

Deferred compensation as income -- standards.

M-79-175

In resolving the questions asked by Judge Elmore, the Commission decided that:

- 1) Payments from the State Retirement System (PERS) are not income but are "salary" within the meaning of 82030 (b) (2);
- 2) Stocks and mutual funds held by the deferred compensation program for state employees are reportable investments if the thresholds are satisfied;
- 3) investments held by deferred compensation frequently need not be disclosed because they are not in the official's disclosure category;
- 4) there must be a foreseeable and material effect on the investment held by deferred compensation before the official will be disqualified;
- 5) in the case of a mutual fund, the mutual fund is the investment and is not pierced unless the official has a 10 percent interest in the fund.

This advice is consistent with the McKenzie letter but overrules the Simon letter.

TP:JO

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

June 27, 1977

James D. Simon
Staff Attorney
Department of Benefit Payments
744 P Street
Sacramento, California 95814

Dear Mr. Simon:

This is in response to your letter of 31 May requesting informal advice concerning whether under the Department's Conflict of Interest Code designated employees are required to report as an "investment" or a "source of income", contributions to the State of California Deferred Compensation Plan for employees.

Our advice is that they need not be reported. Having analyzed the descriptive materials of the plan, we cannot conclude that any of the various insurance plans are "investments". Article X of the plan clearly states:

"The State shall have the sole ownership of all investments made pursuant to this Plan and no participant shall have any interests therein or the right to acquire the same."

Furthermore, Government Code §82034 excludes "any insurance policy" and seems to require an ownership interest of some nature in order to constitute an "investment". Similarly, §82030 which defines "income" excludes from that definition both "salary from a state agency [§82030(b)(2)] and "any insurance policy" and interest or deposits in financial institutions and shares in a credit union [82030(b)(7)]. We think the deferred salary plan, taken as a whole, is "salary from a state agency" within the meaning of §82030(b)(2). We believe that the policy enunciated in its formal opinion No. 76-074, Richard J. Moore, supports this conclusion. We do not believe that reporting (and potential disqualification) by designated employees of their participation in this plan is

James D. Simon
June 27, 1977
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intended or necessary under the Political Reform Act.

Thank you for writing. I trust this answers your question.
If I can be of further assistance, please feel free to call on
me at 2-6444.

Sincerely,

Kenneth W. Goshorn

Kenneth W. Goshorn
Research Specialist III
Conflicts of Interest Division

KWG:mfa
Attachment

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State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

June 1, 1977

79175

Mr. Vincent V. MacKenzie
Chief Counsel
Energy Resources Conservation
and Development Commission
1111 Howe Avenue
Sacramento, CA 95825

Re: Opinion Request No. 77-012

Dear Mr. MacKenzie:

Thank you for your letter of April 25, 1977, requesting the Commission to issue an opinion concerning certain questions raised by your agency's conflict of interest code.

The Commission will not issue a formal opinion in this matter because the request presents no substantial questions of interpretation under the Political Reform Act. 2 Cal. Adm. Code §18320(b).^{1/} However, I trust the following informal advice will suffice to resolve the matter.

Government Code §82034 defines "investment." (I assume your code either similarly defines the term or incorporates the definitions contained in the Political Reform Act). That section provides, in relevant part:

"Investment" means any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights warrants, options, debt instruments and any partnership or other ownership interest....Investments of an individual

^{1/} It also should be noted that in requesting either a formal opinion or written advice from the Commission, the identity of the person asking, or on whose behalf the question is asked, should be identified. Since that was not done this advice will not provide any legal immunity as described in Government Code §83114. See 2 Cal. Adm. Code §18329.

Mr. Vincent V. MacKenzie
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includes a pro rata share of investments of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a ten percent interest or greater.

Thus, as indicated in your letter, an employee's holdings in investment funds referred to in your letter would be an "investment" and hence the subject of a potential "financial interest" as defined in Government Code §87103. However, the California utilities in which the mutual funds hold interests are not business entities in which the employees have an investment unless and until the employee's interest in the fund exceeds 10% of the total assets of the fund. Such does not appear to be the case in this situation.

Since the employees do not have an investment in the utilities themselves, the only remaining question is whether decisions materially affecting one or more of the utilities will "foreseeably have a material financial effect" on the mutual funds themselves. See §87103. This may, of course, depend on the size and diversification of the fund's investments. Although you have provided us with no specific information concerning this, we think it clear, in light of our knowledge of the two mutual funds in question, that this will not "foreseeably" occur as a result of decisions of your agency. Accordingly, barring some unusual evidence of unforeseeable impact of agency decisions, the employees in question are not barred by Government Code §87100, or similar provisions in your conflict of interest code, from making or participating in decisions concerning such California utilities by virtue of their possession of investments in the subject mutual funds.

I trust this answers your question. Thank you for writing. If we can be of any further assistance please call Kenneth Goshorn of the Conflict of Interest Division at 322-6444. If you wish to appeal the denial of your opinion request, you may do so pursuant to 2 Cal. Adm. Code §18321.

Sincerely,


Michael Bennett
Executive Director

MB:MB:jo

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

1111 HOWE AVENUE
SACRAMENTO, CALIFORNIA 95825

Date Received 4-29-77

Response Due 5-11-77

APR 23

79175

April 25, 1977

Daniel H. Lowenstein, Chairman
Fair Political Practices Commission
1100 K Street
Sacramento, California 95814

Dear Chairman Lowenstein:

The Energy Resources Conservation and Development Commission has directed me to request a formal opinion from the Fair Political Practices Commission on the question set forth below. This request is made pursuant to Government Code section 83114 and Title 2, section 18320 of the California Administrative Code.

As you know, the F.P.P.C. recently approved this Commission's Conflict of Interest Code. Nevertheless, certain issues remain unsettled, and it is the purpose of this request for an opinion to resolve one such major uncertainty. The factual circumstances described below potentially apply to the Commissioners and numerous employees of the Energy Commission.

Facts Presented:

A representative of the Energy Commission makes or participates in the making of governmental decisions (as those terms are utilized in Government Code § 87100) that bear on the actions and financial posture of California utilities, including powerplant siting determinations and utility conservation programs. This same individual maintains significant interests (over \$1,000) in both the T. Rowe Price New Income Fund, Inc. and the T. Rowe Price Growth Stock Fund, Inc., mutual funds that are available to state employees through the state employee deferred compensation program. Both mutual funds hold interests in the same California utilities that are subject to regulation under the Energy Commission's statutory mandate.

April 25, 1977

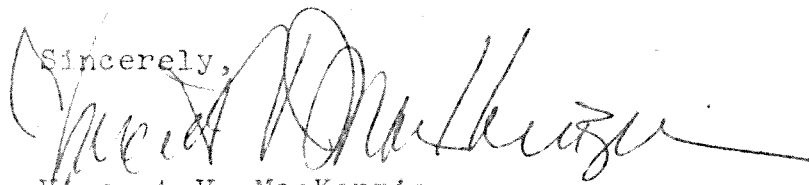
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Question Presented:

Does the Energy Commission representative's investment in either the T. Rowe Price New Income Fund, Inc. or the T. Rowe Price Growth Stock Fund, Inc., given the factual circumstances posited above, give rise to a conflict of interest under Government Code section 87100? Specifically, is it reasonably foreseeable that the individual's involvement in the decision-making process will have a material financial effect, distinguishable from its effect on the public generally, on those investments? Note: for purposes of this question, participation in either of the funds is considered to be an "investment" as that term is used in Government Code section 87103. This conclusion is based in part upon informal representations of E.P.P.C. staff.

Prompt resolution of this issue is requested. I recognize, however, the far-reaching significance of an interpretation. Should you or your staff have any questions regarding this matter, please contact Richard Frank of this Office at telephone number 322-4926.

Sincerely,



Vincent V. MacKenzie
Chief Counsel

VVM:RF:mg

cc: Commissioners, ERCDC
Executive Director, ERCDC