

March 7, 2012

Theodore R. Meriam
Board Member
Clayton Valley Charter High School
990 Oak Street
Clayton, CA 94517

Re: Your Request for Informal Assistance
Our File No. I-12-031

Dear Mr. Meriam:

This letter responds to your request for advice regarding the conflict-of-interest provisions of 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 assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature and not limited to a specific governmental decision, we are treating your request as one for informal assistance.²

Please note that the Commission does not provide advice on bodies of law outside the confines of the Act. Thus, we offer no opinion on the application of other incompatible activities and conflict-of-interest laws that may apply including, but not limited to, common law conflict of interest and Government Code Section 1090.

QUESTION

May you take part in government decisions, as a member of a school board for a charter high school, regarding the purchase of various technological solutions including Microsoft solutions, considering your employment with Microsoft and your investment in the company?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

The determination of whether you may take part in the school board's decisions can be made only after determining whether Microsoft is directly or indirectly involved in the decision. For a contract with Microsoft or the purchase of products from Microsoft, Microsoft is directly involved in the decision, and you may not make, participate in making, or use your position to influence the decision unless you can rebut the presumption of materiality by showing that it is not reasonably foreseeable the decision will have *any* financial effect, even "one-penny," on Microsoft. If Microsoft is indirectly involved in the decision such as a decision to purchase an off-the-shelf Microsoft product, or equipment utilizing Microsoft software, from a third-party source unrelated to Microsoft, you may take part in the decision -- barring any other potentially disqualifying economic interests -- so long as the reasonable foreseeable financial effect on Microsoft is less than the applicable materiality standard in Regulation 18705.3(c)(1).

FACTS

You are an appointed member of the governing school board for Clayton Valley Charter High School (the "School Board"), a public conversion charter school in the city of Concord. You are also employed by the Microsoft Corporation as a Readiness Program Manager. In the near future, the School Board will be determining the technological needs of its students, faculty, and staff. It is anticipated that the Operations Standing Committee will propose various technological solutions to the School Board for its approval including Microsoft solutions.

As an employee of Microsoft, you are not currently in a commissioned sales position or in a material ownership position. You do however hold approximately \$32,000 in common Microsoft stock and receive an annual, fixed, salary from the company. Because your division within Microsoft is not involved with sales of Microsoft products, you do not anticipate any personal financial gain, or benefit as an employee of Microsoft, from a decision by the School Board approving the purchase of Microsoft solutions.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

Step One: Are you a "public official?"

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee

or consultant of a state or local government agency” (Section 82048.) As a member of the School Board, you are a public official within the meaning of the Act.

Step Two: Are you 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 intervening substantive 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 decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) You are making, participating in making, or influencing a governmental decision when taking part in School Board decisions regarding the purchase of technological solutions including Microsoft solutions.

Step Three: What are your economic interests?

Of the economic interests recognized under the Act³, those interests that may be implicated by your account of the facts are the following:

Business Entity – 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, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a) and (b).)

Source of Income – A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within the 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.) “Income” is defined to include a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest. (Section 82030(a).)

Personal Finances – A public official has an economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Microsoft: From the facts provided, you are currently an employee of Microsoft and own stock in the company valued at approximately \$32,000. As an employee of Microsoft, with an

³ Our analysis is limited to the economic interests you have identified.

investment in the company of \$2,000 or more, you have an economic interest in Microsoft as a business entity under both subdivisions (a) and (d) of Section 87103.

In addition to your economic interest in Microsoft as a business entity, it also appears that you will have received income from Microsoft of \$500 or more in the 12 months prior to any decisions by the School Board regarding the purchase of technological solutions including Microsoft solutions. Accordingly, it appears that you also have an economic interest in Microsoft as a source of income. (Section 87103(c).)

Personal Finances: A public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)⁴

Step Four: Are your economic interests directly or indirectly involved in the decision?

Regulation 18704.1(a) states that a business entity or source of income is *directly* involved in a decision before the official's agency when that business entity or source of income, 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.”

A business entity or a source of income that is not directly involved in a governmental decision is regarded as *indirectly* involved. (Regulations 18704.1(b), 18705.1(a)(2), and Regulation 18705.3(b).)

Based upon the facts you have provided, the School Board will be considering the purchase of technological solutions including Microsoft solutions. If the School Board is contracting with Microsoft or purchasing Microsoft products through Microsoft, Microsoft is directly involved in any decision by the School Board regarding the purchase of technological

⁴ Pursuant to Regulation 18705.5(a), a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest is not considered a separate financial effect on the official's personal finances and would not be analyzed separately under the “personal financial effects” rule. Moreover, you have stated that you do not anticipate that the decision by the School Board would result in any personal financial gain or benefit as a Microsoft employee. While the Commission does not Act as a finder of fact in issuing advice, to the extent that there is no reasonable foreseeable personal financial gain or benefit as a Microsoft employee, the personal financial effect rule does not appear to apply to your particular circumstances and we do not discuss it further.

solutions. Then again, if the School Board is merely considering the purchase of technological solutions such as off-the-shelf Microsoft products, or other equipment utilizing Microsoft software, from a third-party source otherwise unrelated to Microsoft, Microsoft would be regarded as indirectly involved in the decision. (See *Curry* Advice Letter, No. A-98-005.)

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interests?

Materiality

A conflict of interest may arise only when the reasonably foreseeable effect of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

For economic interests in business entities *directly* involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(b), which states, "the financial effects of a government decision on a business entity which is directly involved in the government decision is presumed to be material."⁵ This presumption of materiality may be rebutted only by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the business entity. However, the size of the financial effect does not matter. If there is *any* financial effect at all, even "one-penny," that effect is presumed to be "material."

Alternatively, for economic interests in business entities *indirectly* involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. For a Fortune 500 company such as Microsoft, the materiality standard is provided in Regulation 18705.1(c)(1), which states the following:

"If the business entity is listed in the Fortune 500 or, if not listed in the Fortune 500, has revenues that are no less than the revenues of the business entity that ranks 500th in the Fortune 500 list, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

"(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year of \$10,000,000 or more; or

⁵ While Regulation 18705.1(b)(2)(A) provides an exception to the presumption of materiality for a directly involved economic interest in a Fortune 500 company such as Microsoft, this exception only applies if the official's economic interest is an investment interest worth \$25,000 or less. Because this exception does not apply to your circumstances, we do not discuss it further.

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500,000 or more; or

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$10,000,000 or more.”

Foreseeability

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).) However, 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.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Based upon the facts you have provided, it will be essential to determine whether Microsoft is directly involved in any particular decision before the school board. To the extent Microsoft is directly involved in the decision, *any* financial effect on your economic interests in Microsoft is presumed to be material. Accordingly, you would be prohibited from making, participating in making, or using your official position to influence the decision unless you can rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have *any* financial effect, even “one-penny,” on Microsoft.

If, however, Microsoft is indirectly involved in any particular decision, you may take part in the decision, barring any other potentially disqualifying economic interest you may have, so long as the reasonable foreseeable financial effect on Microsoft is less than the applicable materiality threshold under Regulation 18705.3(c)(1).

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the “public generally” or the “legally required participation” exceptions are applicable to your circumstances, so we will not address them further.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

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