



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 8, 2015

Debora Fudge
Windsor Town Councilperson
375 Jensen Lane
Windsor, CA 95492

Re: Your Request for Informal Assistance
Our File No. I-15-091

Dear Ms. Fudge:

This letter responds to your request for advice regarding your duties under the conflict of interest provisions of the Political Reform Act (the "Act").¹ Because your questions are general in nature, we are treating your request as one for informal assistance.²

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

FACTS

You are a city councilmember for the Town of Windsor. You also serve on the Boards of SMART (Sonoma Marin Area Rail Transit), Sonoma County Waste Management Agency, and as an alternate on Sonoma Clean Power. Your election term ends in November 2016. This is when your terms on the other Boards end as well.

You are considering forming a consulting business with two other persons who are not current elected officials. Your work would primarily be land use consulting (outside of Windsor), community relations, media relations, campaign management (outside of Windsor), consulting for unincorporated areas impacted by winery events, and possibly consulting for a winery owner planning a resort in the unincorporated area.

Currently, your two prospective partners are considering entering into a contract with a housing developer in another city who wants to build housing on land owned by SMART as a separate venture.

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).)

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. Section 87103 specifies the interests that may result in a conflict of interest under the Act:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
- An interest in a source of income to the official, including commission income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- An interest in a source of gifts to the official if the gifts aggregate to \$460 or more within 12 months prior to the decision. (Section 87103(e).)
- An interest in the official's personal finances, including those of the official's immediate family. This is known as the "personal financial effects" rule. (Section 87103.)
- In some cases, a business partner may be considered an economic interest for purposes of the Act. In *In re Nord* (1983) 8 FPPC Ops. 6, the Commission addressed the question of one partner's interest in other partners. There the Commission concluded that an investment by a limited partner in a partnership constituted an investment interest in each *controlling* general partner of the partnership. The *Nord* Opinion also noted that the same investment concept would apply to two general partners in a regular partnership or in a limited partnership so long as the requisite level of investment existed. However, the *Nord* opinion has not been applied to regular partnerships with more than two general partners where no single partner holds a controlling position or acts as a managing partner.

Potentially Disqualifying Interests Section 87103

1. You present the following scenario: You become a partner in the firm with two others. The two other partners contract with a housing developer who wants to build housing on land owned by SMART. You have nothing to do with that contract and receive no income from that contract.

The Act would not prohibit associating with your prospective partners or the partnership. The Act only prevents financial conflicts of interest in governmental decision-making. However, the creation of the partnership can impact your responsibilities under the Act.

- *The Partnership:* Under Section 87103(a) and (d), the partnership would be a potentially disqualifying interest of yours. However, applying *In re Nord*, you would not have an interest in your individual partners unless they were a source of income to you.
- *Clients of the Partnership:* You would also have an interest in clients of the partnership (Section 87103(c)) to the extent that your 1/3 interest in income to the partnership is \$500 or more.

2. *Could you individually form your own consulting firm and work jointly with the other consultants' firms on projects for which you do not have a conflict of interest?*

This business structure creates the following interests under Section 87103:

- *Your Firm:* Under Section 87103(a) and (d) you would have an interest in your firm but not the other consultants' firms.
- *Clients of your firm:* You would also have an interest in clients of your firm (Section 87103(c)), but not the clients of the other other consultants' firms.
- *The Joint Venture:* Under Section 87103(a) and (d), the joint venture may be a potentially disqualifying interest of yours. The term "business entity" includes joint ventures. (Section 82005.) The common definition of a "joint venture" is: "A special combination of two or more persons, where in some specific venture, a profit is jointly sought without any actual partnership or corporate designation, or as an association of persons to carry out a single business enterprise for profit, for which they combine their property, money, effects, skill, and knowledge." (*Sadugor v. Holstein* (1962) 199 Cal.App.2d 477, 483.) While you will not have formed a partnership under these facts, you appear to be engaged in a joint venture with the other firms. However, applying *In re Nord*, you would not have an interest in your individual partners unless they were a source of income to you.

3. *Could you individually form your own consulting firm and the other consultants hire you as an individual contractor or employee for certain projects for which you have no conflicts of interest?*

This business structure creates the following interests under Section 87103:

- *Your Firm:* Under Section 87103(a) and (d) you would have an interest in your firm but not the other consultants' firms.
- *Clients of your firm:* You would also have an interest in clients of your firm (Section 87103(c)), but not the clients of the other other consultants' firms.
- *Other sources of income to you or your firm:* You would have an interest in the other consultants as sources of income to you if they hired you as individual contractor or employee. (Section 87103(c).)

Foreseeability and Materiality

The application of these rules will depend on the facts surrounding the decision and the facts related to the private business relationships you form. Until we have those facts, we cannot tell you if you have a conflict of interest in any prospective decisions. However, we can provide the following general guidance.

Foreseeability: A financial effect on your interests (the partnership and your sources of income) is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before your agency. An interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest.

In other cases, while a financial effect need not be likely to be considered reasonably foreseeable, if the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. The general rule is if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable.

Materiality: Regulation 18702.1(a) provides that the reasonably foreseeable financial effect of a governmental decision on a business entity in which an official has a financial interest is material whenever the business entity:

“(1) Initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity;

“(2) Offers to make a sale of a service or a product to the official's agency;

“(3) Bids on or enters into a written contract with the official's agency;

“(4) Is the named manufacturer in a purchase order of any product purchased by the official's agency or the sales provider of any products to the official's agency that aggregates to \$1,000 or more in any 12-month period;

“(5) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement that the official's agency is authorized to issue;

“(6) Is the subject of any inspection, action, or proceeding subject to the regulatory authority of the official's agency; or

“(7) Is otherwise subject to an action taken by the official's agency, the effect of which is directed solely at the business entity in which the official has an interest.”

In all other cases, Regulation 18702.1(b) provides that the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity.³

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel
Legal Division

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³ Regulation 18702.3, applicable to the materiality determination with respect to sources of income, provides that the financial effect is material if the source (a business entity) will be materially affected under Regulation 18702.1.