the term "participated." The last sentence of this discussion (page 4), states:

For audits and approvals, the proceeding continues until a final determination of the matter, up to and including hearing by the Board.

As with the definition of "proceeding" discussed above, this definition is inconsistent with Section 87400(c) because it fails to include court actions.

(2) In both the manual and employee documents you set forth the procedures that the Board will follow in its determination of whether a former employee violated provisions of the Act. Section 87404 states that, upon the petition of any interested person in any judicial or other proceeding, the presiding officer may, after notice and hearing, exclude from the proceeding a person found to have violated the "revolving door" provisions of the Act.

Since Section 87404 does not direct or authorize the Commission to participate in the presiding officer's determination as to whether a violation of the Act occurred in these cases, we offer no comment on the notice and hearing procedure established in these documents. We note, however, that the Commission is required to comply with the notice and hearing requirements of the Administrative Procedure Act (see Government Code Section 11500, et seq.) in its own determinations of whether violations of the Act have occurred.

(3) Finally, you ask whether the provisions of the manual document should be adopted as regulations under the Administrative Procedure Act (see Government Code Sections 11340-11356) and whether the Board has the authority to adopt them.

The Commission has the duty to review the Board's conflict of interest code (see Sections 87303 and 82011) and assure that it is adopted as a regulation (see Regulation 18750). However, the subject matter covered by the provisions of the manual document is not the type of information required to be included in the Board's conflict of interest code (see Section 87302). Accordingly, the Commission has no authority to direct the Board to adopt these provisions as regulations. Since we do not have such authority, we offer no comment on whether or not these provisions should be adopted as regulations. We suggest that you contact the Office of Administrative Law if you have any questions in this regard.

We hope that this response has been of assistance to you. If, however, you have additional questions, please contact us at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Scott Hallabrin
Counsel, Legal Division

DMG:SH:ld

Enclosure



STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-6194

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ERNEST J. DRONENBURG, JR.
Third District, San Diego

PAUL CARPENTER
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

CINDY RAMBO
Executive Director

November 21, 1988

Ms. Kathryn Donovan
Acting General Counsel
Fair Political Practices Commission
428 J Street, Ste. 800
P.O. Box 807
Sacramento, CA 95804

Dear Ms. Donovan:

I am writing to you at the request of our Executive Director, Ms. Cindy Rambo, to seek your advice concerning our proposed statements regarding restrictions on activities of former Board employees, draft copies of which are enclosed. The staff intends to propose to our elected Board that they formally adopt these two documents, and we would like your opinion as to whether these documents properly state the law and that we are following appropriate procedures in adopting and distributing them. We are asking this special favor of you because you are clearly the state agency with the most expertise in this area.

The first document is a statement to be distributed to all employees setting forth the restrictions on activities of former employees found in the Political Reform Act in Government Code Sections 87400 to 87403. The statement, which is to be signed by the employee, is intended to notify employees of these restrictions, and to advise them of the nature of the activities which the Board believes are proscribed by the law. The statement includes some definitions that are unique to the Board, which are based on Board experience and procedures, my reading of the law, and my reading of the opinions of the Fair Political Practices Commission. In particular, I am proposing to define "participated" to include "any activity in a proceeding in a supervisory role" relying on three of your advice letters, Sanford (A-85-1982), Chacon (A-87-197) and Evans (I-86-117).

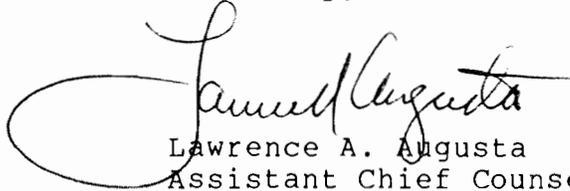
The second document is a proposed amendment to the Board of Equalization Administrative Manual (BEAM). The purpose of this document is to place in our official administrative procedures, the delegation from the Board to the Executive Director of the

authority to implement the procedures for prohibiting participation in proceedings before the Board of Equalization under Government Code Sections 87400 to 87403. This authorization includes authorization to send notice to the former employee of the potential violation and the opportunity for hearing. Further, it delegates to the Executive Director the authority to pursue additional civil and criminal penalties, including filing complaints with the District Attorney or the Attorney General and with the FPPC. Of particular concern is the proposed provision that the Executive Director notify the client of the former employee that the former employee is disqualified. We have discussed with other state agencies the issue of notice to clients, but have been unable to find any precedent one way or the other with respect to the propriety of notifying the affected taxpayer or client.

We do not intend to adopt these as regulations following the procedures set forth in the Administrative Procedure Act; however, we will adopt them in open session of the Board allowing opportunity for comment by the public and affected employees. Therefore, we would also like your comments on whether it is required that such statements be adopted as regulations and whether we have the authority to do so.

Inasmuch as we would like to have this matter placed on the Board's January agenda, we would appreciate it if you could give us an early response. Thank you very much for your kind attention to this matter.

Sincerely,



Lawrence A. Augusta
Assistant Chief Counsel

LAA:ba



California Fair Political Practices Commission

November 29, 1988

Lawrence A. Augusta
Assistant Chief Counsel
California State Board of
Equalization
P.O. Box 942879
Sacramento, CA 94279-0001

Re: 88-449

Dear Mr. Augusta:

Your letter requesting advice under the Political Reform Act was received on November 28, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Scott Hallabrin, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
Diane M. Griffiths
General Counsel

DMG:plh

(DRAFT)

SECTION 1226 - BEAM

STATEMENT REGARDING RESTRICTIONS
ON ACTIVITIES OF FORMER STATE OFFICERS AND EMPLOYEES

Authority: Government Code Sections 87400 to 87403

Policy

The Political Reform Act contains provisions which prohibit former employees from representing taxpayers in proceedings in which they participated while employed by the State Board of Equalization. The law gives to the presiding or other officer of any state agency the authority to exclude any

person found to be in violation of this prohibition from further participation, or from assisting or counseling any other participant, in any proceeding then pending before the agency or officer. The Board has delegated to the Executive Director the authority to implement this procedure whenever it comes to the Executive Director's attention that a former employee may be in violation of the law. The Executive Director is authorized to send notice of the apparent violation to the former employee and to the affected taxpayers. The notice will advise the former employee of the opportunity for a hearing to determine whether a violation has occurred should the former employee believe the facts are different than is represented to the Executive Director. If the person is found to be in violation, the person will be notified by the Executive Director that they are excluded from further participation in the proceeding then pending before the Board or its staff.

If the former employee persists in violating the statute, the Executive Director is authorized to pursue the additional civil and criminal penalties provided for in the Political Reform Act, including filing a complaint with the

District Attorney or the Attorney General, and/or filing a complaint with the Fair Political Practices Commission which has authority to investigate complaints and to impose monetary penalties for violations.

Procedures

It is the responsibility of the immediate supervisor to give each new employee and each employee who is terminating employment with the Board two copies of the statement for signature. The signed original should be sent to the Personnel Office along with other records required for employment or termination. The employee retains the second copy. Blank copies of form GA-_____, Statement Regarding Restrictions on Activities of Former State Officers and Employees (Exhibit A) may be ordered from Supply.

2089A

DRAFT

Statement Regarding Restriction on Activities
of Former State Officers and Employees

The Law Places Restrictions on Certain Activities

Effective January 1, 1981, provisions were added to the Political Reform Act of 1974 to prohibit former state employees from representing or advising other persons for compensation in certain circumstances after leaving state service. These sections of the law, which are set forth in full on the reverse, provide that no former state administrative official, after termination of state employment, shall, for compensation, act as agent or attorney for, or otherwise represent, aid, advise, counsel, consult or assist in representing any other person before any court or state administrative agency, or any officer or employee thereof in connection with any proceeding where the State of California is

a party or has a direct and substantial interest, if the proceeding is one in which the former official participated while employed by the state.

Board Employees are Covered by Restrictions

Employees of the State Board of Equalization who participate, in other than a purely clerical, secretarial or ministerial capacity, in any proceedings of the Board affecting any taxpayer, are governed by this provision, and may not represent, advise or assist in representing or advising that taxpayer with respect to that proceeding after leaving state service. This statement is intended to notify Board employees of these restrictions, and to advise them of the nature of the activities which the Board believes are covered by the law.

Explanation of Terms

"Proceedings of the Board" are any activities in furtherance of the tax administration responsibilities of the Board, including, but not limited to, audits, collection

matters, rulings and opinions on tax matters, appraisals and preliminary and other hearings relating to a specific party or parties. Proceedings of the Board do not include legislative or quasi legislative matters, such as promulgation of rules and regulations which apply to taxpayers generally and not to specific taxpayers.

"Representation" includes making any formal or informal appearance, or making any oral or written communication with the intent to influence the outcome of the proceeding.

"Participated" is defined in subdivision (d) of Section 87400 to mean taking part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee. "Participated" includes any activity in a proceeding in a supervisory role. Thus, supervisors who review and approve or disapprove actions or conclusions of

subordinates, whether in audits, hearings, collections, opinions and rulings or whatever, have participated in the pending proceedings.

"Participated" includes the use of confidential information. Since virtually all the information which the Board acquires from taxpayers is confidential, Board employees have "participated" in any proceedings in which they use or review that confidential information.

The conduct of the former employee is restricted throughout the duration of the proceeding in which he or she participated as a state employee. For audits and appraisals, the proceeding continues until a final determination of the matter, up to and including hearing by the Board.

Disqualification Procedure

If it comes to the attention of the Executive Director of the Board that a former employee may be in violation of the law restricting activities of former employees, the Executive

Director will send notice of the apparent violation to the former employee and to the party the former employee proposes to represent. The notice will advise the former employee of the opportunity for a hearing to determine whether a violation has occurred. If the former employee is found to be in violation, he or she will be excluded from further participation or from assisting or counseling any other participant in the proceeding then pending before the Board or its staff.

Civil and Criminal Penalties

The law also provides for civil and criminal penalties for persons who knowingly or willfully violate the prohibition. Additionally, the law grants to the Fair Political Practices Commission the power to investigate complaints and to impose monetary penalties for violations.

Advice on Specific Activities

The Fair Political Practices Commission is authorized, upon request of any person, to issue written advice as to the persons' duties under the law. Former employees who wish advice on whether proposed activities will violate the law may write directly to the Commission.

Receipt and Acknowledgement

(To be completed in duplicate; one copy for employee's personnel file and one copy for employee)

I hereby certify that I have read the above Statement Regarding Restrictions on Activities of Former State Officers and Employees and am familiar with its contents.

Executed at _____, _____, on _____
city state date

Signed _____
(signature of employee)

Name of Employee _____
(type or print)

88-449



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-6194

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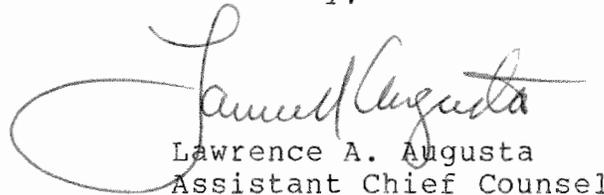
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I hereby certify that I have read the above Statement Regarding Restrictions on Activities of Former State Officers and Employees and am familiar with its contents.

Executed at _____, _____, on _____
city state date

Signed _____

(signature of employee)

Name of Employee _____

(type or print)