



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 25, 2020

Glen R. Googins  
City Attorney  
City of Chula Vista  
276 Fourth Ave  
Chula Vista, CA 91910

Re: Your Request for Advice  
**Our File No. A-20-065**

Dear Mr. Googins:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.<sup>1</sup> Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

### QUESTION

Under the Act and Section 1090, may Chula Vista City Councilmember Jill Galvez, and the City Council, consider a contract between the City and Bank of America regarding the purchase of firefighting vehicles, given that Councilmember Galvez's husband works for Merrill Lynch, which is part of a division of Bank of America, and owns Bank of America stock?

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<sup>1</sup> 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

Under the Act, Councilmember Galvez is prohibited from taking part in a contracting decision between the City and Bank of America, as she has an interest in Bank of America as a business entity and a source of income, and the decision would have a reasonably foreseeable, material financial effect on Bank of America based on its express involvement in the contract. Under Sections 1090 and 1091, Councilmember's financial interest in the contract is considered "remote" and she is similarly required to recuse herself from the decision, but the City may still contract with Bank of America.

## FACTS AS PRESENTED BY REQUESTER

The City of Chula Vista seeks to purchase an aerial ladder fire truck (costing \$1,505,921.62) and an engine/pump fire truck (costing \$767,883.61), which together cost \$2,273,805.23. To finance the purchase of the two fire trucks, Chula Vista seeks to enter into a lease agreement with Bank of America Corporation ("Bank of America") with a written rate and term lock for up to \$2,400,000 at 1.39% interest with a five-year term (the "Proposed Lease").

Pursuant to Chula Vista's purchasing procedures and municipal code requirements, City Council approval of the proposed lease will be required. The City of Chula Vista has a five-person City Council, consisting of the Mayor and four councilmembers. Councilmember Jill Galvez was elected to office in 2019. To approve the Proposed Lease, an affirmative vote of three of the five councilmembers is required. Councilmember Galvez did not play any role in identifying, negotiating, or recommending the Proposed Lease, and she would not play any role in its implementation or management.

Councilmember Galvez has informed the City that her husband works for Merrill Lynch & Co., Inc. ("Merrill Lynch"). In 2009, Bank of America acquired Merrill Lynch. In 2013, Bank of America completed the merger of its Merrill Lynch subsidiary into Bank of America. As a result of the merger, Bank of America assumed all of Merrill Lynch's obligations, and Merrill Lynch ceased filing separate reports with the U.S. Securities and Exchange Commission. Subsidiaries of Merrill Lynch continue to operate under the Merrill Lynch name and brand. Bank of America reports its operations results through four business segments: Consumer Banking, Global Wealth & Investment Management, Global Banking, and Global Markets, as well as a catchall category of "All Other." Merrill Lynch Global Wealth Management is part of the Global Wealth & Investment Management segment. Corporate Management of Bank of America consists of a Board of Directors and an Executive Team. Mr. Galvez is not on the Board of Directors or the Executive Team.

Bank of America employs approximately 200,000 employees, including Merrill Lynch employees. Mr. Galvez works as a Senior Vice President in the San Diego office of Merrill Lynch and is in charge of a team of subordinates that manage the investment accounts of various clients. He has been employed with Merrill Lynch for the last 10 years.

Mr. Galvez's salary consists of only commissions obtained from client investments. Mr. Galvez also has a 401(k)-retirement account, to which only he contributes. Mr. Galvez owns 2,000 shares of Bank of America stock. The stock (as of May 7, 2020) is valued at \$46,100 (\$23.05 per share). Mr. Galvez's Bank of America shares are common stock. Bank of America common stock

has a market cap of \$193,899,900,000, with 8,675,611,000 shares outstanding. Thus, Mr. Galvez's percentage of Bank of America stock is significantly less than three percent. The stock was originally Merrill Lynch stock but became Bank of America stock after Merrill Lynch merged into Bank of America.

Mr. Galvez has no involvement with Bank of America's leasing operations, played no role in the Proposed Lease, and would not have any role in the implementation or management of the Proposed Lease.

In a follow-up email, the City Attorney's Office provided clarifying information from Councilmember Galvez, stating that her husband is not a corporate officer with Bank of America and does not have a fiduciary relationship with the banking sector of Bank of America. Rather, Mr. Galvez acts as a financial consultant, overseeing an assistant and serving large net worth clientele as their financial advisor. Another email further clarified that the contract between the City and Bank of America would be a lease-to-purchase contract.

## ANALYSIS

### *The Act*

Under Section 87100 of the Act, "[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." "A public official has a financial interest in a decision within the meaning of Section 87100 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 certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- Any business entity in which the public official has a direct or indirect investment<sup>2</sup> worth two thousand dollars (\$2,000) or more.
- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

(Section 87103(a), (c).) Councilmember Galvez has economic interests in Bank of America as a business entity and source of income.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial 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

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<sup>2</sup> For purposes of the Act's conflict of interest provisions, an "indirect investment" includes any investment or interest owned by the spouse of the public official. (Section 87103.)

contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

The applicable standards for determining whether a reasonably foreseeable financial effect on a business entity interest, found in Regulation 18702.1, are the same standards applicable where a source of income interest is a business entity. (See (Regulation 18702.2(a)(4).) Under Regulation 18702.1(a)(1)(C), the reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a business entity is material if the entity is a named party in, or the subject of the decision, including any decision in which the entity enters into a contract with the agency. Here, the governmental decision at issue—approval of the Proposed Lease—involves the City entering into a contract with Bank of America, Councilmember Galvez’s business entity and source of income interest. Accordingly, the decision would have a reasonably foreseeable, material financial effect on Councilmember Galvez under Regulation 18702.1.

### *Section 1090*

Under Section 1090, city officers “shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member.” Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

Under Section 1091(a), however, “[a]n officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.” Section 1091(b)(2) defines “remote interest” to include “[t]hat of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.”

The facts presented here fall squarely into the remote interest exception in Section 1091(b)(2).<sup>3</sup> Bank of America, including Merrill Lynch, is a large national corporation with

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<sup>3</sup> We note that the facts, which relate to Councilmember Galvez’s husband, rather than herself, do not fall literally within the language of Section 1091(b)(2), which contemplates a relationship between *the official* and the

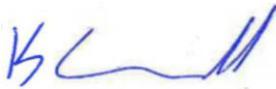
approximately 200,000 employees. Mr. Galvez has been an employee of Merrill Lynch for ten years. Bank of America acquired Merrill Lynch in 2009 and completed its merger of Merrill Lynch into Bank of America, as a parent company in 2013. Thus, Mr. Galvez has been a Bank of America employee for longer than three years prior to Councilmember Galvez's election to the Chula Vista City Council in 2019. Mr. Galvez owns less than 3 percent of Bank of America's stock and he is neither an officer nor a director of Bank of America for purposes of Section 1091(b)(2). Lastly, Mr. Galvez did not take part in formulating a bid for the contract on behalf of Bank of America. Therefore, Councilmember Galvez's interest in Bank of America, via her husband's employment with Merrill Lynch, is a remote interest under Section 1091(b)(2) with respect to the contract at issue here.

Based on the above analysis, Councilmember Galvez is disqualified from taking part in the City Council's consideration and potential approval of the City's lease with Bank of America. Under Section 1091(a), she is required to disclose her remote interest in the contract to the City Council, have the remote interest noted in the City Council's records, and abstain from taking part in the decision. Similarly, because she is also disqualified from taking part in the decision under the Act, she must follow the recusal requirements outlined in Regulation 18707(a), which includes the further requirement that Councilmember Galvez recuse herself and leave the room after identifying her economic interests. (Regulation 18707(a)(1)(C).)

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

Sincerely,

Dave Bainbridge  
General Counsel

  
By: Kevin Cornwall  
Counsel, Legal Division

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contracting party as the basis for the conflict of interest. However, a remote interest or noninterest exception that would apply to the officer if he or she directly held the financial interest at issue, also applies to an officer whose financial interest results from the officer's community property interest in his or her spouse's income. (See 81 Ops.Cal.Atty.Gen. 169 (1998); 78 Ops.Cal.Atty.Gen. 230 (1995).)