



FAIR POLITICAL PRACTICES COMMISSION

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April 7, 2005

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**Re: Your Request for Informal Assistance
Our File No. I-05-035**

Dear Mr. Hayes:

This letter is in response to your request on behalf of Yuba City Councilmember John Miller for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your question does not provide a specific situation that could create a conflict of interest, we are treating your request as one for informal assistance.²

QUESTION

Does the calculation of a significant segment of the population described in regulation 18707.5, subsections (a)(1)(A) and (b)(1), require inclusion of the number of retail customers and revenues for all five locations of a business entity that is a source of income to the councilmember when only one of the business locations is situated in the jurisdiction?

CONCLUSION

For the purposes of regulation 18707.5, only retail customers and revenues to a business entity that come from the official's jurisdiction count.

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

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed.)

FACTS

Yuba City has a population of greater than 10,000. Councilmember Miller owns ten percent or greater interest in a business entity serving retail customers from five store locations. A retail customer is planning a residential development project that may come before the council. You also state that only one retail store of the business entity is located within the jurisdiction; the four other stores are outside the jurisdiction, with the farthest located approximately 60 miles away.

ANALYSIS

Normally, in applying section 87103, the Commission employs an eight step analytical framework to assist in determining whether a public official has a disqualifying conflict of interest. (Regulation 18700(b) (1) – (b) (8).) However, the specificity of your inquiry does not require such an analysis.³

Step 7: Public Generally Exception: Your question solely concerns the applicability of a special exception to the conflict-of-interest rules. Under section 87103.5(a) a retail customer of a business entity engaged in retail sales of goods or services to the public generally is not a source of income to an official who owns a 10 percent or greater interest in the entity if the retail customers of the business entity constitute a *significant segment* of the *public generally*, and the amount of income received by the business entity from the customer is *not distinguishable* from the amount of income received from its other retail customers.

Regulation 18707.5(a)(1) provides:

“For purposes of Government Code section 87103.5(a), as to a business entity located in a jurisdiction with a population of more than 10,000 or which is located in a county with more than 350 retail businesses, the retail customers constitute a significant segment of the public generally if either of the following applies:

“(A) The retail customers of the business entity during the preceding 12 months are sufficient in number to equal 10 percent or more of the population or households of the jurisdiction; or

“(B) The retail customers of the business entity during the preceding 12 months number at least 10,000.”

³ Your facts indicate that the first six steps are clearly met. (1) You are a public official. (2) You will be making, participating in making, or using your official position to influence a decision. (3) You have an economic interest in your customers as sources of income. (4) A customer is directly involved in the decision as an applicant. (5) The applicable materiality standard is any financial effect on the customer, even a penny. (6) It is reasonably foreseeable that the decision will have a financial effect on the customer since the customer is an applicant. (Section 87103; Regulations 18700-18707.9.)

For purposes of the Act, the term "jurisdiction" means the state with respect to a state agency and, with respect to a local government agency, the region, county, city, district or other geographical area in which it has jurisdiction. (Section 82035.) Therefore, when calculating a significant segment of the population for the purposes of regulation 18707.5, you should only count the retail customers to those locations in the jurisdiction, even when some locations of the business entity are located outside the jurisdiction.

Regulation 18707.5(b)(1) further provides:

"For purposes of Government Code section 87103.5(a), as to a business entity located in a jurisdiction with a population of more than 10,000 or which is located in a county with more than 350 retail businesses, the amount of income received from a retail customer is not distinguishable from the amount of income received from its other retail customers if the amount spent by the customer in question is less than one-tenth of one percent of the gross sales revenues that the business entity earned during the 12 months prior to the time the decision is made."

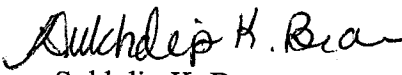
In order for this exception to apply, both requirements (the significant segment and indistinguishable income requirement) must be met. Since the first prong is not met, it is not necessary to analyze this issue. However, under the Act, sources of income do not include sources of income received from a source outside the official's jurisdiction. (Section 82030.) Therefore, to determine indistinguishable effects, only revenues of persons who are sources of income in the official's jurisdiction would be counted.

Please note that the Commission is not the finder of fact and only issues advice based on the facts as presented. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because the Commission does not act as a finder of fact in providing advice, the determination of whether this exception applies is necessarily a factual question that is ultimately for you to decide.

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

Sincerely,

Luisa Menchaca
General Counsel


By: Sukhdip K. Brar
Intern, Legal Division

Enclosure

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