



FAIR POLITICAL PRACTICES COMMISSION

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July 17, 2002

The Honorable John Campbell
Assemblymember, Seventieth District
State Capitol
Post Office Box 942849
Sacramento, CA 94249-0070

**Re: Your Request for Informal Assistance
Our File No. I-02-180**

Dear Assemblymember Campbell:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ This letter should not be construed as advice on any conduct that may have already taken place. In addition, our response is based on the facts presented. The Commission does not act as a finder of fact in its advice-giving capacity (*In re Oglesby* (1975) 1 FPPC Ops. 71), and our advice is applicable only to the extent that facts provided to us are correct and that all of the material facts have been provided.

QUESTION

May you participate in the Assembly floor vote on Senate Bill 1648, which would prohibit any insurer from having any ownership interest in an auto body repair shop?

CONCLUSION

You may vote on the bill, but only if your source of income will not be materially affected, or if materially affected, the effect will be substantially the same as the effect on the public generally.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

You own an 87% interest (worth more than \$2,000) in ACD Holding, LLC (hereafter "ACD"). ACD leases property to Caliber Body Works, Inc., a California company doing business as Caliber Collision Center (hereafter "Caliber"). Under the lease, which runs from October 2001 to October 2008, Caliber pays ACD \$11,000 per month. Caliber operates approximately 35 automobile repair shops in California and 30 in Texas, has gross revenues of approximately \$190 million and is not traded on any stock exchange, but appears to meet the financial criteria to be listed on the American Stock Exchange.

In 2001 the Interinsurance Exchange of the Automobile Club of Southern California (hereafter "Auto Club") purchased a 19% interest in Caliber, but does not control, manage or govern Caliber's operations as a result of the purchase. The Auto Club has for several years offered the Immediate Repair Program to its policy holders who suffer automobile damage, under which policy holders can, in lieu of waiting for a damage appraisal and finding their own repair shop, opt to have the repairs done by any one of a number of pre-approved repair shops. There are approximately 200 pre-approved shops in Southern California that participate in this program of which approximately 35 are operated by Caliber. Caliber has been part of this program since 1991. Other than the ownership interest in Caliber, the Auto Club does not own an interest in any other automobile repair shops.

Senate Bill 1648 is currently on the Assembly floor and will soon be presented for a floor vote. This bill would make it unlawful for an insurer to acquire an ownership interest in auto body repair shops and require any insurers that have such an interest to divest themselves of the interest within eight years after the bill becomes effective. If the bill is passed, it will become effective on January 1, 2003, meaning that insurers who own these interests on January 1, 2003, would have until January 1, 2011, to divest themselves of the interests.

You have been informed that the Auto Club is the only insurer in California that currently owns an interest in auto body repair shops. Therefore, it appears that Senate Bill 1648 will cause only the Auto Club to divest itself of its interest in auto body repair shops. In other words, if Senate Bill 1648 passes, it will affect only the Auto Club on the divestment issue and this in turn will require the Auto Club to sell its 19% interest in Caliber by January 1, 2011. Whether or not this divestment will have an impact on Caliber's gross revenues, expenses, assets or liabilities is purely speculative at this point. Since the Auto Club has included Caliber in its Immediate Repair Program since 1991, it would seem that divestment of its interest in Caliber would not significantly affect this relationship or Caliber's gross revenues and you are not aware of any such effect. Also, you state that the divestment would not affect any of Caliber's expenses. Finally, since Caliber's shares are not publicly traded, it is difficult to assess whether or not the Auto Club's divestment would have any impact at all on the assets or liabilities of Caliber. The Auto Club would merely be selling its interest in Caliber to someone else for the market value of its interest but this would not necessarily affect the overall value of Caliber's assets. Consequently, it appears unclear at this point as to whether Senate Bill 1648 would have any material financial impact at all on Caliber.

ANALYSIS

Section 87100 of the Act prohibits a 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. Section 87103 specifies that an official has a financial interest in a decision 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 his or her immediate family or on certain specified economic interests. Thus, all public officials, including members of the Legislature, will have a conflict of interest in any decision that will have a reasonably foreseeable material financial effect on their economic interests. (See generally, *Isenberg* Advice Letter, No. I-89-343.)

In order to determine whether the prohibition in § 87100 applies to a given decision, regulation 18700 provides an eight-step analysis.

Steps One and Two: Are you a Public Official and will you be Making, Participating, or Influencing a Governmental Decision?

The first step in the analysis, whether you are a “public official” is not at issue in your letter. Legislators are public officials under the Act. Your question acknowledges that you wish to make a governmental decision by voting in the Assembly floor vote on Senate Bill 1648. (Regulations 18702, et seq.)

Please note that despite being public officials subject to the Act’s conflict-of-interest rule in § 87100, members of the Legislature are only subject to administrative penalties for violations of the conflict-of-interest provisions in connection with the decisions specified in § 87102.5. Section 87102.5(a)(5) specifies as follows:

“Any rollcall vote on the Senate or Assembly floor on an item which the member knows is nongeneral legislation.”

The vote of concern in your question falls within the scope of subdivision (a)(5).

Step Three: Do you have economic interests?

The third step is to identify the economic interests that you have that may be impacted by the decision. Under § 87103 of the Act, there are six different types of economic interests that may result in a conflict of interest for a public official. The economic interests pertinent to your question are as follows:

1. A public official has an economic interest in a business entity where the public official has an investment interest of \$2,000 or more or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (§ 87103(a) and (d).) You are an 87% owner of ACD Holing, LLC.

2. A public official has an economic interest in any person from whom he/she has received income aggregating \$500 or more within 12 months prior to the time when the relevant governmental decision is made. (§ 87103(c).) "Income" includes a pro rata share of the income of any business entity or trust in which the individual (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest. (§ 82030(a).) Since you own 87% ACD, and your pro rata share of the income received from Caliber Collision Center is \$500 or more, Caliber is considered a source of income to you.

The Act also recognizes that: "[a]n official has a financial interest in a decision within the meaning of Government Code 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 a business entity which is a parent or subsidiary of, or is otherwise related to, a business entity in which the official has one of the interests defined in Government Code section 87103(a), (c) or (d)." (Regulation 18703.1(c).)

Regulation 18703.1(d)(1) defines a "parent-subsidiary" relationship as follows:

"Parent-subsidiary. A parent-subsidiary relationship exists when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation."

The Automobile Club of Southern California is not the parent of Caliber because it owns only 19 percent of Caliber, but the two entities may be otherwise related. Two business entities are "otherwise related" if any one of three tests is met. Under the first test, one business entity must have a controlling ownership interest in the other business entity. (Regulation 18703.1(d)(2)(A).)

The second test requires that there be shared management and control between the two entities. (Regulation 18703.1(d)(2)(B).) To make this determination, four criteria must be considered: (1) whether "[t]he same person or substantially the same person owns and manages the two entities;" (2) whether "[t]here are common or commingled funds or assets;" (3) whether "[t]he business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a regular basis;" and (4) whether "[t]here is otherwise a regular and close working relationship between the entities." (*Ibid.*)

Under the third test, when "[a] controlling owner (50 % or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity," the two entities are otherwise related. (Regulation 18703.1(d)(2)(C).)

You have not provided any facts to suggest that any of these tests will be met with respect to the Auto Club and Caliber. For purposes of the remainder of this analysis we assume that they are not otherwise related. If you determine that any of these standards will be met, the remainder of this analysis may not be accurate and you should contact us for further advice.

Step Four: Are your economic interests directly or indirectly involved in the decision?

In the fourth step you must determine whether your economic interests are directly or indirectly involved in the decision. Regulation 18704.1(a) provides that:

“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.”

Your question concerns your involvement in decisions affecting the Auto Club’s ownership interest in Caliber. Caliber has not proposed this legislation and is not named in the legislation. Thus, Caliber would be indirectly involved in the decision.

Steps Five and Six: Will the reasonably foreseeable financial effect of the decision on your economic interests be material?

In steps five and six, the public official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on one of those economic interests. This determination takes two steps. First, in step five, the official must find and apply the applicable materiality standard set forth in Commission regulations. (Regulation 18700(b)(5), Regulation 18705, et seq.) After finding the applicable materiality standard, the official must then decide in step six whether it is reasonably foreseeable that the standard will be met. (Regulation 18706.)

We do not know the financial size of the company, but assuming that it is not publicly traded nor of large financial size, the materiality of the financial effect would be analyzed under Regulation 18705.1(c)(4). Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental 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 \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

Thus, if the decisions in question will foreseeably affect the company to the financial extent set forth in the applicable provision of Regulation 18705.1, absent some exception, you will have a conflict of interest in the decision.

Several factors set forth in your facts suggest that a material financial effect on Caliber is not foreseeable.

The Auto Club has included Caliber in its Immediate Repair Program since 1991, ten years prior to acquiring an ownership interest in the business in 2001. Since this business relationship is not necessarily dependent on the Auto Club owning a part of Caliber, it would seem speculative that divestment of the Auto Club in 2011 would materially affect Caliber’s gross revenues, expenses, assets or liabilities. The Auto Club would merely be selling its interest in Caliber to someone else, presumably for the market value of its interest, and this may not financially affect Caliber in any respect. However, as noted previously, the Commission does not act as the finder of fact in providing advice and since the foreseeability determination is factual in nature, we must leave this determination to you.

Step Seven: The “Public Generally” Exception.

Under the “public generally” exception, the official may still participate in the decision if the effect of the decision on the official’s interest is not distinguishable from the effect on the public generally. (§ 87103.) The “public generally” exception is codified in Regulation 18707, which provides that the exception will apply if the decision will affect a significant segment of the public generally in substantially the same manner as it would affect the public official’s interests. For example, if the decisions in question would affect a specific industry, trade, or profession, Regulation 18707.7 provides:

“Where a decision will affect an industry, trade, or profession in substantially the same manner as the decision will affect an official’s economic interest, the industry, trade, or profession constitutes a ‘significant segment’ of the jurisdiction only as set forth below:

“(a) In the case of an elected state officer, an industry, trade, or profession constitutes a significant segment of the public generally, as set forth in section 87102.6 of the Government Code.”

Section 87102.6(b) provides in pertinent part:

“(2) The term ‘public generally’ includes an industry, trade, or profession.

“(3) Any recognized subgroup or specialty of the industry, trade, or profession constitutes a significant segment of the public.

“(4) A legislative district, county, city, or special district constitutes a significant segment of the public.

“(5) More than a small number of persons or pieces of real property is a significant segment of public.

“(6) Legislation, administrative action, or other governmental action impacts in a similar manner all members of the public, or all members of a significant segment of the public, on which it has a direct financial effect, whether or not the financial effect on individual members of the public or the significant segment of the public is the same as the impact on the other members of the public or the significant segment of the public.”

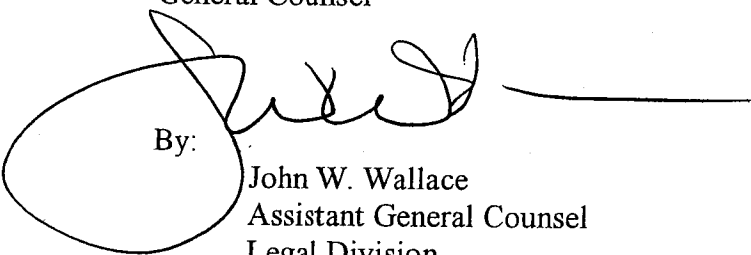
You have provided no facts for us to determine if this exception is applicable.

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

Sincerely,

Luisa Menchaca
General Counsel

By:



John W. Wallace
Assistant General Counsel
Legal Division

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