



FAIR POLITICAL PRACTICES COMMISSION

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October 21, 2003

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**Re: Your Request for Advice
Our File No. A-03-219**

Dear Dr. Cochran:

This letter is in response to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

QUESTION

Do the Act's conflict of interest rules bar you from accepting part-time scientific consulting work for a private industry employer?

CONCLUSION

No. The Act's conflict of interest provisions do not preclude a public official from accepting outside private employment during his or her tenure as a public official. The conflict of interest rules limit a public official's conduct only when the official is faced with a particular governmental decision which would foreseeably have a material financial effect on one or more of the official's economic interests.

FACTS

You are a staff toxicologist in the Department of Pesticide Regulation ("DPR"), who conducts risk assessments on pesticides registered for use in the State of California. A risk assessment consists of five steps – 1) identifying the adverse effects of a pesticide; 2) establishing the dosage required to cause these adverse effects; 3) determining how much of the pesticide people are exposed to; 4) estimating whether the amount of

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

pesticide that people are exposed to is likely to cause illness; 5) discussing the uncertainties in estimating the likelihood of illness. After a lengthy review process, these risk assessments are passed to the risk managers within DPR to help them decide whether a pesticide is safe to use under existing conditions or whether mitigation measures are required.

You have begun to look at the field of scientific consulting as a potential endeavor when you leave state service.² As a consequence of discussions with a former colleague who works for Infoscintific, you have been offered an opportunity to do some scientific consulting on your own time on a topic which does not involve pesticides.

The project involves examining and compiling in a coherent document the extant toxicological data on a number of chemicals. These chemicals are not pesticides; rather they are: 1) contaminating by-products of pesticide manufacture, or 2) chemicals used to dilute and "solubilize" pesticides.

Neither DPR nor the USEPA currently regulates "inerts" (non-pesticidal chemicals present in pesticide formulations). This situation may change in the future. However, you are not being asked to render your opinion on the risks associated with the use of these chemicals, but merely to compile the existing toxicological data on several chemicals so that someone else can estimate those risks.

The funding for this work comes from Industry, and some of the companies funding this project produce pesticides which are regulated by your department.

ANALYSIS

A conflict of interest generally prohibits a public official from taking part in the governmental decision in which the official has a conflict, but the possibility that an official may have conflicts of interest growing out of a new job does not prevent the official from accepting that employment. The purpose of the Act's conflict of interest provisions is simply to ensure that "[p]ublic officials, whether elected or appointed, [should] perform their duties in an impartial manner, free from bias caused by their own financial interests...." (Section 81001(b).) Thus, 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, including financial interests in non-governmental employers which are sources of income to the official. But while an official may not participate in governmental decisionmaking in which he or she has a conflict of interest, the Act does not restrict an official's non-governmental activities, such as non-governmental employment.³

² Although not the subject of your inquiry, the Act imposes some restrictions on state employees relative to post-retirement employment. For your information, we enclose our fact sheet on "revolving door" and other post-employment issues.

³ Please bear in mind that state governmental agencies maintain lists of "incompatible activities," which are not part of the Act. You should review your agency's list prior to accepting any outside employment, to ensure that you do not engage in activities incompatible with your public responsibilities.

A public official who is also employed in the private sector should be aware of the possibility that his employment may give rise to conflicts of interest that will require him or her to abstain from certain governmental decisions. Determining whether a conflict of interest exists under section 87100 of the Act requires analysis of the following questions, which we outline here for your convenience:

1. Are you a "public official" within the meaning of the Act?

As an employee of the Department of Pesticide Regulation, you are a public official subject to the Act's conflict of interest provisions. (Section 82048; regulation 18701(a).)

2. Are you making, participating in making, or using your official position to influence a governmental decision?

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to a decisionmaker regarding a governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing the decision, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

You have not identified any particular governmental decision in which you might be participating. Because analysis of a conflict of interest under the Act requires the identification of a specific governmental decision, we cannot determine whether you might have a conflict of interest in any particular decision, which is attributable to your anticipated employment. In what follows, we describe the further steps in the Act's conflict of interest analysis, which you would consider only *after* concluding that you would make, participate in making, or use your official position to influence a governmental decision.

3. What are your economic interests – the possible sources of a conflict of interest?

Under Section 87103 of the Act, there are six different types of economic interests that may potentially pose a conflict of interest for a public official:

1) A public official has an economic interest in a business entity where the public official either has a direct or indirect investment of \$2,000 or more in the business entity. (Section 87103(a); regulation 18703.1(a).)

2) A public official has an economic interest in a business entity where the public official is in any of several business relationships specified in regulations 18703.1(b) through (e). (Section 87103(d); regulation 18703.1.)

3) A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth \$2,000 or more in fair market value. (Section 87103(b); regulation 18703.2.)

4) A public official has an economic interest in any person from whom he/she has received income aggregating \$500 within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c); regulation 18703.3.)

5) A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$340 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. (Section 87103(e); regulation 18703.4.)

6) A public official has an economic interest under the "personal financial effect rule" provided by Section 18703.5. In particular, a governmental decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; regulation 18703.5.)

If you accepted employment with Infoscintific, assuming that it is a business entity in which you have neither an ownership interest nor a managerial position, Infoscintific would nonetheless become an economic interest to you (as a source of income) as soon as it paid you \$500 or more within any 12-month period.

4. Is your economic interest directly involved in the governmental decision?

A source of income such as Infoscintific is directly involved in a decision before an official's agency when, directly or by an agent, it:

"(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." (Regulation 18704.1(a).)

If a source of income is not directly involved in a governmental decision, it is treated as indirectly involved therein. (Regulation 18704.1(b).)

5. Materiality standard; what financial impact on your economic interest would be considered material?

Not all financial effects are sufficient to create a conflict of interest as defined by the Act; only “material” financial effects cause conflicts of interest. The size of any financial effect that is considered to be “material” varies with the nature of the economic interest, and whether that economic interest is directly or indirectly involved in the decision at issue. Assuming a decision in which Infoscientific is not directly involved, you would refer to the materiality standard for an indirectly involved business entity, which is laid out in regulation 18705.1(c). Thus, using the example of a “small” business which is indirectly involved in a governmental decision, the effect of the decision would be “material” when:

- “(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.” (Regulation 18705.1(c)(4).

6. Foreseeability

Conflicts of interest do not arise if a material financial effect is not a reasonably foreseeable consequence of a particular decision in which the public official participates. An effect upon an economic interest is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Exceptions to the Rule (Steps Seven and Eight).

An official who otherwise has a conflict of interest in a decision may still participate in that decision if the circumstances are such that the “public generally” exception may be invoked. This exception applies when the financial effect of a decision upon a public official's economic interests is not distinguishable from the effect of the decision on a significant segment of the public generally. (Section 87103; regulation 18707(a).) We do not have information suggesting that this exception would apply in any of the decisions that may come before you in your current employment with DPR, but mention it here in order to provide a complete overview of the analytical process.

Finally, an official who otherwise has a conflict of interest in a decision may still participate in that decision if the "legally required participation" exception is applicable. (Section 87101, regulation 18708.) This is an exception that typically applies when an agency is unable to assemble a quorum of its members without the participation of an official who has a conflict of interest. Here again, you have not provided any facts suggesting that this exception would apply to you in your work at DPR.

In addition to the Act's general conflict of interest provisions, section 87104 prohibits any public official from acting as an agent or attorney for, or otherwise representing, any other person for compensation before his or her agency, or officer or employee thereof, if the appearance or communication is made for the purpose of influencing action on a contract, grant, loan, license, permit, or other entitlement for use. The prohibition of section 87104 applies where the official will be compensated by some third party. (*Geismar* Advice Letter, No. A-95-407.) We assume that you expect to be compensated by Infoscientific for your services, but the work you describe does not appear to involve appearances before or communications with DPR. So long as this is the case, section 87104 does not restrict your employment by Infoscientific.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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