



FAIR POLITICAL PRACTICES COMMISSION

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June 16, 2009

Hipolito A. Rizado, Jr.
13951 Hearthstone Lane
Chino Hills, CA 91709-4812

**Re: Your Request for Advice
Our File No. A-09-143**

Dear Mr. Rizado:

This letter is in response to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act").¹ Our advice is limited to obligations arising under the Act. We do not address the applicability, if any, of other laws such as Public Contract Code Sections 10410 or 10411.

QUESTIONS

1. Under the permanent ban, would you, as an Associate Tax Auditor at the Economic Development Department (EDD), be prohibited from appearing before EDD and their auditors regarding tax audits in which you did not participate as a public official?
2. Under the one-year ban, would you, as an Associate Tax Auditor at EDD, be prohibited from appearing before EDD and their auditors regarding tax audits?

CONCLUSIONS

1. No. Under the permanent ban, you would be prohibited from aiding, advising, representing or otherwise assisting a taxpayer regarding any tax audits or other matters *in which you participated* as a state employee. But, the ban would not prohibit you from representing a taxpayer on a different audit with EDD, or in any proceeding in which you were not involved.
2. No, the one-year ban does not apply to tax audits.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

On December 30, 2008, you left your Associate Tax Auditor position at EDD. You have asked whether the revolving door rules prohibit you from handling a case for a client that does not involve an audit in which you participated.

ANALYSIS

The Act has three main post-governmental employment restrictions on individuals who are considering leaving or who have left state service, two of which might apply to you:

- 1) A “permanent ban” barring a state employee from “switching sides” in any specific proceeding between two parties that the employee worked on while in state service (Sections 87400-87405).
- 2) A “one-year ban” prohibiting a state employee from communicating with his or her former agency to influence the agency’s administrative or legislative action (Section 87406).
- 3) The third law, Section 87407, prohibits certain state and local officials from making, participating in making, or using their official positions to influence decisions affecting persons with whom they negotiate employment, or have any arrangement concerning employment. (Section 87407; Regulation 18747.) Because you already left your state employment, this section does not apply to you.

1. Permanent Ban

Sections 87401 and 87402 (collectively, the “permanent ban”) prohibit former state administrative officials from advising or representing any person for compensation in any judicial or other proceeding *in which the official participated while in state service*. Specifically, Section 87401 provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial or quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.”

In addition, Section 87402 prohibits former state administrative officials from being paid to “aid, advise, counsel, consult or assist in representing” any other person in any proceeding in

which the official would be prohibited from appearing under Section 87401. As an Associate Tax Auditor at EDD, you are a "state administrative official" for purposes of the permanent ban. (Section 87400(b).) Therefore, the permanent ban restricts your activities in the private sector.

The permanent ban only applies to "judicial, quasi-judicial or other proceedings" in which you "personally and substantially" participated at EDD. (Section 87400(d).) A "judicial, quasi-judicial or other proceeding" is "any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency." (Section 87400(c).) Thus, the permanent ban covers tax audit proceedings.

The permanent ban applies throughout the duration of any audit proceeding in which you participated and applies not only to proceedings in which you directly participated, but also in certain cases in which the proceeding was under your supervisory authority. (See, Regulation 18741.1(a)(4), copy of recently amended regulation enclosed.) It does not, however, prohibit you from representing a taxpayer in any *new proceeding*, even though that taxpayer may have been a party to a previous proceeding in which you participated. We regard as "new" a proceeding involving different parties, or different factual or legal issues from those considered in previous proceedings. (*Grimm* Advice Letter, No. A-99-086 and *Lucas* Advice Letter, No. A-00-034.) However, what constitutes the same or different "proceeding" for purposes of these restrictions must be analyzed on a case-by-case basis. Accordingly, you may not aid, advise, represent or otherwise assist taxpayers with audits you participated in or supervised at EDD. However, in the future, you may assist or represent the company in any new proceedings with EDD, except to the extent that the one-year ban applies.

2. The One-Year Ban

The Act prohibits specified officials, for a period of one year after leaving state service, from being paid to communicate with or appear before their former agency for the purpose of influencing administrative or legislative action, or a specified action or proceeding involving a permit, license, grant, contract or the sale of goods or property. Section 87406 specifically provides that no designated employee of a state administrative agency:

"For a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property . . ." (Section 87406(d)(1).)

You pose the question whether tax audits and appeals of those audits are “administrative or legislative” actions subject to the one-year ban quoted above. Section 82002 defines “administrative action as:

“(a) ‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, Regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding”

Section 82037 defines “legislative action” as:

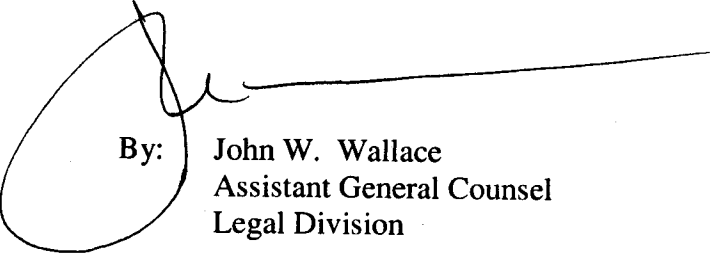
“‘Legislative action’ means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. ‘Legislative action’ also means the action of the Governor in approving or vetoing any bill.”

In the *Chan* Advice Letter, No. I-02-084, we concluded that tax audits were a “judicial, quasi-judicial or other proceeding” subject to the permanent ban provisions of Section 87041 and not subject to the one-year ban of Section 87406. Since tax audits and appeals do not qualify as legislative or administrative action (nor the issuance of a permit, license, grant, contract or sale of goods or property), they will not be covered by the one-year ban.

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

Sincerely,

Scott Hallabrin
General Counsel


By: John W. Wallace
Assistant General Counsel
Legal Division

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