



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

August 22, 2011

Patricia Rodriguez
Senior Staff Counsel
California Department of Public Health
Office of Legal Services
1501 Capitol Avenue, MS 0506
P.O. Box 997377
Sacramento, CA 95899-7377

Re: Your Request for Informal Assistance
Our File No. I-11-134

Dear Ms. Rodriguez:

This letter responds to your request for advice, on behalf of Amelia Schendel, regarding the conflict-of-interests 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, we are treating your request as one for informal assistance.²

Please note that the Commission is not permitted to offer advice on bodies of law outside the confines of the Act. We therefore offer no opinion on the application, if any, of other laws that may apply such as laws regarding incompatible activities and other conflict-of-interest laws.

QUESTION

Do the Act's conflict-of-interest provisions prohibit a local director of the Women, Infants and Children Supplemental Nutrition Program from operating a business that sells its products through other private business that are vendors under the program?

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

While the director's business activities may ultimately implicate the Act's conflict-of-interests provisions and disqualify the official from governmental decision-making, in itself, the Act does not prohibit the director from operating a business entity for personal gain, nor prohibit the director from entering into an agreement with other private businesses to sell her products merely because the businesses are vendors under the program.

FACTS

Ms. Schendel is a local agency director for the Women, Infants and Children Supplemental Nutrition Program (the WIC Program), which is administered by the California Department of Public Health (the "CDPH") and funded by the United States Department of Agriculture. Under the WIC Program, the CDPH contracts with local agencies (both counties and non-profits) to administer services and provide food instruments for at risk participants to purchase nutritious foods. Participants consist of income eligible women who are pregnant or post partum and their children up to the age of five. Food vendors who wish to exchange foods for food instruments apply for authorization under the WIC Program and must be approved to participate. Vendors redeem food instruments for cash at participating banks.

In addition to her position with the WIC Program, Director Schendel also operates a business selling breastfeeding supplements. While she does not advertise her position with the WIC Program in marketing her products, Ms. Schendel is currently selling products through private businesses, which are vendors under the program, and are considered "WIC only stores" because their sales under the program equal 50-percent or more of their total sales.

ANALYSIS

In this letter, we limit our advice to the requirements of the Act, and specifically, to the Act's conflict-of-interest provisions. We caution, however, that there are other bodies of law that may restrict the director's private business activities, including, but not limited to, laws regarding incompatible activities such as Government Code Section 19990, and other conflict-of-interest laws such as Government Code Section 1090 and common law conflict-of-interest laws.

In itself, the Act does not prohibit a local director of the WIC Program from operating a business entity for personal gain, nor does the Act prohibit the director from entering into an agreement with other private businesses to sell her products merely because the businesses are vendors under the WIC Program. Nonetheless, Director Schendel's business activities may ultimately implicate the Act's conflict-of-interests provisions and disqualify her from governmental decision-making.

Section 87100 prohibits any public official from making, participating in making, or otherwise 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 governmental 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 a given governmental decision. (Regulation 18700(b)(1)-(8).)³

Generally, 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 local director of the WIC Program, Director Schendel is a public official within the meaning of the Act. Accordingly, Director Schendel may have a disqualifying conflict of interest in any governmental decision, which has a reasonable foreseeable material financial effect on one or more of her economic interests.

Essential to determining whether Director Schendel may have a disqualifying conflict of interest is the identification of her economic interests that may be affected by a governmental decision. Economic interests from which conflicts of interests may arise are defined in Section 87103 and Regulations 18703-18703.5 and include:

- An economic interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b)).
- An economic interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in a source of gifts to the official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic 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; Regulation 18703.5.)

Director Schendel's business activities may implicate some or all of the economic interests identified above. The most obvious economic interests implicated are the following:

³ Enclosed is the Commission fact sheet entitled, "Can I Vote? Overview of Conflicts Laws," which details all eight steps for your future reference.

- *Economic interests in her business as both a business entity and a source of income:* As the owner of her business, and assuming that she has an investment in her business of \$2,000 or more and will receive income of \$500 or more from this business in the 12 months prior to a decision, Director Schendel has economic interests in her business as both a business entity and a source of income. (Section 87103(a), (c), and (d).)
- *Potential interests in private businesses that sell her products:* Depending on the terms of the agreements between the director and the businesses, Director Schendel may also have economic interests in those businesses that sell her products. For example, if a business purchases her products for resale, Director Schendel has an economic interest in the business as a source of income if she receives income of \$500 or more from the business in the 12 months prior to a decision. Additionally, to the extent that a business allows Director Schendel to sell her products through the business without actually purchasing the products, the director may have an economic interest in the business as a source of a gift if the business is providing services for less than fair market value.⁴

You have not, however, provided a specific factual situation in which a particular governmental decision is implicated. Therefore, we can only state that there would be a potential conflict of interest any time Director Schendel makes, participates in making, or influences a governmental decision if the decision will have a reasonably foreseeable material financial effect on her economic interests including her interests in her business and potential interests in those businesses that sell her products. If Director Schendel needs assistance regarding her involvement in any specific governmental decision, it is advisable that she seek additional advice identifying the decision and providing the relevant facts pertaining to the decision.

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

Enclosure

⁴ A "gift" is defined in Section 82028(a) as a "payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received" A "payment" is any "rendering of . . . services or anything else of value, whether tangible or intangible." (Section 82044.)