



FAIR POLITICAL PRACTICES COMMISSION

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December 23, 2004

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**Re: Your Request for Informal Assistance
Our File No. I-04-193**

Dear Ms. Donovan:

This letter is in response to your request on behalf of California Air Resources Boardmember Patricia Pineda for informal assistance¹ regarding the provisions of the Political Reform Act (the "Act").² Nothing in this letter should be construed to evaluate any conduct which has already taken place.

QUESTION

Does the "public generally" exception pursuant to regulation 18707.4 apply to Ms. Pineda as an appointed member of the California Air Resources Board?

CONCLUSION

No. The "public generally" exception, created for members of boards and commissions under regulation 18707.4, does not apply to Boardmember Pineda's position with the Air Resources Board.

FACTS

On August 12, 2004, the Governor appointed Patricia Pineda to the California Air Resources Board (the "Board"). At the time of her appointment, Ms. Pineda was vice president for legal, governmental affairs and human resources, and corporate secretary

¹ Informal assistance does not confer the immunity provided by a Commission opinion or formal written advice. (Regulation 18329(c)(3), copy enclosed.)

² Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All statutory references herein are to the Government Code unless otherwise indicated. All regulatory references herein are to Title 2 of the California Code of Regulations unless otherwise indicated.

for New United Motor Manufacturing, Inc. ("NUMMI"), where she had been employed since 1984. NUMMI is the joint venture of Toyota and General Motors, located in Fremont, California, which builds the Toyota Corolla, the Pontiac Vibe, and the Toyota Tacoma for the North American market. Effective September 1, 2004, Ms. Pineda started a new position with Toyota Motor North America, Inc. ("Toyota"), as group vice president and general counsel, corporate communications. Her duties at Toyota do not include responsibility for matters under the Board's jurisdiction.

You have stated that the Governor selected Ms. Pineda to fill the Board's so-called "automotive seat" based on her position within the automotive industry. Health & Safety Code section 39510 specifies the appointment criteria for the eleven members of the board, as follows:

Section 39510

"(a) The State Air Resources Board is continued in existence in the California Environmental Protection Agency. The state board shall consist of 11 members.

(b) The members shall be appointed by the Governor, with the consent of the Senate, on the basis of their demonstrated interest and proven ability in the field of air pollution control and their understanding of the needs of the general public in connection with air pollution problems. Six members shall have the following qualifications:

(1) *One member shall have training and experience in automotive engineering or closely related fields.*

(2) One member shall have training and experience in chemistry, meteorology, or related scientific fields, including agriculture or law.

(3) One member shall be a physician and surgeon or an authority on health effects of air pollution.

(4) Two members shall be public members.

(5) One member shall have the qualifications specified in paragraph (1), (2), or (3) or shall have experience in the field of air pollution control.

(c) Five members shall be board members from districts who shall reflect the qualitative requirements of subdivision (b) to the extent practicable. Of these five members, one shall be a board member from the south coast district, one shall be a board member from the bay district, one shall be a board member from the San Joaquin Valley Unified Air Pollution Control District or, if the unified district is abolished, from the San Joaquin Valley Air Quality Management District if created pursuant to Section 5 of Chapter 915 of the Statutes of 1994, one shall be a board member from the San Diego County Air Pollution Control District, and one shall be a board member of any other district. (Emphasis added.)

¶...¶

Thus, the Board's appointment statute specifically mandates that four Board members must have qualifications in the following fields: (1) automotive engineering and closely related fields, (2) chemistry, meteorology, or related scientific fields, including agriculture or law, (3) medicine or the health effects of air pollution, and (4) any of the foregoing fields or air pollution control. The statute also provides for two public members who need not have any special qualifications beyond a demonstrated interest and understanding of air pollution issues, as well as five members who sit on local and regional air quality management districts. The member who is appointed pursuant to subdivision (b)(1) of this statute is commonly referred to by Board members and staff as holding the "automotive seat." The Governor's Deputy Appointments Secretary, Tod Burnett, has confirmed that the Governor appointed Ms. Pineda to fill the position under subdivision (b)(1).

Health & Safety Code section 39002 provides that, while local and regional air authorities have the primary responsibility for control of air pollution from all sources other than vehicular sources, the Board has primary responsibility for the control of vehicular sources. Moreover, Health & Safety Code section 39003 acknowledges that motor vehicles play a predominant role in causing the state's air pollution:

§ 39003. "The State Air Resources Board is the state agency charged with coordinating efforts to attain and maintain ambient air quality standards, to conduct research into the causes of and solution to air pollution, *and to systematically attack the serious problem caused by motor vehicles, which is the major source of air pollution in many areas of the state.*" (Emphasis added.)

Ms. Pineda is employed by and receives income from Toyota. During the preceding 12 months, she has received income from NUMMI aggregating \$500 or more. You assert that "it is implicit in Health and Safety Code section 39510(b)(1) and the other statutory provisions that emphasize the Board's role in regulating motor vehicle pollution that the Board member who holds the 'automotive seat' is appointed to represent and further the interests of the automotive industry." By way of example, you have stated that the predecessor to this position on the Board was a "retired" employee of General Motors.

ANALYSIS

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).) 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.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a

governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her economic interests.

STEPS 1 & 2: IS BOARDMEMBER PINEDA A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As a member of the Air Resources Board, Boardmember Pineda is a public official under the Act. (Section 82048, regulation 18701.) Consequently, she may not make, participate in making, or otherwise use her official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of her economic interests.

Additionally, as a member of the Air Resources Board, Boardmember Pineda will be called upon to consider Board actions that involve "making," "participating in making," or using or attempting to use her official position to "influence" a governmental decision.

STEP 3: DOES BOARDMEMBER PINEDA HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?

A public official has a financial interest in a decision within the meaning of section 87103 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 one of five enumerated economic interests, including:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (§ 87103(a); reg. 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (§ 87103(d); reg. 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (§ 87103(b); reg. 18703.2);
- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (§ 87103(c); reg. 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (§ 87103(e); reg. 18703.4);
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (§ 87103; reg. 18703.5).

You have acknowledged that during the preceding 12 months Boardmember Pineda received income from NUMMI aggregating \$500 or more. You have also stated that Boardmember Pineda is currently employed by Toyota.

Source of Income/Business Entities: Under the facts you have presented, Boardmember Pineda has an economic interest in her source of income from NUMMI in that she received income aggregating \$500 or more during the last 12 months. (Section 87103(c).) This economic interest will continue until 12 months has passed from her last receipt of payment of \$500 or more from NUMMI. Additionally, Boardmember Pineda also has an economic interest in her current source of income from Toyota.³ Both of these entities are also potentially disqualifying under the provisions of section 87103(d).

STEP 4: IS THE ECONOMIC INTEREST DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION ?

“In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official’s economic interest is directly involved or indirectly involved in the governmental decision.” (Regulation 18704(a).) For governmental decisions that affect sources of income, the standards set forth in regulation 18704.1 apply.

Regulation 18704.1(a) 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.”

You have not presented any facts regarding a particular governmental decision involved. This standard must be applied on a decision-by-decision basis. However, unless Boardmember Pineda’s economic interests meet the criteria set forth above, they would be indirectly involved in the governmental decision.

³ Although your facts have not indicated a salary, for purposes of this analysis we assume Boardmember Pineda has received at least \$500 in compensation since her employment with Toyota commenced.

STEP 5: WHAT ARE THE APPLICABLE MATERIALITY STANDARDS?

First, regulation 18705.1 is applied to define the standards to be used when determining whether a financial effect of an economic interest is material. When a business entity is an economic interest of a public official and is directly involved in a decision (as defined above), any reasonably foreseeable financial effect on the entity is deemed material. (Regulation 18705.3.) This standard for determining materiality is known as the "one penny" rule. If the business entity is affected by even one penny, the financial effect is deemed material.

For those situations where the business entity is indirectly involved, regulation 18705.1(c) provides different materiality standards based on the financial size of the entity and the nature of the financial effect. You should consult this regulation to determine if an effect will be material in a specific factual situation.

STEP 6: REASONABLY FORESEEABLE

Once the applicable materiality standard has been applied, the next step is to determine if it is reasonably foreseeable that the financial effect of the governmental decision will meet that materiality standard for the economic interest involved. The effect of a decision is considered reasonably foreseeable if there is a substantial likelihood that it will occur (regulation 18706(a)) and would need to be determined by the facts involved in that governmental decision. If it is not reasonably foreseeable that there will be a material financial effect on the business entities who are economic interests, she does not have a conflict of interest within the meaning of the Act.

STEP 7: PUBLIC GENERALLY

In those cases where a public official's economic interest will experience a material financial effect, under the "public generally" exception the official may still participate in a decision if the financial effect of the decision on the official's economic interest is indistinguishable from the decision's effect on the public generally. (Section 87103; regulation 18707(a).) This "public generally" exception is codified in regulations 18707-18707.9. "Pursuant to these provisions, if a 'significant segment' of the jurisdiction is affected by the governmental decision in substantially the same manner as it would affect the public official, then the official may participate in the decision." (*Holland Advice Letter, I-01-140.*)

Your letter concerns only this step of the standard conflict-of-interest analysis and addresses the specific "public generally" exception created for appointed members of boards and commissions. You ask whether the "public generally" exception under regulation 18707.4 applies to Boardmember Pineda in her appointed position.

"In 1976, the Commission adopted regulation 18703, the predecessor of current regulation 18707.4 (previously numbered 18703.3), in order to harmoniously interpret the Political Reform Act with the numerous state statutes providing for industry representation on regulatory boards. Regulation 18707.4 creates a *narrow* exception from

disqualification under the Act's conflict of interest laws for members of boards or commissions who, by law, are required to have a particular economic interest to be on the board." (*Dorsey* Advice Letter, No. I-01-102.) (Emphasis added.)

The Commission discussed the history of the exception for industry representatives on regulatory boards in its opinion, *In re Callanan* (1978) 4 FPPC Ops. 33:

"The subsections were adopted in an effort to reconcile the conflict of interest provisions of the Political Reform Act with other statutes which require certain boards to include as members persons who represent the industry, trade or profession which the board oversees. The Commission was persuaded that when the legislative body which creates a regulatory board determines that industry views and expertise should be represented on the board, the Political Reform Act should not be interpreted to prevent industry members from participating in board decisions affecting the industry." (*Callanan, supra*, p. 4.)

Current regulation 18707.4 provides:

"(a) For the purposes of Government Code section 87103, the 'public generally' exception applies to appointed members of boards and commissions who are appointed to represent a specific economic interest, as specified in section 87103(a) through (d), if all of the following apply:

(1) The statute, ordinance, or other provision of law which creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.

(2) The member is required to have the economic interest the member represents.

(3) The board's or commission's decision does not have a reasonably foreseeable material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.

(4) The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent. For purposes of this regulation, a significant segment constitutes fifty percent of the persons the

member was appointed to represent.

(b) In the absence of an express finding and declaration or requirement of the types described in 2 Cal. Code Regs. section 18707.4(a)(1) and (2), the 'public generally' exception only applies if such a finding and declaration or requirement is implicit, taking into account the language of the statute, ordinance, or other provision of law creating or authorizing the creation of the board or commission, the nature and purposes of the program, any applicable legislative history, and any other relevant circumstance."

This exception can apply in one of two ways. First, the language of the statute must explicitly state that the member is "appointed to ... represent and further the interests of the specific economic interest"⁴ and that "the member is required to have the economic interest the member represents" (regulation 18707.4(a)(1) and(2)). Alternatively, "[i]n the absence of an express finding and declaration or requirement... the "public generally" exception only applies if such a finding and declaration or requirement implicit" (Regulation 18707.4(b).)

Since there is no language in the statute in this case that explicitly authorizes the exception under regulation 18707.4(a)(1-4), the exception would only apply if it is implicit "taking into account the language of the statute, ordinance, or other provision of law creating or authorizing the creation of the board or commission, the nature and purposes of the program, any applicable legislative history, and any other relevant circumstance." (Regulation 18707.4(b).)

You state, that since Boardmember Pineda was appointed to fill what has been referred to as the "automotive seat" on the Board, and that under the language of the statute, that member must have *training and experience* in the field of *automotive engineering or closely related fields*, the first two criteria required to meet the "public generally" exception under regulation 18707.4(a)(1) and (2) are met, as the required language is *implicit* from a reading of the statute. (Regulation 18707.4(b).)

In the *Kenny* Advice Letter, No. A-93-470, we considered the same "training and experience" language contained in Health and Safety Code section 39510 regarding a previous appointment to the ARB and the applicability of the "public generally" exception for appointed members to boards and commissions with respect to that appointment. We advised that while the statute required that the position be filled with someone who had "training and experience" in a specific field, it did not require that the member be appointed as representative of that interest, only that the appointment be based on the

⁴ In the context of this regulation, the "economic interest" referred to applies in a broad sense to the general industry or profession for which the position was created (in this case, the automotive industry) and not to the specific economic interest held by the member (NUMMI or Toyota). (See *Bennett* Advice Letter, No. A-98-239; *Dorsey, supra*, *Cline* Advice Letter, No. A-03-110; *Ennis* Advice Letter, No. A-03-180.)

expertise gained in that area, i.e, automotive engineering or a closely related field.⁵ In essence, we concluded that the statute did not require, explicitly or implicitly, that the person appointed is appointed to “represent and further” the interests of the specific interest. The person must simply have expertise in the area.

For us to reach a different conclusion here, we would have to find that the legislative history supports a conclusion that the *training and experience* in automotive engineering or closely related fields necessary to qualify for *this* position could only be acquired by those in the automotive industry, and that their appointments were necessary to represent and further the interests of the automotive industry. After reviewing the information you have provided regarding the legislative history of the statute,⁶ we see nothing implicit in considering the overall nature of the statute that would lead us to that conclusion or that would prevent someone with a background in automotive engineering or closely related fields, but who was employed in a position other than within the automotive industry, from meeting the requirements of this position.

We also did not find that the most recent amendments to regulation 18707.4, or the Commission’s consideration of possible further amendments to the regulation warrant a different analysis of regulation 18707.4(a)(1). None of the amendments adopted impacted that subdivision. Furthermore, while there was some discussion by the Commission regarding the proper standard for application of the requirement that an official “have the economic interest the member represents” under regulation 18707.4(a)(2), this again does not impact how we are to analyze the requirements under regulation 18707.4(a)(1).

Therefore, since the applicable language in the ARB statute is essentially the same as the language we examined under *Kenny, supra*, i.e. “training and experience” in an area (automotive engineering vs. law), we would be reaching totally contradictory results based solely on the field in which the expertise is required, and also basing the analysis upon where the expertise in the area is gained, were we to now conclude that the language herein meets the “public generally” exception as provided in regulation 18707.4.

While you state that the Governor’s office has indicated that the appointment was made to fill the seat under subdivision (b)(1) of Health and Safety Code section 39510, this fact alone is insufficient to conclude that an implicit finding and declaration or requirement is implicit for purposes of regulation 18707.4(b).

Accordingly, we conclude that based on the relevant circumstances taken as a whole there is no implicit finding and declaration in the statute that the criteria under regulation 18707.4(a)(1) have been established under regulation 18707.4(b). We reaffirm our position stated in the *Kenny* Advice Letter that, under the language of the ARB

⁵ In *Kenny, supra*, the appointed member was required to have training and experience in law under subdivision (b)(2) of section 39510. See also *Beautrow* Advice Letter, No. I-89-042.

⁶ In a letter dated November 22, 2004, you provided additional information regarding the legislative history of the statute in question.

statute, the member is appointed not to represent a particular segment of the public but, rather, based on the member's expertise in that field.

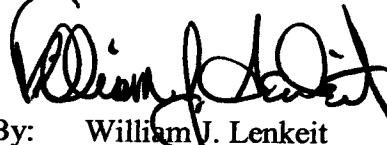
STEP 8: LEGALLY REQUIRED PARTICIPATION

You have not presented any facts indicating that this step need be analyzed.

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

Sincerely,

Luisa Menchaca
General Counsel



By: William J. Lenkeit
Counsel, Legal Division

Enclosures

WJL:jg

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