



# California Fair Political Practices Commission

May 6, 1992

Daniel R. Hume  
1722 Mitchell #181  
Tustin, CA 92680

Re: Your Request for Informal Assistance  
Our File No. I-92-167

Dear Mr. Hume:

This letter is in response to your request for advice regarding your duties and responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Your request is general in nature and seeks general guidance with respect to the provisions of the Act. Accordingly, we treat your letter as a request for informal assistance pursuant to the provisions of Regulation 18329.<sup>2</sup>

## QUESTION

Do the conflict-of-interest provisions of the Act prohibit or restrict your participation in business activities?

## CONCLUSION

The conflict-of-interest provisions of the Act do not restrict the private business activities of public officials, but may restrict your participation in governmental decisions. For example, as a public official, you are prohibited from using your official position to influence governmental decisions which will have a reasonably foreseeable material financial effect, distinguishable from the effect of the decisions on the public generally, on your economic interests.

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<sup>1</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

<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).)

### FACTS

You are a real property appraiser with the assessor's office in Orange County. In this capacity, you appraise real property within the county.

You seek our advice to determine whether the conflict-of-interest provisions of the Act would prohibit you from conducting certain business activities in your spare time. You wish to engage in the purchase and sale of trust deeds secured by property located outside of Orange County. You also wish to determine whether you may maintain your broker's license in an office located outside the jurisdiction of Orange County. Additionally, you wish to determine whether your partner, who is not employed by the county assessor's office, would be precluded from engaging in the purchase and sale of second deeds of trust on a part-time basis.

### ANALYSIS

The Act does not restrict the private business activities of public officials. However, Section 87100 prohibits public officials from making, participating in, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. You have advised me that you are a public official and have disclosure and disqualification obligations pursuant to the Orange County conflict of interest code and Section 82048. Accordingly, you may not participate in governmental decisions which will have a reasonably foreseeable material financial effect, distinguishable from the effect of the decisions on the public generally, on your economic interests as discussed below.

#### Financial Interests

An 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, or on a member of the official's immediate family,<sup>3</sup> or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

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<sup>3</sup> An official's "immediate family" are his or her spouse and dependent children. (Section 82029.)

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

#### Section 87103.

From the facts provided, your economic interests would include sources of income and interests in real property for which you hold the second deed of trust.

In addition, Regulation 18704.3 provides that the following are deemed to be sources of income to a public official who is a broker, within the meaning of subdivision (c) of Section 87103:

(A) The person the broker represents in the transaction;

(B) If the broker receives a commission from a transaction conducted by an agent working under the broker's auspices, the person represented by the agent;

(C) Any brokerage business entity through which the broker conducts business; and

(D) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.

Regulation 18704.3(c)(2).

Accordingly, you must consider the material effect of governmental decisions in which you are engaged on the following economic interests: (1) Any person<sup>4</sup> or business which you have represented in a real estate transaction in the 12 months preceding the governmental decision; (2) Any person who has been a source of commission income to an agent working for your business (In re Carey (1976) 3 FPPC Ops. 99); (3) The business in which you are a partner; and (4) Any person who has received a fee for referring a party to a transaction to you.

In addition, your economic interests may include: (1) An interest in your business partner (In re Nord (1983) 8 FPPC Ops. 6); and (2) Clients of your business who have been sources of income to you of \$250 or more in the 12 months preceding a governmental decision (Russell Advice Letter, No. A-88-484). Consequently, you must consider the foreseeable and material financial effect of your decisions as a public official on each of these economic interests to determine whether you must disqualify yourself from participating in such decisions.

Making, Participating in Making, or Attempting to Influence a Governmental Decision

A public official makes a governmental decision or participates in the making of a governmental decision whenever the public official votes on a matter, commits the agency to a course of action, or enters into any contractual agreement on behalf of the agency. (Regulation 18700(b).) Additionally, a public official participates in a governmental decision when, acting within the authority of his or her position, the public official:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

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<sup>4</sup> "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert. (Section 82047.)

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c).

With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, an official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer. (Regulation 18700.1.)

For example, as an appraiser, you determine the value of real property in Orange County. Making such a determination as an employee of the county constitutes the making of a governmental decision. Pursuant to the conflict-of-interest provisions of the Act, you may be required to disqualify yourself from appraising the real property of an individual who has been a source of \$250 or more in income to you in the preceding twelve months, as discussed below.

Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. To be foreseeable, the effect of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Community Development Comm. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817; In re Thorner (1975) 1 FPPC Ops. 198.) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interests in a decision are materially affected by a decision. If the official's economic interests are directly involved in the decision, Regulation 18702.1 provides the appropriate standard for assessing materiality. However, when the official's economic interests will

be affected indirectly by a decision, the appropriate standards for determining materiality are those of Regulations 18702.2 through 18702.6. When an official's interests in real property are indirectly involved in a governmental decision, the appropriate standard for determining materiality is that of Regulation 18702.3. These regulations are discussed below.

A. Economic Interests Directly Involved in the Decision

A person or business entity is directly involved in a decision before an official's agency when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

Regulation 18702.1(b).

Accordingly, as discussed above, the owner of a real estate parcel which you are appraising for the county would be directly involved in the appraisal decision. If the owner of the parcel has been a source of income of \$250 or more to you in the twelve months preceding the appraisal, you are required to disqualify yourself from performing the appraisal. (Regulation 18702.1.)

B. Economic Interests Indirectly Involved in the Decision

When your source of income is a business entity or an individual who is indirectly involved in the appraisal you are performing, the appropriate standards for determining materiality are those of Regulations 18702.2 and 18702.6. We are enclosing these regulations for your guidance.

In certain circumstances, you may be the recipient of "promised" income within the meaning of subdivision (c) of Section 87103. Commission income is deemed "promised" income to a real estate broker when a sale is pending (i.e., the sale is in escrow). (Larsen Advice Letter, No. A-82-192; Raiment Advice Letter, No. I-90-032.) You have not provided us with sufficient information to determine whether you will be the recipient of "promised" income. However, the same regulations discussed above would apply to such transactions.

Public Generally

Even if the reasonably foreseeable financial effect of a governmental decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87100.) If the decision does not affect all members of the public in the same manner, disqualification may be required unless the effect of the decision on the public official's economic interests is the same as the effect on a significant segment of the public. (Regulation 18703.) For purposes of our discussion, the public is the entire population of the city. (In re Legan (1985) 9 FPPC Ops. 1; In re Owen (1976) 2 FPPC Ops. 77; Jorgensen Advice Letter, No. A-90-017.)

The "public generally" exception would be inapplicable to you. This is so because when you perform an appraisal for the county, the appraisal will affect the owner of the property in a manner which is distinguishable from the effect of the appraisal on a substantial segment of the population of the county. Therefore, if the owner of the appraised property has been a source of income of \$250 or more to you in the preceding twelve months, you are required to disqualify yourself from performing the appraisal. However, absent a foreseeable material financial effect on an economic interest, you and your partner may participate freely in the proposed business activities.

We trust this letter adequately responds to your inquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.<sup>5</sup>

Sincerely,

Scott Hallabrin  
Acting General Counsel



By: Blanca M. Breeze  
Counsel, Legal Division

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Enclosures: Regulations 18702.2, 18702.6, 18702.3 and 18702.4  
A Guide to the Political Reform Act. California's

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<sup>5</sup> Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.