



## FAIR POLITICAL PRACTICES COMMISSION

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October 6, 2010

William B. Loscutoff  
144 Jalisco Place  
Davis, CA 95616

Re: Your Request for Informal Assistance  
**Our File No. I-10-148**

Dear Mr. Loscutoff:

This letter is in response to your request for assistance regarding the “revolving door” provisions of the Political Reform Act (the “Act”).<sup>1</sup> Because you are requesting general information on the operation of the law, and do not inquire about a specific transaction, we are providing you with informal assistance.<sup>2</sup> Please bear in mind that our advice is based solely on the provisions of the Act. We can offer no opinion on the application, if any, of such provisions as Government Code Section 1090, or other post-government employment laws such as Public Contract Code Section 10411. We urge you to consult with your former agency’s counsel or the Attorney General’s office on any possible application of these provisions, after your post-retirement employment plans take more concrete form.

### QUESTION

You ask first about any restrictions the Act would impose on you following your recent separation from government employment, if you were to be employed by a company regulated by your former agency, but in a position involving only clients outside the state of California. You also ask about employment by another company, where your role would be to facilitate development and certification by your former agency of that company’s new products.

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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 regulations may be found in Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed).

## CONCLUSION

The Act does not prevent you from accepting post-governmental employment in the private sector, nor from accepting reimbursement from a prospective employer for out-of-pocket expenses you describe in connection with your travel to Vapor Systems Technologies ("VST") offices in Ohio. You correctly understand that for twelve months following your retirement date you may not make any compensated appearance before your former agency for the purpose of influencing administrative or legislative action, or influencing actions or proceedings, as described below. Assuming that neither Veeder-Root ("VR") nor VST was involved in any judicial, quasi-judicial or other proceeding during your time at CARB, you would not be subject to the Act's permanent ban.

## FACTS

Until your retirement on November 3, 2009, you were employed by the California Air Resources Board ("CARB") as Chief of its Monitoring & Laboratory Division. Prior to your retirement you were responsible for the gasoline marketing vapor recovery program, which involved developing regulations and test procedures, certifying equipment for marketing in California, and general implementation of California's vapor recovery program. You are now exploring opportunities to consult with several companies that you used to regulate.

You have been asked to assist one company, VR, with marketing *outside* of California. For VR, you do not expect to have any contact, formal or informal, with CARB staff or its board. However, a second company, VST, has also expressed interest in retaining you as a consultant to facilitate development and CARB certification of future VST products. While not strictly necessary, your services would be more effective if you were able to interact with CARB staff, including former subordinates.

Prior to your retirement neither VR nor VST had any judicial, quasi-judicial or other proceeding pending with CARB. Both companies had been issued Executive Orders ("EOs") signed by you, certifying their equipment for marketing in California. You believe that these EO's have subsequently been superseded by EOs issued to VR and VST by your successor.<sup>3</sup>

You contacted CARB about possibly consulting for VST, and were advised by your successor, Dr. Ayala, of the likely application of the Act's "one year ban" under Section 87406(d)(1), described below, and you agree on its probable application in your case. You were also alerted to the possible application of the Act's "lifetime ban" and have requested an opinion from CARB's legal counsel on that topic. You have not yet received this opinion, and are following the advice of Dr. Ayala to seek advice from the Commission on this topic.

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<sup>3</sup> A safety problem with VST- certified nozzles was discovered six months after your retirement. As a result, the State Fire Marshall required modification of the nozzles to remove their "hold open latches" by October 15, 2010.

You have neither signed an agreement nor accepted compensation from either VR or VST. However, you flew to VST offices in Ohio in August to discuss consulting and have been offered reimbursement for documented travel expenses, approximately \$1,000 for airfare, car rental and three nights in a hotel. To date you have not accepted reimbursement.

### ANALYSIS

Public officials are subject to three types of post-governmental employment restrictions under the Act. A one-year "revolving door" restriction bars certain state employees from communicating, for compensation, with their former agencies for the purpose of influencing certain administrative or legislative action. (Section 87406, Regulation 18746.1.)

A permanent ("lifetime") ban prohibits a former state employee from "switching sides" to participate, for compensation, in a proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401-87402, Regulation 18741.1.)

Finally, there is a restriction on influencing prospective employment that prohibits a public employee from participating in, or using his or her official position to influence, a governmental decision directly relating to any person with whom he or she is negotiating, or has an arrangement concerning, prospective employment. (Section 87407, Regulation 18747.) Your account of the facts does not suggest that we need to offer advice you on this provision.

### The One-Year "Revolving Door" Restriction

#### A. General Application of the One-Year Ban.

Section 87406 prohibits specified public officials from acting as agents or attorneys or otherwise representing, *for compensation*, "any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof," for one year after the official left the agency's employment "*if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.*" (Emphasis added.)<sup>4</sup>

Regulation 18746.2(a) further provides:

"(a) For purposes of Government Code Section 87406, a formal or informal appearance or oral or written communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An

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<sup>4</sup> The prohibitions of Section 87406 do not apply to appearances for which you do not receive compensation.

appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.”

We assume from your employment history that you were required to file a Form 700 “Statement of Economic Interests” as a “designated employee” under CARB’s conflict of interest code, and you are therefore subject to the Act’s one-year ban.

Regulation 18746.1(b) outlines the circumstances when the prohibitions of the one-year ban will apply. Under this regulation, an official covered by the one-year ban is prohibited from making an appearance or communication if all of the following apply:

“(1) The official has left his or her state office or employment, which means he or she has either permanently left state service or is on a leave of absence.

“(2) The appearance or communication is made within 12 months after leaving state office or employment.

“(3) The public official is compensated, or promised compensation, for the appearance or communication. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section.

“(4) The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to represent his or her personal interests, as defined in 2 Cal. Code Regs., Section 18702.4, subdivision (b)(1), is not prohibited or limited by this section.

“(5) The appearance or communication is made for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, any legislative or administrative action, or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.

“(A) Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings . . .

“(6) The appearance or communication is made before any officer or employee of any of the following:

“(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment . . .

“(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency described in subdivision (b)(6)(A) . . .

“(C) Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the 12 months before leaving state office or employment.”

### B. Communications Covered by the One-Year Ban.

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) A communication is considered to be for the purpose of influencing legislative or administrative action "if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding."<sup>5</sup> (Regulation 18746.2(a).)

Certain communications are *not* restricted under the one-year ban. A communication is not subject to the one-year ban when the former official:

"(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;

"(2) Attends a general informational meeting, seminar, or similar event;

"(3) Requests information concerning any matter of public record; or

"(4) Communicates with the press." (Regulation 18746.2(b)(1)-(4).)

Thus, the one-year ban would not prevent you from requesting information generally available to the public about agency business from your former employer or other state agencies. Nor would it prohibit you from attending informational meetings regarding existing laws, regulations, or policies, as long as you do not attempt to influence legislative or administrative actions by your former agency. Social conversations with employees of your former agency that are not aimed at influencing its administrative or legislative actions are not prohibited by the ban. (*Tobias Advice Letter*, No. A-96-089.) (Section 87406(d)(1).)

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action or a specific proceeding (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if an ex-employee attends a public meeting with

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<sup>5</sup> "Legislative action" is defined at Section 82037 to mean "the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill." Section 82002(a) provides that "'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

many other persons, where there are many topics on the agenda, it may be reasonable to infer that the ex-employee's attendance is not for the purpose of influencing the agency's action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, or other specific action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property (section 87406(d)), it may more readily be inferred that the former employee's presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, No. A-99-300.)<sup>6</sup>

Similarly, as noted above, Regulation 18746.1(b)(5)(A) provides that performing services to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are not considered appearances or communications prohibited under Section 87406, so long as you do not influence other administrative or legislative action, or the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

Accordingly, for twelve months after the effective date of your retirement, you may not make a paid appearance before CARB for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. This does not prevent you from accepting post-governmental employment in the private sector, nor does it prohibit you from accepting reimbursement from a prospective employer for the out-of-pocket expenses you describe in connection with your travel to VST offices in Ohio.

### **The Permanent Ban on "Switching Sides"**

This *permanent* ban prohibits a former state employee from "switching sides" and participating, for compensation, in a specific proceeding involving the State of California, or assisting others in the proceeding, if the proceeding is one in which the former state employee participated while employed by the state. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban is a lifetime ban applicable to any judicial, quasi-judicial, or other proceeding in which you participated while employed as a state administrative official. "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . ." (Section 87400(c).) An official has "participated" in a proceeding if he or she took part in the proceeding "personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . ." (Section 87400(d).)

The permanent ban does not apply to a "new" proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated.

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<sup>6</sup> Further information is provided in the enclosed fact sheet prepared by the Commission to address common questions associated with post-employment restrictions.

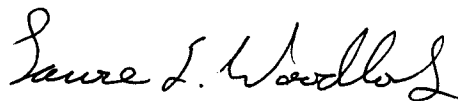
A "new" proceeding *not* subject to the permanent ban typically involves different parties, subject matter, or circumstances that differ from those involved in previous proceedings. (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts let by the employee's former agency, in which the former employee did not participate, are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A "new" contract is one based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and the award of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

Finally, please bear in mind that Section 87402 prohibits former officials from being paid to "aid, advise, counsel, consult or assist in representing" any other person in any proceeding in which the official would be prohibited from appearing under Section 87401. Thus the permanent ban extends not only to appearances before a former agency, but to "switching sides" generally. Thus it prohibits any form of paid "behind the scenes" consultation or assistance.

We have outlined the general provisions of the permanent ban simply for your review and consideration. You state that neither VR nor VST was involved in any judicial, quasi-judicial or other proceeding during your employment at CARB. Assuming that is the case, you will not be subject to any permanent ban under the Act. But absent any information on your participation in specific proceedings while in state service, and of the relation between any such proceedings and matters on which you may be employed by a private-sector client, a summary of the law is all we can offer you at present.<sup>7</sup>

Sincerely,

Scott Hallabrin  
General Counsel



By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

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Enclosures

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<sup>7</sup> We recognize that you have sought advice on this subject from CARB's legal counsel, which may provide important guidance on any specific "proceedings" that might give rise to a permanent ban.