

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

August 6, 1997

Stanley Riddle
Davis Wright Tremaine LLP
One Embarcadero Center, Suite 600
San Francisco, California 94111-3834

Re: Your Request for Advice
Our File No. A-97-294

Dear Mr. Riddle:

This letter is a response to your request on behalf of the directors of the Oak Valley Hospital District (the "district") for advice about the Political Reform Act (the "Act").¹ You have been individually authorized by each of the directors to request advice on his or her behalf.

I. QUESTIONS

A. Do any of the directors have a disqualifying conflict of interest with regard to the final affiliation decisions?

B. If three or more of the directors have disqualifying conflicts of interest regarding the final affiliation decisions, would the "rule of necessity," as codified at Government Code Section 87101, apply?

II. CONCLUSIONS

A.1. Ms. Podolsky has at least one disqualifying conflict of interest in the final affiliation decisions. She has at least one other conflict of interest which may be disqualifying, depending upon the application of the "public generally" exception. We are unable to make this assessment about the application of the public generally exception from a distance. We have provided the relevant legal analysis, and identified the critical question of fact which must be answered to resolve this issue. However, we must leave it to you and Ms. Podolsky to make the final determination.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

A.2. Dr. Cadmus may have a conflict of interest, depending upon whether there will be a material personal financial effect upon him or his immediate family. We are unable to make this assessment from a distance. We have provided the relevant legal analysis, and identified the critical question of fact which must be answered to resolve this issue. However, we must leave it to you and Dr. Cadmus to make the final determination.

A.3. Dr. Chock has at least one disqualifying conflict of interest in the final affiliation decisions. He has at least one other conflict of interest which may be disqualifying, depending upon the application of the "public generally" exception. We are unable to make this assessment about the application of the public generally exception from a distance. We have provided the relevant legal analysis, and identified the critical question of fact which must be answered to resolve this issue. However, we must leave it to you and Dr. Chock to make the final determination.

A.4. Mr. Dayton has at least one disqualifying conflict of interest in the final affiliation decisions.

A.5. Mr. Jeter may have a conflict of interest, depending upon whether there will be a material personal financial effect upon him or his immediate family. We are unable to make this assessment from a distance. We have provided the relevant legal analysis, and identified the critical question of fact which must be answered to resolve this issue. However, we must leave it to you and Mr. Jeter to make the final determination.

B. Given that a sufficient number of directors have disqualifying conflicts of interest to prevent a quorum from being formed, the "legally required participation" exception applies *if* there is no alternative source of decisionmaking authority to which the final affiliation decisions may be referred.

III. FACTS

The district owns and operates Oak Valley Hospital (the "hospital"). You are special legal counsel to the district in connection with a proposed affiliation (the "affiliation") of the district with another health care entity.

The district is a local health care district, organized under Division 23 (commencing with Section 32000) of the California Health and Safety Code. The district has a five-member board of directors (the "board"). Under the district's bylaws, at least three directors must be present to constitute a quorum. To take action on behalf of the district, there must be a majority vote of directors present at a meeting at which a quorum exists.

At the beginning of 1997, the board resolved to assess the desirability of establishing a closer working relationship with a multi-hospital system, and engaged the firm of Deloitte & Touche to assist in the process. The district has had an Association Agreement with Sutter Health ("Sutter") to provide selected management services since 1995.

On March 18, 1997, Deloitte & Touche recommended to the board that affiliation options should be seriously pursued. The affiliation will be structured as a joint operating arrangement, wherein (i) a governing body composed of representatives of the district and the affiliate would oversee hospital operations, (ii) profits and losses from hospital operations would in part benefit and burden the affiliate, (iii) hospital facilities and services would be expanded, (iv) certain administrative functions would be consolidated at the hospital and hospitals operated by the affiliate and (v) the district would retain significant governance rights with respect to the management and operations of the hospital.

Deloitte & Touche solicited proposals from Sutter, Tenet Healthcare ("Tenet"), Catholic Healthcare West ("CHW"), Columbia/HCA, and Adventist Health System/West. On April 2, 1997, the board resolved to consider proposals from Sutter and a joint venture of CHW and Tenet ("CHW/Tenet"). Sutter and CHW are nonprofit corporations. Tenet is a for-profit corporation.

On April 24, 1997, a negotiating committee was appointed. The negotiating committee consists of Dr. Cadmus, a member of the board, and Sandy McKeon, a former member of the board. The negotiating committee is assisted by Deloitte & Touche and district legal counsel. Between April 24, 1997 and June 6, 1997, the negotiating committee met separately with Sutter and CHW/Tenet.

On May 8, 1997, representatives of Sutter and CHW/Tenet made presentations to the board. At this presentation, public comment was received and the board's questions were answered by the presenters.

On May 23, 1997, you made the advice request to which this letter responds.

On June 9, 1997, both Sutter and CHW/Tenet proposed letters of intent to the board regarding the affiliation. On June 16, 1997, the board conducted a study session during which its professional advisers described the proposals, answered the board's questions, and responded to public comment. On June 19, 1997, representatives from Sutter and CHW/Tenet presented proposals to the board, responded to the board's questions, and responded to public comment.

The next step in the affiliation process is final deliberation by the board, culminating in a vote to select either Sutter or CHW/Tenet to enter into negotiations leading a definitive agreement. (Hereafter, these final deliberations and the selection are referred to as the "final affiliation decisions.") This final step is delayed pending this response.

You have told us that, in connection with the affiliation, current employment and independent contractual relationships and leases "are anticipated to be unaffected" and to remain in place with the district.

A. Nancy Podolsky, Chair of the board

Ms. Podolsky is married to Lawrence Podolsky, M.D., who is a member of the hospital's medical staff. Dr. Podolsky operates his practice by means of a professional corporation (the "Podolsky PC"). Dr. Podolsky is the sole shareholder of the Podolsky PC.

Dr. Podolsky has entered into third party payor contracts with various health plans and independent practice associations ("IPA"). He is compensated by the third party payor for medical services he provides to members or enrollees of the plan or IPA. The following "bulleted" paragraphs summarize these third party payor agreements.

- Dr. Podolsky received \$189,000 within the last 12 months pursuant to third party payor agreements with Gould Medical Foundation, Inc., a nonprofit corporation of which Sutter is the sole corporate member, and Omni Health Plan, a nonprofit corporation, which is a subsidiary of Sutter.
- Dr. Podolsky received \$126,000 within the last 12 months pursuant to third party payor agreements with Valley IPA, a for-profit professional corporation which is a former affiliate of Tenet, and National Health Plan, a for-profit corporation which is a wholly-owned subsidiary of Tenet.

Dr. Podolsky owns one of one hundred limited partnership units in McHenry Surgicenter, an outpatient surgery center located in Modesto. Dr. Podolsky owns less than 10 percent of the total ownership interest in the McHenry Surgicenter. National Medical Ventures, Inc., a for-profit enterprise which is a wholly-owned subsidiary of Tenet, is the general partner, and owns 49.5 percent of the total partnership units. The McHenry Surgicenter is not connected with the hospital or the district, and does not compete with the hospital. It contracts with third party payors that are owned or controlled by Sutter, CHW, and Tenet.

Dr. Podolsky leases office space from the district on a month-to-month basis.

The Podolsky PC leases the services of a midwife from the district. The Podolsky PC bills and collects for the midwife's services, deducts a billing fee and a fee for services provided by Dr. Podolsky, then pays the district the remainder as compensation for the leased services. The Podolsky PC receives gross annual income of between \$1,000 and \$10,000 from services of the midwife.

Dr. Podolsky is a party to a waste disposal agreement with the district, pursuant to which the district disposes of not more than 60 pounds of medical waste per month produced by Dr. Podolsky's medical practice in consideration for Dr. Podolsky's continued status as an active member of the hospital's medical staff. The waste disposal services are a standard benefit offered to members of the hospital's medical staff.

As an independent contractor, Ms. Podolsky provides bookkeeping service for the Podolsky PC. She receives gross annual income of between \$1,000 and \$10,000 from the Podolsky PC as compensation for these services.

B. Calvin Cadmus, D.V.M.

Dr. Cadmus is a veterinarian who neither directly nor indirectly has any financial relationship with the district.

C. Edward Chock, M.D.

Dr. Chock is a member of the medical staff of the hospital. Dr. Chock independently contracts with the hospital to provide physician services in the hospital's emergency department. Dr. Chock receives gross annual income of more than \$10,000 in connection with this agreement.

Dr. Chock is a party to a waste disposal agreement with the district, pursuant to which the district disposes of not more than 60 pounds of medical waste per month produced by Dr. Chock's medical practice in consideration for Dr. Chock's continued status as an active member of the hospital's medical staff. The waste disposal services are a standard benefit offered to members of the hospital's medical staff.

Dr. Chock has a greater than 10 percent ownership interest in Oak Valley Medical Dental Center, a California General Partnership (the "partnership"), which leases office space to the district.

Dr. Chock has entered into third party payor contracts with various health plans and IPAs. He is compensated by the third party payor for medical services he provides to members or enrollees of the plan or IPA. The following "bulleted" paragraphs summarize these third party payor agreements.

- Dr. Chock received \$104,000 in the past twelve months pursuant to third party payor agreements with Gould Medical Foundation, Inc., a nonprofit corporation of which Sutter is the sole corporate member, and Omni Health Plan, a nonprofit, which is a subsidiary of Sutter.
- Dr. Chock received \$20,000 in the past twelve months pursuant to third party payor agreements with Valley IPA, a for-profit professional corporation which is a former affiliate of Tenet, and National Health Plan, a for-profit corporation which is a wholly-owned subsidiary of Tenet.
- Dr. Chock received \$15,000 in the past twelve months pursuant to third party payor agreements with Community Health Network Medical Group, Inc., a for-profit professional corporation.

Dr. Chock has an investment worth more than \$1,000 in the Stanislaus Surgery Center, a limited partnership. This ownership interest is less than 10 percent of the total ownership interest in the Stanislaus Surgery Center. This outpatient surgery center, located in Modesto, is not connected with the district or the hospital, and does not compete with the hospital. It contracts with third party payors that are owned or controlled by Sutter, CHW, and Tenet.

D. John Dayton

Mr. Dayton is a practicing pharmacist who neither directly nor indirectly has any financial relationship with the district.

Mr. Dayton has entered into third party payor contracts with various health plans and prescription drug plans. He is compensated for dispensing prescription drugs to members of those plans. The following "bulleted" paragraphs summarize these third party payor agreements.

- Mr. Dayton received \$100,000 in the past twelve months pursuant to third party payor agreements with Omni Health Plan, a nonprofit corporation, which is a subsidiary of Sutter.
- Mr. Dayton received \$100,000 in the past twelve months pursuant to third party payor agreements with National Health Plan, a for-profit corporation which is a wholly-owned subsidiary of Tenet.

E. James Jeter

Mr. Jeter's wife has been continuously employed as a nurse by the district since March 1992. She receives gross annual income of more than \$10,000 from this employment. Otherwise, he has neither directly nor indirectly any financial relationship with the district.

IV. ANALYSIS

Before turning to the analysis of this matter, please note that the Commission does not advise about *past conduct*. (Regulation 18329(b)(8).) Nothing in this advice letter should be construed to advise about the past conduct of any person. Based upon the facts presented in your advice request, it appears that the directors may have made, participated in making, or used their respective official positions to influence governmental decisions about the affiliation. **To whatever extent any director has *already* made, participated in making, or used or attempted to use his or her official position to influence governmental decisions about the affiliation, this advice does *not* apply to, nor does it confer immunity with regard to, those actions.**

The advice in this letter applies *only* to the final affiliation decisions; i.e., the board's final deliberations and vote to select either Sutter or CHW/Tenet to enter into final negotiations leading to a definitive affiliation agreement.

A. Introduction.

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, 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.

B. Public officials.

The Act's conflict-of-interest provisions apply only to "public officials." "Public official," for purposes of the Act, is defined to include every member, officer, employee, or consultant of a state or local agency (with certain exceptions not relevant here). (Section 82048.) In the *Moss* Advice Letter, No. A-94-100, we advised that the members of the board of directors of a local healthcare district formed pursuant to Health & Safety Code sections 32000 *et seq.*, are public officials, for purposes of the Act. As the district was formed, too, under that law, the directors are public officials for purposes of the Act.

As public officials, the directors will have a disqualifying conflict of interest with regard to governmental decisions about the final affiliation decisions if the decisions will have a reasonably foreseeable and material financial effect on their financial interests which is distinguishable from the effect on the public generally.

C. Governmental decisions.

The Act's conflict-of-interest provisions apply only when the relevant public officials make, participate in making, or use or attempt to use their official positions to influence a governmental decision. Here, the directors will deliberate and vote on the final affiliation decisions. Therefore, they will, unless disqualified, be making governmental decisions by voting on these matters (see Regulation 18700(b), and they will be participating in making and influencing decisions by taking part in deliberations and negotiations (see Regulation 18700(c) and 18700.1(a)).

D. Financial interests.

The Act's conflict-of-interest provisions apply only to *financial* conflicts. "Financial interest" is defined, for purposes of the Act, in Section 87103. Section 87103 covers six kinds of financial interests:



- a business entity in which the public official has an investment of \$1,000 or more;
- real property in which the public official has an interest of \$1,000 or more;
- any source of income which aggregates to \$250 or more within 12 months prior to the decision;
- a business entity in which the public official is an officer, director, manager, etc.;
- the donor of gifts to the public official if the gifts aggregate to \$290 or more within 12 months prior to the decision;
- Finally, the public official has a financial interest if the governmental decision will have a "personal effect" on him/her or his/her immediate family, whether positive or negative, of at least \$250 in any 12-month period. (Section 87103; Regulation 18702.1(a)(4).)

The Act's conflict-of-interest provisions apply only if the relevant public official has at least one financial interest at stake in a governmental decision in which the public official may take part. Since your advice request is on behalf of five individuals, whether each individual has a cognizable financial interest at stake in the final affiliation decisions² is analyzed separately for each individual.

Before turning to the individualized analyses for the respective directors, note that *each* director must consider whether he or she has a financial interest in the final affiliation decisions due to the financial effect the decisions may have on the director personally or on his or her immediate family.³ (Section 87103.) (This is known as the "personal effects" rule.) Each director may have a financial interest in the final affiliation decisions if the reasonably foreseeable impact of the decisions results in the personal expenses, income, assets, or liabilities of the director or his or her immediate family increasing or decreasing by at least \$250 in any 12-month period. (Regulation 18702.1(a)(4).) Note that this does not apply to a financial effect on the value of real property owned directly or indirectly, or a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the director or his or her immediate family has an investment interest. (*Ibid.*) The direct and indirect effects on those interests are analyzed independently of Regulation 18702.1(a)(4).

1. Ms. Podolsky.

Ms. Podolsky has seven financial interests potentially at stake in the final affiliation decisions, in addition to the possibility of material personal financial effect. If it is reasonably foreseeable that any interest is materially affected, Ms. Podolsky is disqualified.

² Presumably, the final decisions are separable from any prior decisions. If interlinked, any prior participation by officials who have a disqualifying financial interest will result in a violation of the Act.

³ For purposes of the Act, "immediate family" means the spouse and dependent children. (Section 82029.)

(a) The district is a source of income to Ms. Podolsky. Her husband, Dr. Podolsky, receives income from the district in the form of the medical waste disposal services provided *in consideration* of his active medical staff membership. For purposes of the Act, “income” is defined in terms of “payments.” (Section 82030.) “Payment” is defined to include “services, or anything else of value.” (Section 82044.) Thus, the medical waste disposal services provided by the district constitute income to Dr. Podolsky, for purposes of the Act. Because Ms. Podolsky’s income includes her community property interest in her spouse’s income (Section 82030(a)), it is also income to her. If the value of the medical waste disposal services provided to Dr. Podolsky is such that Ms. Podolsky’s community property share of it exceeds \$250 in the previous twelve months, then the district is a source of income to Ms. Podolsky.⁴ Ms. Podolsky’s source of income, the district, is directly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(b) Ms. Podolsky has a financial interest in the form of her indirect interest in the Podolsky PC. The Podolsky PC is a business entity, for purposes of the Act. (Section 82005.) Such a business entity is a cognizable financial interest under the Act. (Section 87103(a).) Ms. Podolsky is considered to have an indirect interest in any business entity in which her spouse has an investment of more than \$1,000. (Section 87103, final paragraph.) Presumably, Dr. Podolsky’s relationship with the Podolsky PC satisfies this criteria. Therefore, Ms. Podolsky has an indirect financial interest in the Podolsky PC. This financial interest is indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(c) Ms. Podolsky has a direct interest in the business entity through which she provides bookkeeping services to the Podolsky PC. Sole proprietorships are included within the Act’s definition of business entity. (Section 82005.) This financial interest is indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(d) The Podolsky PC is a source of income to Ms. Podolsky, because her sole proprietorship (through which she provides the bookkeeping services) has received more than \$250 in the past twelve months from the PC. (Section 87103(c).) Since Ms. Podolsky owns more than 10 percent of the equity in the sole proprietorship, the income from the Podolsky PC “passes through” the business entity, and is attributed to her. (Section 87103, final paragraph.) The Podolsky PC, as Ms. Podolsky’s source of income, is indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(e) The third party payors with whom Dr. Podolsky contracts are sources of income to Ms. Podolsky. These payors, Gould, Omni, Valley IPA, and National Health Plan, are sources of income to Dr. Podolsky. (Section 87103(c).) Because Ms. Podolsky’s income includes her community property interest in her spouse’s income (Section 82030(a)), it is also income to her.

⁴ The Act’s definition of income excludes “salary and reimbursement for expenses” received from, among others, a local government agency. (Section 82030(b)(2).) As presented in your advice request, the medical waste disposal services do not appear to fit either description.

These third party payors are indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(f) National Health Plan, in which Ms. Podolsky has a financial interest (see Part IV.D.1.(e), above) is a wholly-owned subsidiary of Tenet. Therefore, Tenet, as an “otherwise related business entity,” is also a financial interest of Ms. Podolsky, and is also considered to be a source of income to her. (Regulation 18706, Regulation 18236(a).⁵) Tenet is directly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(g) Ms. Podolsky has an indirect financial interest in the McHenry Surgicenter. Ms. Podolsky is considered to have an indirect interest in any business entity in which her spouse has an investment of more than \$1,000. (Section 87103, final paragraph.) Presumably, Dr. Podolsky’s investment in the McHenry Surgicenter satisfies this criteria. Therefore, Ms. Podolsky has an indirect financial interest in the McHenry Surgicenter. This financial interest is indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)⁶

2. Dr. Cadmus.

You state in your advice request that Dr. Cadmus has no financial relationship with the district, nor with any of the candidates for the affiliation agreement. Therefore, other than the possible application of the “personal effects” rule, Dr. Cadmus does not appear to have a financial interest at stake in the affiliation decisions.

3. Dr. Chock.

Dr. Chock has six financial interests potentially at stake in the final affiliation decisions, in addition to the possibility of a material personal financial effect.

⁵ Neither Sutter nor CHW qualify as financial interests of Ms. Podolsky in this manner because the “otherwise related business entity” rule does not apply to *non-profit* organizations, only to for-profit entities. (*Sauer* Advice Letter, *supra*)

⁶ Although the McHenry Surgicenter contracts with third party payors, which payors are sources of income to it, these payors are *not* sources of income to Ms. Podolsky because Dr. Podolsky owns less than 10 percent of the McHenry Surgicenter. A business entity’s income does not “pass through” to an owner for purposes of identifying sources of income within the meaning of the Act unless he or she owns more than 10 percent of the business entity. (Section 87103, final paragraph.) Thus, the third party payors are not deemed to be sources of income to Ms. Podolsky in this situation, and the fact that some of the third party payors are connected to Sutter, CHW, and/or Tenet is not relevant in the context of the McHenry Surgicenter.

Also, National Medical Ventures, Inc. does not appear to be a financial interest of Ms. Podolsky under the “otherwise related business entity” rule. (See Regulations 18706, 18236.) None of the facts presented to us suggest that any of the criteria stated in Regulation 18236 for identifying such otherwise related business entities are satisfied here. However, we urge you to study Regulation 18236 carefully, and determine, based upon your superior access to the facts, whether this conclusion is in fact valid.

(a) The district is a source of income to Dr. Chock in three respects. (Section 87103(c).) First, he independently contracts with the district to provide emergency physician services in the hospital's emergency department, and has received payments of more than \$250 in the preceding 12 months from the hospital. (The "government salary" exclusion to the definition of income in Section 82030(b)(2) does not generally apply to payments received as an independent contractor.) Second, the hospital district is also a source of income by virtue of the medical waste disposal services provided to Dr. Chock in consideration of his active staff membership. Finally, the district is a source of income to Dr. Chock because the partnership, of which he owns more than 10 percent, receives income from the district in the form of the lease payments for the office space the district rents from the partnership. Since he owns more than 10 percent of the partnership, a *pro rata* share of the income from the district (i.e., the rent payments) "passes through" the partnership to him. (Section 87103, final paragraph.) Dr. Chock's source of income, the district, is directly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(b) Dr. Chock has a cognizable financial interest in his ownership interest in the partnership that leases office space to the district. (Section 87103(a).) This financial interest is indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(c) Dr. Chock has an indirect financial interest in the office space lease *itself* because he owns more than 10 percent of the partnership. (Section 87103, final paragraph.) This financial interest is indirectly involved in the final affiliation decisions.

(d) The third party payors with whom Dr. Chock contracts are sources of income to him. (Section 87013(c).) These payors are Gould, Omni, Valley IPA, National Health Plan, and Community Health Network Medical Group, Inc. These third party payors are indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(e) National Health Plan, in which Dr. Chock has a financial interest (see Part IV.D.3.(d), above) is a wholly-owned subsidiary of Tenet. Therefore, Tenet, as an "otherwise related business entity," is also a financial interest of Dr. Chock, and is also considered to be a source of income to him. (Regulation 18706, Regulation 18236(a).⁷) Tenet is directly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(f) Dr. Chock has a direct financial interest in the Stanislaus Surgery Center. (Section 87103(a).) This business entity is indirectly involved in the affiliation decision.⁸

⁷ Neither Sutter nor CHW qualify as financial interests of Dr. Chock in this manner because the "otherwise related business entity" rule does not apply to *non-profit* organizations, only to for-profit entities. (*Sauer Advice Letter, supra.*)

⁸ Although the Stanislaus Surgery Center contracts with third party payors, which payors are sources of income to the Surgery Center, these payors are *not* sources of income to Dr. Chock because he owns less than 10 percent of the Surgery Center. A business entity's income does not "pass through" to an owner for purposes of

4. Mr. Dayton.

Mr. Dayton has two financial interests potentially at stake in the final affiliation decisions, in addition to the possibility of a material personal financial effect.

(a) The third party payors with whom Mr. Dayton contracts are sources of income to him. (Section 87013(c).) These payors are Omni and National Health Plan. These third party payors are indirectly involved in the final affiliation decisions. (Regulation 18702.1(b).)

(b) National Health Plan, in which Mr. Dayton has a financial interest (see Part IV.D.4.(b), above) is a wholly-owned subsidiary of Tenet. Therefore, Tenet, as an “otherwise related business entity,” is also a financial interest of Mr. Dayton, and is also considered to be a source of income to him. (Regulation 18706, Regulation 18236(a).⁹) Tenet is directly involved in the final affiliation decisions. (Regulation 18702.1(b).)

5. Mr. Jeter.

Mr. Jeter’s wife is a nurse employed by the district. His income normally includes his community property share of her income. However, the Act expressly excludes “salary and reimbursement for expenses ... received from a ... local ... government agency...” from the definition of “income.” (Section 82030(b)(2).) Thus, Ms. Jeter’s salary and reimbursement for expenses received from the district, a local government agency, are not considered to be income for purposes of the Act, either to her or to Mr. Jeter. Therefore, the district is not a source of income to Mr. Jeter. (Section 87013(c); Section 82030(b)(2).)

Note, however, that the “personal effects” rule, described above, has a particular application to Mr. Jeter in this case. He must recuse himself from any decisions by the board which involve hiring, firing, demoting, or disciplining his spouse, or which involve setting a salary for his spouse different from the salary paid to other similarly situated employees. (*Moss Advice Letter*, No. A-94-100.) (For further analysis of this particular issue, see the section of this letter addressing the reasonably foreseeability of financial effects resulting from the final affiliation decisions, below.)

Other than the possibility of a material personal financial effect, Mr. Jeter does not otherwise appear to have a financial interest at stake in the final affiliation decisions.

identifying sources of income within the meaning of the Act unless he or she owns more than 10 percent of the business entity. (Section 87103, final paragraph.) Thus, the third party payors are not deemed to be sources of income to Dr. Chock in this situation, and the fact that some of the third party payors are connected to Sutter, CHW, and/or Tenet is not relevant in the context of the Stanislaus Surgery Center.

⁹ Neither Sutter nor CHW qualify as financial interests of Mr. Dayton in this manner because the “otherwise related business entity” rule does not apply to *non-profit* organizations, only to for-profit entities. (*Sauer Advice Letter, supra.*)

E. Reasonable foreseeability and materiality.

Even if a public official has a financial interest at stake in a government decision, the public official does *not* have a conflict of interest *unless* the decision results in a *reasonably foreseeable* and *material* effect on that financial interest. (Section 87100.) Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made is highly situation-specific. A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Whether a reasonably foreseeable financial effect is material is determined under various regulations promulgated by the FPPC, depending upon the nature of the interest and the degree to which it is involved. (Regulation 18700 et seq.)

It is important to understand that determinations of reasonable foreseeability and materiality are very fact-dependent, and must be made on a decision-by-decision basis. **An effect which may not be foreseeable at an early stage of a process may become foreseeable as the process unfolds. In a matter as complex as a health care affiliation, a “blanket” determination of reasonable foreseeability cannot be made at any stage in the process which applies to the entire process.** With this in mind, issues of reasonable foreseeability and materiality are next analyzed individually for the directors given their respective financial interests.

1. Ms. Podolsky.

(a) Ms. Podolsky’s first financial interest is the district as her source of income (see Part IV.D.1.(a), above.) This financial interest is directly involved in the final affiliation decisions. Taking the issue of materiality first, we must turn to Regulation 18702.1(a). That regulation provides that the effect of a governmental decision—if reasonably foreseeable—is material if the public official’s source of income is directly involved.

Regulation 18702.1(b) provides the criteria for determining whether a person or business entity is directly involved in a decision:

“(b) 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.”

The district is a “person” for purposes of the Act. (Section 82047.) It is *itself* the subject of the proceedings concerning the final affiliation decisions. Therefore, if a financial effect on the district is reasonably foreseeable, Ms. Podolsky has a disqualifying conflict of interest, unless the public generally exception applies. (Regulation 18702.1(a).)

As to Ms. Podolsky’s first financial interest, a material financial effect *is* reasonably foreseeable. Given the high stakes nature of health care mergers and affiliations, there is more than a mere possibility that the final affiliation decisions will have a financial impact on the district. Thus, she has a disqualifying conflict of interest with regard to the district as her source of income, unless the public generally exception applies.

(b) Ms. Podolsky’s second financial interest is her indirect interest in the Podolsky PC, which is indirectly involved in the final affiliation decisions.¹⁰ (See Part IV.D.1.(b), above.) Materiality as to indirectly involved business entities is determined under Regulation 18702.2. That regulation prescribes alternative rules for determining materiality depending upon the size of the business. We assume that subsection (g) applies to the Podolsky PC, and proceed based upon that assumption. However, we strongly urge you and Ms. Podolsky to study Regulation 18702.2 carefully and determine, based upon your superior access to facts about the business, whether this assumption is valid. Subsection (g) provides:

“(g) For any business entity not covered by subdivisions (a), (b), (c), (d), (e) or (f):

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

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

If the reasonably foreseeable impact of the final affiliation decisions is such that any of the conditions stated in subsection (g) is true as to the Podolsky PC, then there will be a material financial effect.

¹⁰ In your advice request, you identified an employee lease agreement (i.e., for the midwife’s services) between the Podolsky PC and the district as a possible financial interest of Ms. Podolsky. You also identified a month-to-month lease of office space by the Podolsky PC from the district as a possible financial interest. Leases other than those involving real property are not *directly* cognizable as an independent financial interest under the Act—except to the extent that there is a personal financial effect under Regulation 18702.1(a)(4). Month-to-month leases of real property are also not cognizable financial interests under the Act (Regulation 18233)—except to the extent that there is a personal financial effect under Regulation 18702.1(a)(4). Moreover, the impact of the final affiliation decisions upon the employee lease agreement and upon the month-to-month lease is relevant to whether there is a reasonably foreseeable material financial effect on the Podolsky PC as a business entity.

In your advice request, you stated that, “[i]n connection with the affiliation, current employment and independent contractual relationships and leases are anticipated to be unaffected and to remain in place with the district.” The Commission does not act as a finder of fact when it renders advice. This advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

It is impossible for us to say whether it is reasonably foreseeable that any of the conditions stated in subsection (g) will be true or false as to the Podolsky PC as a result of the final affiliation decisions. Although you assert that it “is anticipated” that there will be no effect on existing contractual arrangements, we are unable to base a determination upon this simple assertion, when the context is as complex as this situation appears to be. Therefore, we are unable to advise conclusively as to whether Ms. Podolsky has a conflict of interest with regard to the Podolsky PC. She must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

(c) Ms. Podolsky’s third financial interest at stake in the final affiliation decisions is her direct interest in the business entity through which she provides bookkeeping services to the Podolsky PC. (See Part IV.D.1.(c), above.) This business entity is indirectly involved in the affiliation decisions. The analysis and conclusion here is the same as in the preceding part of this letter which addresses the Podolsky PC (Part IV.E.1.(b)).

(d) Ms. Podolsky’s fourth financial interest is the Podolsky PC as her source of income.¹¹ (See Part IV.D.1.(d), above.) This source of income is a business entity which is indirectly involved in the final affiliation decisions. Therefore, the analysis and conclusion as to this fourth financial interest are the same as the analysis and conclusion in Part IV.E.1.(b), above.

(e) Ms. Podolsky has financial interests in each of the four third party payors with whom Dr. Podolsky contracts because the payors are sources of income to her. (See Part IV.D.1.(e), above.) Each of the four payors are indirectly involved in the final affiliation decisions.

(i) Two of the payors, Gould and Omni, are nonprofit entities. Whether a financial effect—if reasonably foreseeable—is material as to indirectly involved nonprofit entities is determined under Regulation 18702.5. That regulation prescribes alternative rules for determining materiality depending upon the size of the entity.

¹¹ The Podolsky PC qualifies as a financial interest of Ms. Podolsky under *two* of the six prongs of Section 87103. First, she has an *indirect* financial interest in the Podolsky PC because her spouse owns more than 10 percent of the business entity (Section 87103, subdivision (a) and final paragraph.) Second, she has a *direct* financial interest in the Podolsky PC because it is a source of income to her sole proprietorship through which she provides bookkeeping services to the PC as an independent contractor. (Section 87103(c).) As it turns out, the materiality issues in both cases are determined pursuant to Regulation 18702.2, probably under subdivision (g).

According to information you provided, Omni had gross annual revenues of approximately \$157,600,000 in 1996. Therefore, the materiality rules in subsection (b) of Regulation 18702.5 apply. That subsection provides:

“(b) For an entity whose gross annual receipts are more than \$100,000,000 but less than \$400,000,000, 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 \$400,000 or more; or
- (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 \$100,000 or more; or
- (3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$400,000 or more.”

If the reasonably foreseeable impact of the final affiliation decisions is such that any of the conditions stated in subsection (b) of Regulation 18702.5 is true as to Omni, then there will be a material financial effect.

It is impossible for us to say whether it is reasonably foreseeable that any of the conditions stated in subsection (b) will be true or false as to Omni as a result of the final affiliation decisions. Although you assert that it “is anticipated” that there will be no effect on existing contractual arrangements, we are unable to base a determination upon this simple assertion, when the context is as complex as this situation appears to be. Therefore, we are unable to advise conclusively as to whether Ms. Podolsky has a conflict of interest with regard to Omni. She must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

According to information you provided, Gould has gross annual revenues of approximately \$75,300,000 in 1996. Therefore, if a financial effect is reasonably foreseeable, then the materiality rules in subsection (c) of Regulation 18702.5 apply. That subsection provides:

“(c) For an entity whose gross annual receipts are more than \$10,000,000, but less than or equal to \$100,000,000 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 \$200,000 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 \$50,000 or more.
- (3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$200,000 or more.”

In other words, if the reasonably foreseeable impact of the affiliation decisions is such that any of the conditions stated in subsection (c) of Regulation 18702.5 is true as to Gould, then there will be a material financial effect.

It is impossible for us to say whether it is reasonably foreseeable that any of the conditions stated in subsection (c) will be true or false as to Gould as a result of the final affiliation decisions. Although you assert that it "is anticipated" that there will be no effect on existing contractual arrangements, we are unable to base a determination upon this simple assertion, when the context is as complex as this situation appears to be. Therefore, we are unable to advise conclusively as to whether Ms. Podolsky has a conflict of interest with regard to Gould. She must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

(ii) Two of the third party payors, Valley IPA and National Health Plan, are for-profit business entities. Materiality as to indirectly involved for-profit business entities is determined under Regulation 18702.2. That regulation prescribes alternative rules for determining materiality depending upon the size of the business.

We assume that subsection (g) of Regulation 18702.2 applies to the Valley IPA, and proceed based upon that assumption. (Regulation 18702.2(g) is excerpted in its entirety in Part IV.E.1.(b), above.) However, we strongly urge you and Ms. Podolsky to study Regulation 18702.2 carefully and determine, based upon your superior access to facts about the business, that this assumption is valid. The analysis and conclusion here is the same as in the preceding part of this letter which addressed the Podolsky PC (Part IV.E.1.(b)), because Valley IPA is also indirectly involved business entity.

National Health Plan meets the standards for listing on the New York Stock Exchange.¹² Therefore, if a financial effect is reasonably foreseeable, materiality is determined under subsection (e) of Regulation 18702.2. That subsection in turn provides that the materiality rules in subsection (b) shall apply. Regulation 18702.2(b) provides:

"(b) For any business entity listed on the National Association of Securities Dealers National Market List (securities of companies on this over-the-counter market list are registered with and subject to the Security and Exchange Commission's rule requiring tape reporting of last sale information [17 CFR Section 240.77 Aa3-1]):

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$150,000 or more; or

¹² According to information provided by you, in the 12-month period ending May 1997, National Health Plan had gross annual revenues of more than \$128,000,000 and net tangible assets of more than \$19,000,000. (See Regulation 18702.2(e).)

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$50,000 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$150,000 or more.”

In other words, if the reasonably foreseeable impact of the final affiliation decisions is such that any of the conditions stated in subsection (b) is true as to National Health Plan, then there will be a material financial effect.

It is impossible for us to say whether it is reasonably foreseeable that any of the conditions stated in subsection (b) of Regulation 18702.2 will be true or false as to National Health Plan as a result of the final affiliation decisions. Although you assert that it “is anticipated” that there will be no effect on existing contractual arrangements, we are unable to base a determination upon this simple assertion, when the context is as complex as this situation appears to be. Therefore, we are unable to advise conclusively as to whether Ms. Podolsky has a conflict of interest with regard to National Health Plan. She must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

(f) As explained in Part IV.D.1.(f), above, Ms. Podolsky has a financial interest in Tenet because National Health Plan is a wholly-owned subsidiary of Tenet. Tenet is therefore an “otherwise related business entity” in which Ms. Podolsky has a financial interest as a source of income. (Regulation 18706, 18236(a).)

Tenet is directly involved in the final affiliation decisions as a joint venturer in one of the finalists. It is reasonably foreseeable that the board’s decision on the affiliation will have a financial effect on Tenet because as a finalist it will either get the business or it will not.

Having concluded that a financial effect is reasonably foreseeable, the next issue is whether that effect will be material. Regulation 18702.1(a)(1) provides that any reasonably foreseeable financial effect on a directly involved source of income is deemed to be material. Thus, unless the public general exception applies, Ms. Podolsky has a disqualifying conflict of interest in the final affiliation decisions with regard to Tenet.

(g) Ms. Podolsky has an indirect financial interest in the McHenry Surgicenter (see Part IV.D.1.(g), above). This business entity is indirectly involved in the final affiliation decisions. Given that the McHenry Surgicenter is not connected with, or a competitor of, the district or hospital, the financial effect of the final affiliation decisions on it are speculative. Although the affiliation of a local hospital with a major health care entity will undoubtedly have a “ripple effect” throughout the local medical community, the nature and degree of impact is legitimately characterized as speculative at this point. Therefore, a material financial effect is *not* reasonably foreseeable, and Ms. Podolsky does not have a conflict of interest in the final affiliation decisions based upon her indirect financial interest in the McHenry Surgicenter.

2. Dr. Cadmus.

As Dr. Cadmus has no financial relationship with the district, his only possible cognizable financial interest under the Act derives from the “personal effects” rule, discussed above. It is impossible for us to say whether a personal financial effect on Dr. Cadmus or his immediate family (Regulation 18702.1(a)(4)) is reasonably foreseeable. Therefore, we unable to advise conclusively as to whether he has a conflict of interest. He must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

3. Dr. Chock.

(a) Dr. Chock’s first cognizable financial interest is the district as his source of income. (See Part IV.D.3.(a).) The analysis and conclusion here is the same as in Part IV.E.1.(a), above, which addressed the district as a source of income to Ms. Podolsky. We conclude that a material financial effect on Dr. Chock’s source of income, the district, is reasonably foreseeable for the reasons stated in Part IV.E.1.(a). Thus, Dr. Chock has a disqualifying conflict of interest in the final affiliation decisions unless the public generally exception applies.

(b) Dr. Chock’s second cognizable financial interest is his ownership interest in the partnership, a business entity which is indirectly involved in the final affiliation decisions. Materiality as to indirectly involved business entities is determined under Regulation 18702.2. That regulation prescribes alternative rules for determining materiality depending upon the size of the business. We assume that subsection (g) applies to the partnership, and proceed based upon that assumption. However, we strongly urge you and Dr. Chock to study Regulation 18702.2 carefully and determine, based upon your superior access to facts about the business, if this assumption is valid. (Regulation 18702.2 (g) is excerpted in its entirety in Part IV.E.1.(b), above.)

If the reasonably foreseeable impact of the final affiliation decisions is such that any of the conditions stated in subsection (g) of Regulation 18702.2 is true as to the partnership, then there will be a material financial effect on the partnership.

In your advice request, you stated that, “[i]n connection with the affiliation, current employment and independent contractual relationships and leases are anticipated to be unaffected and to remain in place with the district.” It is impossible for us to say whether it is reasonably foreseeable that any of the conditions stated in Regulation 18702.2 (g) will be true or false as to the partnership as a result of the final affiliation decisions. Although you assert that it “is anticipated” that there will be no effect on existing contractual arrangements, we are unable to base a determination upon this simple assertion, when the context is as complex as this situation appears to be. Therefore, we unable to advise conclusively as to whether Dr. Chock has a conflict of interest with regard to the partnership. He must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

(c) Dr. Chock's third financial interest possibly at stake in the final affiliation decision is his interest in the partnership's office space lease itself, which he has because he owns more than 10 percent of the partnership. (See Part IV.D.3.(c), above.) This third interest is indirectly involved in the final affiliation decisions. Materiality as to leasehold interests indirectly involved in governmental decisions is determined under Regulation 18702.4, which provides:

“The effect of a decision is material as to a leasehold interest in real property if any of the following applies:

(a) The decision will change the legally allowable use of the leased property, and the lessee has a right to sublease the property;

(b) It is reasonably foreseeable that the lessee will change the actual use of the property as a result of the decision;

(c) It is reasonably foreseeable that the decision will result in a change in the actual use of property within 300 feet of the leased property, and the changed use will significantly enhance or significantly decrease the use or enjoyment of the leased property;

(d) The decision will increase or decrease the amount of rent for the leased property by \$250 or 5+percent, whichever is greater, during any 12-month period following the decision; or

(e) The decision will result in a change in the termination date of the lease.”

If the reasonably foreseeable impact of the final affiliation decisions is such that any of the conditions stated in Regulation 18702.4 will be true as to the partnership's lease with the district, then the financial effect will be material.

In your advice request, you stated that, “[i]n connection with the affiliation, current employment and independent contractual relationships and leases are anticipated to be unaffected and to remain in place with the district.” It is impossible for us to say whether it is reasonably foreseeable that any of the conditions stated in Regulation 18702.4 will be true or false as to the partnership's office space lease as a result of the final affiliation decisions. Although you assert that it “is anticipated” that there will be no effect on existing contractual arrangements, we are unable to base a determination upon this simple assertion, when the context is as complex as this situation appears to be. Therefore, we are unable to advise conclusively as to whether Dr. Chock has a conflict of interest with regard to the lease. He must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

(d) Dr. Chock has financial interests in the five third party payors who are sources of income to him. (See Part IV.D.3.(d), above.) Each of these payors is indirectly involved in the final affiliation decisions.

(i) Two of the payors, Gould and Omni, are nonprofit entities. The analysis and conclusions with regard to these two payors is the same as the analysis and conclusion stated in Part IV.E.1.(e)(i), above.

(ii) Three of the payors, Valley IPA, National Health Plan, and Community Health Network Medical Group, Inc., are for-profit entities. The analysis and conclusions with regard to these three payors is the same as the analysis and conclusions stated in Part IV.E.1.(e)(ii), above.

(e) We advise that, unless the public generally exception applies, Dr. Chock has a disqualifying conflict of interest in the final affiliation decision with regard to Tenet for the reasons stated in Part IV.E.1(f), above.

(f) Dr. Chock has a financial interest in the Stanislaus Surgery Center (see Part IV.D.3.(f), above). This business entity is indirectly involved in the final affiliation decision. Given that the Stanislaus Surgery Center is not connected with, or a competitor of, the district or hospital, the financial effect of the final affiliation decisions on it are speculative. Although the affiliation of a local hospital with a major health care entity will undoubtedly have a “ripple effect” throughout the local medical community, the nature and degree of impact is legitimately characterized as speculative at this point. Therefore, a material financial effect is *not* reasonably foreseeable, and Dr. Chock does not have a conflict of interest in the final affiliation decisions based upon her indirect financial interest in the Stanislaus Surgery Center.

4. Mr. Dayton.

(a) Mr. Dayton has financial interests in the two third party payors identified in Part IV.D.4.(a), above.

(i) One of these payors, Omni, is a non-profit. The analysis and conclusions with regard to this payor is the same as the analysis and conclusion stated in Part IV.E.1.(e)(i), above.

(ii) One of these payors, National Health Plan, is a for-profit. The analysis and conclusions with regard to these three payors is the same as the analysis and conclusions stated in Part IV.E.1.(e)(ii), above.

(b) We advise that, unless the public generally exception applies, Mr. Dayton has a disqualifying conflict of interest in the final affiliation decision with regard to Tenet for the reasons stated in Part IV.E.1(f), above.

5. Mr. Jeter.

In Part IV.D.4, above, we advised that the district is not a source of income to Mr. Jeter despite the fact that his spouse is employed by the hospital, because of the “government salary” exclusion (see Section 82030(b)(2)). However, we warn that the “personal effects” rule could have a particular application to Mr. Jeter because his spouse is employed by the district.

Mr. Jeter may take part in final affiliation decisions which will have a reasonably foreseeable and material financial effect on his spouse’s salary, per diem or reimbursement for expenses. (Section 82030(b)(2), Regulation 18702.1(c).) However, Mr. Jeter may *not* take part

in final affiliation decisions which will have other reasonably foreseeable material effects on his spouse's employment status. If the final affiliation decisions will have a reasonably foreseeable impact on the elimination or retention of his spouse's job, or her promotion or demotion, or some similar impact on his spouse, and the effect is that personal expenses, income, assets, or liabilities of Mr. Jeter or his immediate family increases or decreases by at least a \$250 in a 12-month period, then he will have a disqualifying conflict of interest unless the public generally exception applies. (*Siegrist* Advice Letter, No. I-96-269.)

In this particular context (i.e., of Mr. Jeter's spouse as an employee of the district) or in the larger context of all possible personal financial effects, it is impossible for us to say whether a personal financial effect on Mr. Jeter or his immediate family (Regulation 18702.1(a)(4)) is reasonably foreseeable. Therefore, we are unable to advise conclusively as to whether Mr. Jeter has a conflict of interest. He must make this essentially factual determination on a decision-by-decision basis as the process unfolds.

F. The "public generally" exception.

Even if a public official has what would otherwise be a conflict of interest, he or she is not disqualified if the financial effect on him or her is indistinguishable from the effect on the public generally. (Section 87103; Regulation 18703 *et seq.*) This is known as the "public generally" exception.

A material financial effect on a public official's financial interest is indistinguishable from the effect on the public generally if the decision will affect a "significant segment" of the public "in substantially the same manner" it affects the public official. (Regulation 18703(a)(1),(2).) "Significant segment" is defined in Regulation 18703(a)(1):

"(1) Significant Segment: The governmental decision will affect a "significant segment" of the public generally as set forth below:

(A) For decisions that affect the official's economic interests (excluding interests in a business entity which are analyzed under subdivision (B)):

(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents, or

(ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(B) For decisions that affect a business entity in which the official has an interest as set forth in Section 87103, fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; or,

(C) For decisions that affect any of the official's economic interests, the decision will affect 5,000 individuals who are residents of the jurisdiction; or,

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (a)(1)(A) through (a)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.”

“Substantially the same manner” is defined in Regulation 18703(a)(2):

“(2) Substantially the Same Manner: The governmental decision will affect the official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (a)(1) of this regulation.”

In general terms, applying the public generally exception is a two-step process. First, one must determine whether there is a cognizable “significant segment” of the public. Second, if there is, one must determine whether this significant segment is affected in “substantially the same manner” as the public official is.

1. Ms. Podolsky.

Ms. Podolsky has at least two conflicts of interest in the final affiliation decision. The first conflict arises because the district, as her source of income, is directly involved in the final affiliation. The second conflict arises because Tenet, which is also a source of income to her, is also directly involved in the final affiliation decision. Whether the public generally exception applies in either case is analyzed next.

(a) Ms. Podolsky has a conflict of interest with regard to the district as her source of income. (Part IV.E.1.(a), above.) The source of income which presents the potentially disqualifying conflict of interest is a public entity, i.e., the district. We have previously advised that if a governmental decision so affects a public entity, in many cases we presume that the effect of the decision flows to all, or at least to a significant segment, of residents in the jurisdiction. Under such circumstances, the effect of the decision on the official’s economic interest would be the same as the effect on the public generally. (*Marino* Advice Letter, No. A-96-304; *Alperin* Advice Letter, No. A-96-046; *Soldani* Advice Letter, No. 94-042.) Thus, despite her financial interest in the district as a source of income, Ms. Podolsky may take part in governmental decisions in which the district is directly involved *if* the impact of the governmental decision will flow to all or significant segment of the residents of the district. If, on the other hand, the effect of the governmental decision in question does not flow to at least a significant segment of the residents of the district, then the public generally exception does not apply. This determination must be made on a decision-by-decision basis.

(b) Ms. Podolsky has a conflict of interest with regard to Tenet as her source of corporation income. (Part IV.E.1.(f), above.) The public generally exception does *not* apply here because persons like Tenet, a major healthcare corporation, do not comprise a significant segment of the public in Ms. Podolsky's district. (Regulation 18703(a)(1).) Therefore, Ms. Podolsky has a *disqualifying* conflict of interest in the final affiliation decision because she has a financial interest in Tenet.

2. Dr. Cadmus

As explained in Part IV.E.2, above, Dr. Cadmus' only possible conflict of interest would arise from a reasonably foreseeable material personal financial effect. From a distance, we cannot conclusively advise whether there will be such an effect. Therefore, we decline to speculate on the possible application of the public generally exception when it is not clear if there is a conflict.

3. Dr. Chock

Dr. Chock has at least two conflicts of interest in the final affiliation decision. The first conflict arises because the district, as his source of income, is directly involved in the final affiliation. The second conflict arises because Tenet, which is also a source of income to him, is also directly involved in the final affiliation decision.

(a) Dr. Chock has a conflict of interest with regard to the district as her source of income. (Part IV.E.3.(a), above.) Our advice about the applicability of the public generally exception to this conflict is the same as the advice stated in Part IV.F.1.(a), above, with regard to Ms. Podolsky's similar conflict.

(b) Dr. Chock has a conflict of interest arising from his financial interest in Tenet (Part IV.E.3.(e), above). This conflict of interest is *disqualifying* for the reasons explained in Part IV.F.1.(b), above, with regard to Ms. Podolsky's similar conflict.

4. Mr. Dayton

Mr. Dayton has at least one conflict of interest in final affiliation decision. It arises because Tenet, which is a source of income to him, is directly involved in the final affiliation decision. (Part IV.E.4.(b) above.) This conflict of interest is *disqualifying* for the reasons explained in Part IV.F.1.(b), above, with regard to Ms. Podolsky's similar conflict.

5. Mr. Jeter

As explained in Part IV.E.5, above, Mr. Jeter's only possible conflict of interest would arise from a reasonably foreseeable material personal financial effect. (This assumes that final affiliation decisions which may affect his spouse fall within the Regulation 18702.1(c)(1) exception.) From a distance, we cannot conclusively advise whether there will be such an effect.

Therefore, we decline to speculate on the possible application of the public generally exception when it is not clear if there is a conflict.

G. Legally required participation.

At least three directors, Ms. Podolsky, Dr. Chock, and Mr. Dayton, have disqualifying conflicts in the final affiliation decision. As there are five members of the board, and three are required to form a quorum, you have asked about the applicability of the “legally required participation” exception.

In general terms, this “rule of necessity” allows a public official, who is otherwise disqualified due to a conflict of interest, to participate in a governmental decision to the extent such participation is legally required. Section 87101 of the Act provides:

“Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.”

Regulation 18701 elaborates on Section 87101:

“(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

(b) Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she shall:

(1) Disclose as a matter of official public record the existence of the financial interest;

(2) Describe with particularity the nature of the financial interest before he or she makes or participates in making the decision;

(3) State the reason there is no alternative source of decision-making authority;

(4) Participate in the decision only in an open meeting of the agency, as required by Government Code Sections 11123 and 54953, or in closed session, as provided in Government Code Sections 11126, 54956.7, 54956.8, 54956.9, 54957 and 54957.6, where participation by the official is legally required for the agency to act.

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is

otherwise disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification.”

The most important issue in determining whether the legally required participation rule applies is whether there exists an alternative source of decisionmaking authority for the final affiliation decisions. If the board is the *only* authority which may lawfully act on the final affiliation decisions, then the legally required participation rule applies. (Regulation 18701(a); *Heisinger* Advice Letter, No. A-95-333.)

If the legally required participation rule does apply (i.e., there is no alternative source of decisionmaking authority), the rule must be applied *narrowly*. (Regulation 18701(c).) Consistent with this mandate, the Commission has interpreted the rule to permit the participation of the *fewest* otherwise disqualified persons possible in any decision. (*In Re Hudson* (1978) 4 FPPC Ops. 13.) For example, if you conclude that Dr. Cadmus and Mr. Jeter do not have disqualifying conflicts, then *one and only one* of the unequivocally disqualified directors (i.e., Ms. Podolsky, Dr. Chock, and Mr. Dayton) may be selected randomly to create a quorum and participate in the final affiliation decision. (*Heisinger, supra.*)

Once random selection has resulted in a quorum, the director selected may participate in the decisions without regard to the possible effect of the decisions upon the official's financial interests. Additionally, the random selection procedure need not be repeated with respect to a series of decisions involving the same general subject matter and the same disqualifying interests. (*Hopkins* Advice Letter, No. A-82-088; *Hill* Advice Letter, No. A-87-110.) However, where there are changed circumstances (either as to an official's personal financial interests or as to the proposed decision) which alter the conclusion as to disqualification of any director, a new situation exists requiring a fresh look at the situation and, if appropriate, a new drawing by lot. (*Hopkins* Advice Letter, *supra.*)

Also, please note that pursuant to subdivision (b) of Regulation 18701, the disqualified director may participate fully at public meetings of the board and at closed sessions when required by law if participation is legally required. However, the director may not engage in any private discussions with other district officials regarding the final affiliation decisions. (*Grunwald* Advice Letter, No. A-95-184.)

Finally, we again stress that this advice has no applicability whatsoever to any actions already taken by any of the directors. The apparent applicability of the legally required participation rule to the final affiliation decisions does not in any way advise about any governmental decisions which any of the directors has already made, participated in making, or used or attempted to use his or her official position to influence. If any of the actions already taken by any of the directors is subsequently found to constitute a violation of the Act, the mere fact that the legally required participation rule apparently applies to the *final* affiliation decisions does not retroactively mitigate the violation(s).

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel

A handwritten signature in black ink, appearing to read "J. Vergelli". The signature is written in a cursive style with a large initial "J" and a period at the end.

By: John C. Vergelli
Staff Counsel, Legal Division

SGC:JV:ak