



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 12, 2017

Marcus Contardo, M.D., M.P.H.
Anatomic and Clinical Pathology
P O Box 2888
Del Mar, CA 92104-5888

Re: Your Request for Informal Assistance
Our File No. I-17-008

Dear Dr. Contardo:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Because your question concerns potential future duties under the Act generally, rather than any specific decision, we are treating your request as a request for informal assistance.² Also, we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.³

You request advice concerning a seat on the board of a hospital district, a position you may consider taking in the future either by appointment or election. Your medical practice is currently under contract with the district hospital to provide, among other things, physician staffing and a departmental medical director. You also chair a medical staff peer review committee under a formal written agreement. You ask how the conflict of interest provisions of the Act would apply should you ultimately take a seat on the district board.

The primary purpose of the Act's conflict of interest provisions is to ensure that "public officials, whether elected or appointed, 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

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.

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).)

³ Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Although the Commission has jurisdiction to provide formal advice under Section 1090, we do not provide informal assistance concerning those provisions. We recommend that you review the California Attorney General's conflict of interest manual at <https://oag.ca.gov/> for a substantive overview of Section 1090 conflicts of interest. And should you decide to become a member of the district board, we would urge you to request written advice from the Commission for any governmental decisions involving your personal business with the district hospital.

them.” (Section 81001(b).) In furtherance of this goal, 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 provides that a public official has a financial interest in a decision 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 one or more of the official’s financial interests. The financial interests are:

1. Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more. (Section 87103(a).)
2. Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more. (Section 87103(b).)
3. Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. (Section 87103(c).)
4. Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
5. Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating [\$470] 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).)
6. Personal finances, meaning the financial effect of a governmental decision on the personal finances of a public official or his or her immediate family.

Foreseeability and Materiality. The standard for foreseeability differs depending on whether or not an interest is explicitly involved in the decision. An interest is explicitly involved, and the financial effect is generally presumed to be reasonably foreseeable, where the interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. (Regulation 18701(a).) If the interest is “not explicitly involved” in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material, depending on the nature of the interest.

An official is making a decision if the official “authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any

contractual agreement on behalf of his agency.” (Regulation 18704(a).) Participating in a decision occurs when the official “provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Regulation 18704(b).) Lastly, an official uses his or her position to influence a decision if the official contacts or appears before any official in his or her agency for the purpose of affecting a decision. (Regulation 18704(c).)

In addition, when a public official who holds an office specified in Section 87200 (including district hospital board members) has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of financial interest involved in the decision as well as details of the financial interest on the record of the meeting; (2) recuse himself or herself, and (3) leave the room for the duration of the discussion and/or vote on the item. (Section 87105; Regulation 18704.5.)

Public Generally and Legally Required Exceptions

The Act prohibits an official from taking part in a decision only if the effect of the decision on the official's interest is distinguishable from the effect on the “public generally.” (Section 87103.) Commonly referred to as the “public generally exception,” Regulation 18703(a) provides the following general rule:

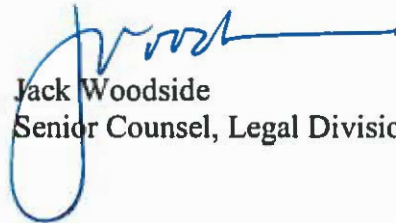
“A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.”

Additionally, in certain circumstances, a public official may be “legally required” to participate in a decision. (See Regulation 18705.)

Should you assume the position and have specific questions, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

By:  Jack Woodside
Senior Counsel, Legal Division

JW:jgl