

May 9, 2013

Jim Griffith
540 Saco Terrace
Sunnyvale, CA 94089

Re: Your Request for Advice
Our File No. A-13-048

Dear Mr. Griffith:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note that because 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), this letter is based on the facts presented. We also note that our advice is based solely on the provisions of the Act.

QUESTION

Do the conflict-of-interest provisions of the Act prohibit you from voting on whether to reauthorize the City of Sunnyvale’s Business Improvement District (“BID”)?

CONCLUSION

No. You have provided no facts to suggest that the decision will have a foreseeable and material financial effect on your economic interests, as discussed more fully below.

FACTS

You are the Vice Mayor for the City of Sunnyvale. You are also a full-time software engineer with Apple, and work at an Apple location outside of Sunnyvale. You own Apple stock.

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.

The City of Sunnyvale operates a downtown BID where community events, advertising and some facility maintenance are provided to assist the member businesses. According to the Report to Mayor and Council, No. 13-075, member businesses are required to pay an annual fee based on the benefits they receive as members of the BID.² The City of Sunnyvale collects the fees assessed on the businesses and forwards these funds directly to the BID. The City charges the BID a fee for this service.

The BID must be annually reauthorized by the City Council at the request of the BID Board. The BID governing body is a private organization called the Sunnyvale Downtown Association, and the City has no authority over its leadership beyond the annual BID renewal.

Apple leases one office building within the BID, and it pays approximately \$100/year for membership in the BID, which you believe is mandatory for all businesses within the BID boundaries.

ANALYSIS

The Act's conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.) Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official's economic interests.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

As the Vice Mayor for the City of Sunnyvale who will be called upon to vote on the BID reauthorization, you are a public official who will be making a governmental decision. You therefore meet steps one and two.

Step Three: What are your economic interests?

Of the economic interests recognized under the Act,³ those interests implicated by your account of the facts are the following:

² (See <http://sunnyvale.ca.gov/Portals/0/Sunnyvale/CouncilReports/2013/13-075.pdf>.)

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

Source of Income – A public 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.)

According to your letter, you are currently a full-time software engineer with Apple. As a result, you have an economic interest in Apple as a source of income.⁴

Step Four: Is the economic interest directly or indirectly involved in the governmental decision?

Apple as a Source of Income – Regulation 18704.1(a) states that a source of income is directly involved in a decision before the official's agency when that 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.

Sources of income that are *not* directly involved in governmental decisions are regarded as indirectly involved. (Regulations 18704(a) and 18704.1(b).) Apple is not initiating the proceeding nor will it be a named party in, or the subject of, the proceeding concerning the reauthorization of the BID by the City. As a result Apple is *indirectly* involved in the decision.

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 impact 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 *indirectly* involved in a decision, including business entities that are a source of income to an official, the materiality standard is provided in Regulation 18705.1(c). Apple is currently listed in the 6th position in the Fortune 500 list. Therefore, Regulation 18705.1(c)(1) applies:

⁴ This assumes that you have received income totaling \$500.00 or more from Apple in the prior 12 months.

(1) 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

(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 identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. For a material financial effect to be foreseeable on an official's economic interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Here, you indicate that as part of the annual fee paid by member businesses, the BID governing body organizes events, conducts advertising on behalf of the businesses, and performs some maintenance on the facilities within the BID boundaries. However, you have provided no facts to suggest that the financial effect of the BID reauthorization decision would even come close to meeting any of the criteria set forth in Regulation 18705(c)(1)(A)-(C).

Accordingly, based on your facts, the decision whether to reauthorize the BID will not have a foreseeable and material financial effect on your economic interest in Apple.

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.)

You have not presented any facts suggesting that the “public generally” or the “legally required participation” exceptions are applicable to your situation, 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: Jack Woodside
Counsel, Legal Division

JW:jgl