

November 10, 2011

R. Morgan Gilhuly
Barg Coffin Lewis & Trapp
350 California Street
San Francisco, CA 94104-1435

**RE: Your Request for Advice
Our File No. A-11-194**

Dear Mr. Gilhuly:

This letter is in response to your request on behalf of Dr. Kenneth Lawenda regarding the Political Reform Act (the “Act”).¹ This letter is based on the facts presented; the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (In re Oglesby (1975) 1 FPPC Ops. 71.) There are other bodies of law, separate and apart from the Act’s conflict-of-interest provisions, which may apply to Dr. Lawenda’s situation. We urge you to check with the Attorney General’s office to determine whether any other laws are applicable in light of the facts you present. Also, the Commission will not advise with respect to past conduct. Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTIONS

1. Does the Act prohibit Dr. Lawenda, a consultant to Luxottica Retail North America, Inc. (“Luxottica”), from participating in decisions of the California State Board of Optometry (the “Board”) relating to:

- (a) the Board’s position on AB 778, or
- (b) litigation in which a subsidiary of Luxottica is a plaintiff?

2. If Dr. Lawenda has a conflict of interest, may he nevertheless participate in these decisions under the “public generally” exception?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

1 and 2. The Act does not prohibit Dr. Lawenda from participating in these decisions so long as the decisions will not have a reasonably foreseeable material financial effect on any of Dr. Lawenda's economic interests.

FACTS

Dr. Lawenda has been a professional member of the Board since November 2007. The Board, which is established within the California Department of Consumer Affairs, regulates the practice of optometry. The Board has eleven members, including six professional members and five public members. Pursuant to the Optometry Practice Act, only California-registered optometrists who are actually engaged in the practice of optometry, or are members of faculty of a school of optometry, may be appointed as professional members of the Board. All professional members currently serving on the Board are members of the California Optometric Association.

On April 11, 2011, Dr. Lawenda entered into a consulting agreement with Luxottica for the period through September 30, 2011. Luxottica is an international eyewear manufacturer. LensCrafters, Inc., a prescription eyewear retailer, is a subsidiary of Luxottica. Neither Luxottica nor any of its subsidiaries or affiliated companies is regulated by the Board. However, the Board has established standards for certain ophthalmic devices (lenses, frames and contact lenses) that must be met before a licensed optometrist can sell, dispense, or furnish such devices. Dr. Lawenda's compensation under the agreement, which exceeded \$500 for the period of the agreement, was not based on the success or outcome of any Luxottica initiative. In our conversation of October 14, 2010, you stated that the annual revenues of Luxottica are approximately €3.56 billion.

Dr. Lawenda's services to Luxottica consisted of (i) helping Luxottica obtain input and feedback about strategic Luxottica initiatives from key optometric leaders ("KOL") in California and other U.S. and Canadian jurisdictions, (ii) obtaining feedback from and indentifying questions and issues raised by the California KOLs, (iii) soliciting feedback from KOLs on Luxottica business plans, (iv) providing advice on optometric recruiting and professional association relationships, (v) helping ensure that Luxottica's policies, strategies and positions on regulations and legislation are well-reasoned and supported by fact and logic, (vi) advising on the potential impact of Luxottica-supported initiatives on patients, quality of care and the professional judgment of optometrists, (vii) advising regarding the overall success of the profession of optometry and how it would impact Luxottica's reputation, product sales and ability to recruit optometrists, and (viii) advise on Luxottica's ability to have business affiliations with optometrists in California, other states and Canadian provinces.

Dr. Lawenda's consulting work has not in any way overlapped with his duties on the Board. He has not been compensated by Luxottica for time spent on Board business, including Board meetings, nor for any travel or other activities incidental to his service on the Board.

Dr. Lawenda disclosed his consulting position to the Executive Officer of the Board and the Board Counsel on or about April 11, 2011, before the Board's April 11, 2011 meeting. Dr. Lawenda had also previously disclosed to the Executive Officer and the Board Counsel his intention to enter into the consulting agreement.

AB 778: You indicate that Assembly Bill 778 makes clear that, notwithstanding any other provision of law (including the laws regulating optometrists), opticians and optical companies may enter into certain business affiliations (ownership, contracts, joint advertising) with health care services plans that provide vision care. AB 778 would not change existing law permitting these business arrangements, but, rather, would clarify that appropriately licensed plans where opticians and optometrists are "co-located" may be owned and/or operated by opticians and optical companies. Luxottica supports AB 778. The California Optometric Association, of which Dr. Lawenda is a member, and Vision Services Plan, an insurer that provides coverage for optometric services, both oppose the bill.

After advising the Board's Executive Officer and Counsel of his consulting arrangement with Luxottica, it was recommended that Dr. Lawenda recuse himself from Board discussions regarding certain matters.

The Board discussed and considered whether to support or oppose AB 778 at meetings on May 10, 2011, June 21, 2011 and September 16, 2011. At the June 21, 2011 Board meeting, Dr. Lawenda recused himself from the Board's discussion of AB 778, which included the Board's review of a letter dated June 16, 2011 from the Executive Officer to Senator Curren Price stating the Board's opposition to AB 778, and he left the meeting room. At the Board's September 16, 2011 meeting, Dr. Lawenda recused himself and did not participate in discussions regarding AB 778. He did, however, remain present during the public meeting.

You state that any action the Board may take regarding AB 778 will not have any financial effect on Luxottica. The determination whether to pass AB 778 is in the hands of the Legislature, and, even if passed, must be signed by the Governor before becoming law. The Board has no power to pass AB 778.

The Litigation: In 2002, the National Association of Optometrists and Opticians, Eye Care Centers of America and LensCrafters, Inc., a subsidiary of Luxottica, filed a complaint in the U. S. District Court, Eastern District of California, against the Attorney General of California and the Director of the California Department of Consumer Affairs. Plaintiffs seek declaratory and injunctive relief regarding certain sections of the Business and Professions Code and related regulations, alleging that these provisions impose unreasonable restraints on interstate commerce in violation of the U. S. Constitution.

Dr. Lawenda is not aware of any occasion when the Board has been called upon to discuss or decide any matter relating to the Litigation. Moreover, the Litigation is not within the jurisdiction or responsibilities of the Board. Dr. Lawenda does not anticipate that the Board will have any reason to discuss the Litigation in the future. You state that if the Board should have occasion to discuss the Litigation, "there is not a substantial likelihood that any such decision will affect a financial interest."

ANALYSIS

Section 87100 of the Act provides that “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” Regulations 18700 through 18709 set forth an eight-step analysis in determining whether a public official has a conflict of interest in a governmental decision he or she will be making.

Step One: Is Dr. Lawenda a “public official” within the meaning of Section 87100?

Section 82048 defines a public official as “every member, officer, employee or consultant of a state or local government agency.” As a board member of the Committee, which is a state government agency, Dr. Lawenda is a public official.

Step Two: Will Dr. Lawenda be making, participating in making or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a governmental decision if, for the purpose of influencing the decision, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

When Dr. Lawenda votes on whether to support or oppose AB 778, he will be making a governmental decision. If the Board makes a decision regarding the Litigation, Dr. Lawenda will be making, or participating in making, a governmental decision.

Step Three: What are Dr. Lawenda’s economic interests?

The economic interests from which conflicts of interest may arise are described in section 87103 and regulations 18703-18703.5.

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); regulation 18703.1(b).)

- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); regulation 18703.2.)
- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); regulation 18703.4.)
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; regulation 18703.5.)

Dr. Lawenda has an economic interest in Luxottica because he has received income from Luxottica exceeding \$500. In addition, a public official always has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family.

Step Four: Will Dr. Lawenda’s economic interests be directly or indirectly involved in a governmental decision?

Source of Income

Regulation 18704.1(a) provides that a person (including business entities and sources of income) “is directly involved in a decision before an official’s agency when that person, either directly or by an agent: (1) initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request, or (2) is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Bill 778

Luxottica is not initiating any Board proceedings involving AB 778, nor is it a named party or the subject of decisions regarding such a proceeding. Accordingly, it is not directly involved. Sources of income which are not directly involved in governmental decisions under the rules quoted above are regarded as indirectly involved. (Regulation 18704.1(b).)

The Litigation

LensCrafters, Inc., a subsidiary of Luxottica, is a plaintiff in an action filed against the Attorney General of California and the Director of the California Department of Consumer Affairs. Assuming neither LensCrafters, nor Luxottica, is initiating any Board proceeding involving the Litigation and are not named parties or the subject of Board proceedings regarding the Litigation, Luxottica is indirectly involved.²

Personal Finances

If a decision by the Board will have *any* effect on Dr. Lawenda's personal expenses, income, assets, or liabilities, his interest is directly involved.

Step Five: What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).)

Source of Income

Whether the financial effect of a governmental decision on an indirectly involved business entity is material depends on the size of the business entity. The standards vary according to whether the business entity is a Fortune 500 company, is listed on the New York Stock Exchange, American Stock Exchange, or NASDAQ, or according to the size of the business entity. The following table summarizes these standards.

Type of Business	Effect on Gross Revenues	Effect on Expenses	Effect on Assets/Liabilities
Listed on the Fortune 500 or revenues of no less than the company listed as 500 th on the Fortune 500	\$10,000,000 or more	\$2,500,000 or more	\$10,000,000 or more
Listed on NYSE or net income of no less than \$2,500,000	\$500,000 or more	\$200,000 or more	\$500,000 or more
Listed on NASDAQ or AMEX, or net income of no less than \$750,000	\$300,000 or more	\$100,000 or more	\$300,000 or more
All others	\$20,000 or more	\$5,000 or more	\$20,000 or more

You have indicated that the annual revenues of Luxottica are approximately €3.56 billion, which we calculate to be approximately USD 4.73 billion.³ Luxottica's revenues are

² Your facts regarding potential litigation are speculative at this time. Should a decision regarding the litigation arise you may wish to seek additional advice once the specific facts are known.

³ Based on the exchange rate at fiscal year-end, listed in Luxottica's 2010 Annual Report.

higher than the revenues of the company ranking 500th in the most recent Fortune 500 List. Accordingly, a Board decision involving Luxottica would not have a reasonably foreseeable material financial effect on Luxottica unless it affected Luxottica's gross revenues or assets by \$10,000,000 or more, or its expense/liabilities by \$2,500,000 or more.

Personal Finances

A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least \$250 in any 12-month period.

Step 6: Is it reasonably foreseeable that the financial effect of the governmental decision on Dr. Lawenda's economic interests will meet the applicable materiality standard?

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is "reasonably foreseeable" that the standard will be met. A material financial effect on an economic interest is "reasonably foreseeable" if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered "reasonably foreseeable," but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

As stated above, the Commission does not act as a finder of fact when providing advice. Thus, the determination of whether or not these decisions will affect Dr. Lawenda's economic interests is a factual question that Dr. Lawenda must determine. We note, however, that you have stated that any action the Board may take regarding AB 778 will not have any financial effect on Luxottica. You also state that if the Board may have occasion to discuss the Litigation, "there is not a substantial likelihood that any such decision will affect a financial interest." Under these facts, Dr. Lawenda does not have a disqualifying conflict of interest because the governmental decision will not have a reasonably foreseeable material financial effect on his economic interests. Therefore, the Act does not prohibit him from participating in decisions involving AB 778 or the Litigation.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery M. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl