



## FAIR POLITICAL PRACTICES COMMISSION

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November 25, 1998

John R. Harper  
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453 S. Glassell Street  
Orange, California 92866

**Re: Your Request for Advice  
Our File No. A-98-244**

Dear Mr. Harper:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").<sup>1</sup> Please keep in mind that nothing in this letter should be construed to evaluate any conduct that has already taken place.<sup>2</sup> In addition, this letter is solely based upon the facts presented to us in your letter. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and that all of the material facts have been provided.

### QUESTION

If a city firefighter refinances his home with a loan obtained through Councilmember Sorensen's mortgage brokerage business, may Councilmember Sorensen participate in discussions and decisions regarding a new Memorandum of Understanding between the Firefighters Association and the city, that concerns compensation for the city's firefighters?

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

<sup>2</sup> Pursuant to regulation 18329, the Commission does not provide advice regarding past conduct. (Regulation 18329(b)(8)(A).)

## CONCLUSION

Councilmember Sorensen is prohibited from participating in any decision that will have a material financial effect on a source of income to him, if the effect of the decision on the source of income is distinguishable from the effect on the public generally.

## FACTS

Christopher Sorensen is a councilmember and appointed mayor for the City of Norco (the "city"). Mr. Sorensen is also the owner of a mortgage brokerage business that unites prospective mortgage borrowers with mortgage lenders. A fee for this service is paid by the borrower to the mortgage brokerage. This is done through the escrow process, when the loan is funded.

Mr. Sorensen has been approached by a city firefighter who wishes to refinance his home loan through Mr. Sorensen's brokerage. The firefighter is one of eighteen employees of the Norco Fire Department, and one of ten employees that share this firefighter's classification.

Annual salary and benefit negotiations between the Norco Firefighters Association (the "association") and the city have recently concluded. These negotiations produced a new Memorandum of Understanding (MOU) between the association and the city, concerning compensation for the city's firefighters. The MOU will have to be approved by a vote of the city council, in order to take effect.

## ANALYSIS

The conflict-of-interest provisions of the Act prohibit a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the public official knows, or has reason to know, that he or she has a financial interest. (Section 87100.) As a councilmember and mayor for the City of Norco, Mr. Sorensen is considered to be a public official. (Section 82048.)

### *Economic Interest*

Whether a public official has a financial interest in a decision is governed by Section 87103, which provides, in part, that:

"A public 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, a member of his or her immediate family, or on any of the following:

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(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.”

In your letter, you stated that whenever Mr. Sorensen’s mortgage brokerage business arranges a mortgage loan, a fee is paid to the brokerage by the mortgage borrower. You did not tell us the amount of the fee, but your letter implies that the fee is equal to, or in excess of, \$250. You also informed us that Mr. Sorensen is the owner of the brokerage.

Section 82030(a) provides that income received by a business shall be attributed, on a pro rata basis, to any individual who owns a ten percent or greater interest in the business. Assuming Mr. Sorensen is the sole owner of the brokerage, the entire amount of the fee would therefore be considered income to Mr. Sorensen.

Regulation 18703.3 sets forth the standards for determining who would be considered the source of the income that is generated by certain types of transactions, including brokerage transactions. Subsection (c) of Section 18703.3 provides that “gross payments received as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction” shall be considered “commission income.” The income that Mr. Sorensen would receive from arranging a mortgage loan for the firefighter fits that definition. Subsection (c)(3)(B) of Regulation 18703.3 goes on to provide that when a real estate transaction generates commission income to a broker, the customer would be considered a source of the income. Therefore, the firefighter would be considered a source of the income that Mr. Sorensen derives from arranging a loan for the firefighter. Finally, subsection (c)(4) of Regulation 18703.3 provides that “for the purposes of determining whether disqualification is required under the provisions of Section 87100 and 87103(c), the full gross value of any commission income for a specific sale or similar transaction shall be attributed to each source of income in that sale or transaction.” The firefighter would therefore be considered a source for the entire amount of the income that Mr. Sorensen receives from the transaction.

Putting together the provisions of Section 82030(a) and Regulation 18703.3, if the firefighter refinances his home through Mr. Sorensen’s brokerage business, the firefighter would be considered a source of income to Mr. Sorensen in the full amount of the brokerage fee, which we assume to be \$250 or more. The firefighter would therefore constitute a potentially disqualifying economic interest for Mr. Sorensen under Section 87103(c). This means that Mr. Sorensen is prohibited from participating in any governmental decision, including any governmental decision regarding a Memorandum of Understanding with the Norco Firefighters Association, that would have a reasonably foreseeable material financial effect on the firefighter, that is distinguishable from the effect on the public generally.

Once a public official's economic interests have been identified, the official must evaluate whether it is reasonably foreseeable that a governmental decision will have a material financial effect on any of the economic interests that have been identified. There are three steps to making this evaluation. First, the official must determine whether his or her economic interests will be directly or indirectly involved in the decision. (Regulation 18700(b)(4).) Second, the public official must select the appropriate standard for determining whether the financial impact of the decision on any particular economic interest will be material. (Regulation 18700(b)(5).) Third, the public official must determine whether it is reasonably foreseeable that the materiality standard will be satisfied for any particular economic interest. (Regulation 18700(b)(6).) If it is substantially likely that the materiality standard will be satisfied for any of the official's economic interests, then the public official will have a conflict of interest, unless the "public generally exception" applies. If it is not substantially likely that the materiality standard will be satisfied for any of the official's economic interests, then the public official will not have a conflict of interest. We stress that this is a case-by-case determination.

#### *Direct Versus Indirect Involvement*

Regulation 18704.1 sets forth the criteria for determining whether an economic interest is directly or indirectly involved in a decision. This regulation states:

"(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly 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.

A person 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."

Under subsection (a)(2) of the regulation, a person is directly involved in a decision if either the person, or an agent for the person, is a named party in the proceeding. In this instance, the Norco Firefighters Association is a named party in the proceeding concerning whether the MOU will be approved. You have not told us whether the association is an agent for the firefighter in the proceeding.

If the association is an agent for the firefighter in the proceeding, then, under subsection (a)(2) of Regulation 18704.1, the firefighter would be considered directly involved in the decision, because the firefighter's agent would be a named party in the proceeding. Conversely, however, if the association is not an agent for the firefighter in the proceeding, then the firefighter would only be indirectly involved in the decision.

### *The Appropriate Materiality Standard*

Regulation 18705.3(a) sets forth the standard for determining whether an official's interest in a person who is a source of income, that is *directly* involved in a decision, is materially affected by the decision. In relevant part, Regulation 18705.3(a) provides:

“Any reasonably foreseeable financial effect on a person who is a source of income to the public official, and who is directly involved in a decision before the official's agency, is deemed material.”

This standard is a “one-penny” rule. Under this standard, *any* reasonably foreseeable financial effect on the firefighter, that flows from the decision, would be deemed material.

Regulation 18705.3(b)(3) sets forth the standard for determining whether an official's interest in a person who is a source of income, that is *indirectly* involved in a decision, is materially affected by the decision. In relevant part, Regulation 18705.3(b)(3) provides:

“The effect of a decision is material as to an individual who is a source of income to an official if any of the following applies:  
(A) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more.”

Under this standard, there would have to be a reasonably foreseeable financial effect on the firefighter of \$1,000 or more, flowing from the decision, for the effect to be deemed material.

### *Foreseeability*

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. (Regulation 18706.) Certainty is not required. Only if an effect is just a mere possibility, is it not reasonably foreseeable. (*Downey Cares v. Downey Development Com.* (1987) 196 Cal.App.3d 983, 989-991; *Witt v. Morrow* (1977) 70 Cal.App.3d 817, 822; and *In re Thorner* (1975) 1 FPPC Ops. 198.)

As the MOU concerns the compensation that the firefighter will receive as an employee of the city, a decision regarding whether or not to approve the MOU is without question substantially likely to have some economic effect on the firefighter. Depending upon the terms of the MOU, and what the consequences would be for the firefighter if the MOU is not approved, that effect could easily amount to \$1,000 or more. It therefore appears probable, regardless of which materiality standard is found to be applicable, that a decision on whether to approve the MOU will have a reasonably foreseeable material financial effect on the firefighter.

If a decision on whether to approve the MOU will have a reasonably foreseeable material financial effect on the firefighter, Mr. Sorensen will have to disqualify himself from participating in the decision, unless the "public generally" exception would apply to the decision.

### *Public Generally*

For the "public generally" exception to apply to a decision regarding the MOU, the decision must affect the firefighter in substantially the same manner as it would affect a significant segment of the public. (Regulation 18707(b).)

Regulation 18707(b)(1) defines the term "significant segment," in relevant part, as follows:

"(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

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(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 (b)(1)(A) through (b)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally."

As the MOU only concerns firefighters who are employed by the City of Norco, it is inconceivable that the MOU would affect any significant segment of the public in substantially the same manner as it would affect the firefighter. It must therefore be concluded that the public generally exception would not apply to the decision, so Mr. Sorensen must disqualify himself from participating in the decision if the decision will have a reasonably foreseeable material financial effect on the firefighter.

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

Sincerely,

Steven G. Churchwell  
General Counsel

By:   
Steven Benito Russo  
Staff Counsel, Legal Division

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