



# California Fair Political Practices Commission

March 17, 1993

Thomas F. Casey, III  
San Mateo County Counsel  
County Government Center  
Redwood City, CA 94063

Re: Your Request for Advice  
Our File No. A-93-082

Dear Mr. Casey:

This is in response to your letter requesting advice on behalf of Shirley Hoch, Trustee for the South San Francisco Unified School District, regarding her responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

Please note that other laws beyond the Political Reform Act may apply to your facts, such as Government Code Section 1090. The Commission has no jurisdiction over provisions of law outside the Act. You should contact the Attorney General's Office regarding Section 1090.

## QUESTION

If Ms. Hoch assists in a fundraising program to benefit the school district, will the activity create a conflict of interest with respect to her duties as South San Francisco Unified School District Trustee?

## CONCLUSION

Ms. Hoch may participate in the fundraising. However, she may not participate in any school board decision that will have a material financial effect on any of her sources of income.

<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.

### FACTS

Ms. Hoch is an elected member of the South San Francisco Unified School District Board of Trustees. In her private capacity, Ms. Hoch is a resource and development consultant for the North San Mateo County Boys and Girls Club (the "boys and girls club"). As the resource and development consultant, Ms. Hoch's duties include grant writing, program development, public relations and planning and assisting in fundraising events.

Ms. Hoch has been asked to assist in a fundraising program to benefit the school. However, Ms. Hoch has become concerned that by assisting in the fundraising, the activity may result in a conflict of interest in fulfilling her duties as a school board member.

You have described two different structures for the fundraising and have asked about the conflict of interest ramifications with respect to each.

#### Plan A

A nonprofit entity (the "nonprofit") would be formed to perform the fundraising and disburse any funds raised to the school district. The nonprofit will be controlled by a policy board. Ms. Hoch would be a salaried employee of the nonprofit, but will abstain from decisions regarding the donation of funds to the school district.

#### Plan B

The school district in conjunction with the North San Mateo County Boys and Girls Club Foundation (the "foundation") will conduct the fundraising. You stated that the foundation is a separate nonprofit entity from the boys and girls club, and that the foundation is run by a separate board of directors. The foundation has no employees.

Ms. Hoch would continue to be employed by the boys and girls club and would assist in the fundraising on a voluntary basis. Funds raised by the district and the nonprofit will be shared. Funds obtained by the foundation will not be used for salaries of employees of the boys and girls club. You stated that the funds will be held for capital expenditures.

### ANALYSIS

#### Conflicts of Interest

Section 87100 provides:

No 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.

Section 87103 specifies that an official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of the official's immediate family 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.

\* \* \*

(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.

#### Section 87103.

##### 1. Plan A

Since the nonprofit is not an organization or enterprise operated for profit, Ms. Hoch's involvement with the nonprofit does not create a potential for a conflict of interest under Section 87103(a) or (d).<sup>2</sup> (Libresco Advice Letter, No. I-88-239.) Moreover, where persons donate money to the nonprofit at Ms. Hoch's behest, the donations will generally not be treated as gifts to Ms. Hoch for purposes of the conflict of interest provisions of the Act. (Section 87103(e); Bremberg Advice Letter, No. A-89-445.)

<sup>2</sup> A business entity is defined in the Act as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association." (Section 82005.)

However, you stated that Ms. Hoch will be a salaried employee of the nonprofit created pursuant to Plan A. Moreover, she is currently a salaried consultant with the San Mateo County Boys and Girls Club.<sup>3</sup> Thus, both will be considered sources of income to her under the Act.

As stated above, Ms. Hoch may not participate in any decision which will have a foreseeable<sup>4</sup> direct or indirect material financial effect on those sources of income. A source of income is directly involved in the decision if it initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of, the proceeding. (Regulation 18702.1(b).) Where the source of income is directly involved, disqualification is required. (Regulation 18702.1(a)(1).)

If the source of income is not directly involved, or the effect of the decision under the direct involvement analysis is not considered material, Ms. Hoch must still disqualify herself if the indirect effect of the decision on the source of income is material.

Since the sources of income under your facts are nonprofit entities, Regulation 18702.5 applies. Regulation 18702.5 provides differing thresholds of materiality in relation to the gross annual receipts of the nonprofit. For example:

(f) For an entity whose gross annual receipts are \$100,000 or less, the effect of the decision will be any of the following:

(1) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$10,000 or more.

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more.

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<sup>3</sup> Please note that the boys and girls club will continue to be considered a source of income to Ms. Hoch for 12 months after she receives the last payment of \$250 or more. (Section 87103(c).)

<sup>4</sup> Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$10,000 or more.

Pursuant to Plan A, you stated that Ms. Hoch would disqualify herself where the nonprofit was directly involved. So long as Ms. Hoch also disqualifies herself where her sources of income will be materially affected indirectly, her involvement with the nonprofit will not result in any further obligations under the conflict of interest provisions of the Act.

## 2. Plan B

Under Plan B, you do not reference any governmental decisions. The conflict of interest provisions of the Act apply only to Ms. Hoch's governmental decisions. Under Plan B, the boys and girls club would be considered a source of income, and the same disqualification rules discussed above would apply.

## Campaign Issues

The Act also requires the disclosure of campaign activities of candidates including expenditures made and contributions received. (Sections 84100 et seq.) Generally, a payment received by a candidate is a contribution unless it is clear from surrounding circumstances that it was received for personal purposes unrelated to his or her candidacy or status as an officeholder. (Regulation 18215.) Thus, payments to any organization controlled by a candidate could be considered contributions and the organization considered a controlled committee of the candidate.

Section 82016 defines "controlled committee" as follows:

"Controlled committee" means a committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.

Thus, Section 82016 describes two ways in which the foundation may become Ms. Hoch's controlled committee. First, Ms. Hoch might exert significant influence on the actions or decisions of the foundation. For example, where candidates are voting members of a committee's leadership, we have said they are presumed to be controlling candidates since they exercise significant influence on the actions or decisions of the foundation. (Ferguson Advice Letter, No. A-86-044.)

Second, Ms. Hoch may act in concert with the foundation in making campaign expenditures. By coordinating the expenditures, Ms. Hoch could, in effect, bolster her campaign for office through the foundation. Under such circumstances, the foundation would also be her controlled committee.<sup>5</sup> (Section 82025 and Regulation 18225, define "expenditure.")

Regulation 18217 (copy enclosed) provides an alternate definition of "controlled committee" applicable to organizations which are characterized as exempt organizations under Section 501 of the Internal Revenue Code, provided they are not formed or existing primarily for political purposes. (Regulation 18217(f).) Regulation 18217 provides:

(a) A nonprofit organization, as defined in subdivision (f), shall be considered a controlled committee, if both of the following apply:

(1) A candidate, his or her agent, or any committee he or she controls, exercises significant influence over the actions any decisions of the organization, or acts jointly with the organization in connection with the making of expenditures.

(2) The organization qualifies as a committee under Government Code Section 82013(a), and the organization is operated for political purposes. For purposes of this regulation, an organization is "operated for political purposes" if either of the following applies:

(A) The organization receives or expends funds for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or the qualification or passage of any measure.

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<sup>5</sup> Please note that Section 85201, added by Proposition 73, provides that all contributions or loans made to a candidate, or to the candidate's controlled committee shall be deposited in a single campaign bank account. The Commission has interpreted this to mean that a candidate for elective office may have only one campaign bank account and one controlled committee for each campaign. (Regulation 18521; Riddle Advice Letter, No. A-88-409.) The Commission has created a narrow exception with respect to candidate controlled ballot measure committees which is not an issue in this letter. (Olson Advice Letter, No. A-89-363.)

(B) The organization makes contributions to candidates or their controlled committees.

The purpose of subdivision (a)(2) of Regulation 18217 is to avoid classifying a nonpolitical nonprofit organization as a controlled committee merely because donations are received at the behest of candidates.

Regulation 18217 also provides that a candidate may be involved with a nonprofit without the entity becoming an additional controlled committee of the candidate if certain criteria are met.

(b) For purposes of subdivision (a)(1), a nonprofit organization which is tax-exempt under Section 501 or the Internal Revenue Code, and which is not an organization described in Section 527 of the Internal Revenue Code, is presumed not to be significantly influenced by a candidate, his or her agent, or any committee he or she controls, if the organization complies with all of the factors set forth below:

(1) The candidate is not substantially involved in the day-to-day operations of the organization, and the organization is controlled by a board of directors with 3 or more members, two-thirds of whom are not:

(A) Candidates;

(B) Agents, campaign staff, employees, or persons otherwise under the control of a candidate; or

(C) Brothers, sisters, parents, children, spouses, brothers-in-law, sisters-in-law, sons-in-law, daughters-in-law, mothers-in-law or fathers-in-law of a board member who is a candidate.

(2) The name of the organization does not include the name of the candidate. For purposes of this subdivision (b)(2) the term "name of the candidate" means the candidate's first and last name or some other unambiguous reference to the candidate.

(c) For purposes of subdivision (a)(2), a nonprofit organization which is tax-exempt under Section 501 of the Internal Revenue Code, and which is not an organization described in Section 527 of the Internal Revenue Code, is presumed not to be

operated for political purposes if the organization complies with all of the factors set forth below:

(1) The organization does not make contributions to candidates.

(2) The name of the organization does not include the name of the candidate. For purposes of this subdivision (c)(2) the term "name of the candidate" means the candidate's first and last name or some other unambiguous reference to the candidate.

(3) The organization does not spend funds in excess of the amount permitted under Section 501(h) of the Internal Revenue Code to influence or attempt to influence legislative action.

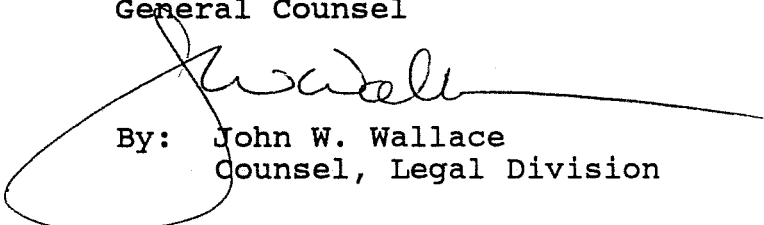
(4) The organization does not spend funds to influence or attempt to influence the qualification or passage of any measure in an amount sufficient to qualify the organization as a committee under Section 82013 of the Government Code.

(5) This subdivision (c) shall not be construed to prevent the organization from forming a separate and independent political committee which is not controlled by any person described in subdivision (b)(1)(A)-(C).

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.<sup>6</sup>

Sincerely,

Jeff Marschner  
General Counsel



By: John W. Wallace  
Counsel, Legal Division

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<sup>6</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.