

April 5, 1993

Manuel A. Rede
City Manager
City of Coachella
1515 Sixth Street
Coachella, CA 92236

Re: Your Request for Informal Assistance

Our File No. I-93-023

Dear Mr. Rede:

This is in response to your letter requesting assistance on behalf of Coachella City Councilmember Juan De Lara, regarding the councilmember's responsibilities under the conflict-of-interest provisions of the Political Reform Act. Since your advice request does not refer to a specific governmental decision, but instead seeks general guidance, we are treating your request as one for informal assistance.

Please note, as we discussed in our telephone conversation of March 29, 1993, other laws may apply to your facts. The Commission does not have jurisdiction to advise on these other provisions of law. The Commission's jurisdiction is limited to the provisions of the Act. It would be advisable to contact the Attorney General's Office with respect to other provisions of law that might be applicable.

QUESTION

Does the Act prohibit Councilmember De Lara from accepting employment with a brokerage firm, Merrill-Lynch, that does business in the jurisdiction and has contracted with the city in the past to issue bonds?

CONCLUSION

The Act does not prohibit the councilmember from accepting employment with Merrill-Lynch. However, the conflict-of-interest provisions of the Act prohibit the councilmember from making, participating in making, or otherwise using his official position to influence a governmental decision which will materially affect any economic interest, including sources of income such as Merrill-Lynch and clients who will have paid the councilmember commission income.

DISCUSSION

You have asked whether the Act prohibits Councilmember De Lara from accepting employment with a brokerage firm, Merrill-Lynch, that does business in the jurisdiction. Merrill-Lynch has also been involved in the city's issuance of bonds, and may be solicited to participate in such activity in the future.

Generally, the Act does not prohibit the private conduct of a public official. Thus, the Act would not prohibit the councilmember's employment with Merrill-Lynch. However, the conflict-of-interest provisions of the Act do prohibit a public official from participating in a decision that will have a financial effect on the official's economic interests.

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using the official's position to influence a governmental decision in which the official has a financial interest. A "public official" is defined in Section 82048 and Regulation 18700 as every natural person who is a member, officer, employee, or consultant of a state or local government agency. This definition would include a member of the Coachella City Council.

Section 87103 specifies 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 the effect on the public generally, on the official or a member of the official's immediate family or on:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) 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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Assuming the councilmember accepts a position with Merrill-Lynch, Merrill-Lynch would become an economic interest of the councilmember by virtue of income received (Section 87103(c)) and his position with Merrill-Lynch. (Section 87103(d).)

Additionally, if the councilmember is a commissioned employee of Merrill-Lynch, generally, commission income is treated as income derived from all the participants in the transaction. For example, Regulation 18704.3 (copy enclosed) provides:

(a) This section contains the disclosure and disqualification requirements for any public official who receives commission income for services rendered as an insurance broker or agent, a real estate broker or agent, a travel agent or salesperson, a stockbroker or a retail or wholesale salesperson.

(b) "Commission income" means gross payments received as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. Commission income is received when it is paid or credited.

(c) The sources of commission income in a specific sale or similar transaction include for each of the following:

* * *

(5) A stockbroker:

(A) The brokerage business entity through which the broker conducts business; and

(B) The person who trades the stocks, bonds, securities or other investments through the stockbroker.

* * *

(d) For purposes of determining whether disqualification is required under the provisions of Sections 87100 and 87103(c), the full gross value of any commission income for a specific sale or similar transaction shall be attributed to each source of income in that sale or transaction.

Consequently, if any person or business has been a source of income to the councilmember of \$250 or more within the 12 months prior to a decision of the city council, they are an economic interest as set forth in Section 87103 and the councilmember may not participate in any decision that will reasonably foreseeably have a material financial effect on that person or business.

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

In addition, the foreseeable effect on a source of income must also be material to require disqualification. The Commission has adopted differing guidelines to determine whether an effect is material, depending on the specific circumstances of each decision. For example, where a source of income is directly before the city council, as an applicant or the subject of the decision, Regulation 18702.1(a) provides that the effect of the decision on a source of income is deemed material and disqualification is required. (Combs Advice Letter, No. A-89-177.)

A source of income is directly before the city council when the source initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of, the proceeding. A person or business entity 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 or business entity. (Regulation 18702.1(b).) This would apply to decisions affecting contracts with the city that Merrill-Lynch has bid on.

Where the source of income is not directly before the city council, but may be indirectly affected, Regulations 18702.2 and 18702.6 (copies enclosed) apply. For example, Regulation 18702.2 would provide for a relatively small business entity, the indirect effect of a decision is material where:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The 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 \$2,500 or more; or

(3) The decision will result in the increase or decrease in the value of assets or liabilities of \$10,000 or more.

Finally, where a source of income is a person and not directly before the city council, Regulation 18702.6 provides:

The effect of a decision is material as to an individual who is a source of income or gifts to an official if any of the following applies:

(a) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

(b) The decision will affect the individual's real property interest in a manner that is considered material under Section 18702.3 or Section 18702.4.

Since we have not been provided with facts relating to a specific decision, we have enclosed some general materials for your information.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.\

Sincerely,

John W. Wallace
Counsel, Legal Division