



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 10, 2019

Bruce Geller, CFA
Chief Executive Officer
DGHM, LLC
565 Fifth Avenue, Suite 2101
New York, NY 10017

Re: Your Request for Advice
Our File No. A-19-041

Dear Mr. Geller:

This letter responds to your request for advice regarding the conflict of interest code provisions of the Political Reform Act (the Act).¹ Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

QUESTION

Is DGHM required to submit Statements of Economic Interests (Form 700) as a consultant subject to full disclosure as directed by CalHR considering the scope of the contract work DGHM performs for CalHR?

CONCLUSION

Yes. As the manager of a small-cap equity investment portfolio for the State's Savings Plus Program, DGHM's primary manager of the investment fund must file a Form 700 as a consultant subject to full disclosure as directed by CalHR.

FACTS AS PRESENTED BY REQUESTER

You are the CEO of Dalton, Greiner, Hartman, Maher and Co., LLC (DGHM or you), a New York-based investment management firm that manages \$1.7 billion in assets, primarily for institutional clients (e.g., corporate and public pension plans, endowments, foundations, and family offices) throughout the United States.

DGHM manages a small-cap equity investment portfolio for the Savings Plus Program of the California Department of Human Resources (CalHR). Several years ago, you were hired in a

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.

competitive bidding process and disclosed in writing throughout that process that: you had no conflicts of interest with anyone in the State of California; you had not made any political contributions to anyone in the State of California; and you had not employed a lobbyist firm or third-party marketing firm in the process of obtaining your contract with CalHR.

Your current contract with CalHR is for a five-year term from June 1, 2015, through May 31, 2020. (Contract at p. 1.) The contract states in relevant part:

All parties understand that this Agreement and its exhibits are established to cover certain terms and conditions regarding Savings Plus Program assets invested by the Department in the Contractor's DGHM V2000 SmallCap Value investment strategy through a separate account ("the Account").

(*Id.* at Exhibit A, p. 1.)

WHEREAS, the Department desires to utilize the Account as an authorized investment strategy of the Plans in the Plans' Small Cap Fund investment option, in which State employees (hereinafter referred to as "Participants") may elect to invest[.]

(*Ibid.*) DGHM is the Account's investment advisor. (*Id.* at Exhibit A, p. 1.)

None of your employees are elected officials in any state or live in the state of California. Your contract with CalHR is an investment management agreement. In your contract with CalHR, you are defined as a contractor and perform investment management services on a specific small-cap value equity investment mandate. This mandate is limited in scope, likely less than 2% of the total assets in the CalHR plan. You have no other responsibilities that relate to a public official's role with broader responsibilities. Under the contract, DGHM has no authority to deviate from the contract guidelines without CalHR's written approval, and CalHR retains full authority to adjust your investment guidelines.

Recently, you received a notice from CalHR to file a Form 700. CalHR denied your request for reconsideration, but suggested you make the request for formal advice at issue here.

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).) Consequently, every agency must adopt and promulgate a conflict of interest code. (Section 87300.)

A conflict of interest code must be formulated at the most decentralized level possible (Section 87301)²; enumerate the positions within the agency, including consultant positions, that involve making or participation in the making of decisions which may have a reasonably

² As the determination of whether an individual is a public official subject to disclosure is best made by the employing agency, we generally defer to the agency's determination unless there is reason to suggest that the determination is incorrect.

foreseeable material financial effect on any financial interest (Section 87302(a)); and set forth the specific types of investments, business positions, real property interests, or sources of income which are reportable for each enumerated position (*ibid*).

Government Code Section 87200 further provides that, among other people, “other public officials who manage public investments” must file statements of economic interests. Known as statutory filers, public officials subject to Section 87200 are subject to full disclosure under the Act. (See Sections 87206 through 87209.)

A. Public Official.

The term “public official” includes “every member, officer, employee or *consultant* of a state or local government agency.” (Section 82048 [emphasis added]; and Regulation 18700.) The issue here is whether you, as contracted investment manager for CalHR, are a “consultant” under the Act. Regulation 18700.3(a)(2) defines a “consultant” to include an individual who, pursuant to a contract with an agency, does the following:

Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18704(a) and (b) or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Section 87302.

The existence of an ongoing relationship between the contractor and the public agency is significant. We have previously found that a contractor serves in a staff capacity when the contract calls for work to be performed “over more than one year” on “high level” projects (*Ennis* Advice Letter, No. A-15-006; see also *Ferber* Advice Letter, No. A-98-118). We have further advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438); where the relationship between the contractor and the agency would last only 12-16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239); and where, under a multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. I-95-296; *Parry* Advice Letter, No. I-95-064.)

Under the facts provided, DGHM is not providing CalHR with temporary or limited services. Rather, the contractual relationship is ongoing. DGHM’s contractual relationship with CalHR began years ago, with a competitive bid for investment management services that continues today with a five-year contract that expires in 2020.

In addition to serving in a staff capacity, a “consultant” must “participate in making a governmental decision, which includes a public official’s authorization or direction of any action by an agency.” (See 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).) “Significant intervening substantive review” has been interpreted to require more than the mere review of the recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the official. (*Greenwold* Advice Letter, No. I-90-349.)

In this case, CalHR utilizes DGHM's investment portfolio as an authorized investment adviser in the State employees' Small Cap Fund investment option. (Contract at Exhibit A, p. 1.) As an advisor of an investment fund option for State employee investors in CalHR's Savings Plus Program, DGHM participates in making governmental decisions under Regulation 18700.3(a)(2). Accordingly, we find that DGHM's primary manager of the investment fund is a consultant and public official under the Act.

B. Managing a Public Investment.

Under Regulation 18700.3(b)(1), "Others public officials who manage public investments" is defined to include:

(B) High-level officers and employees of public agencies who exercise primary responsibility for the management of public investments such as chief or principal investment officers or chief financial managers....

(C) Individuals who, pursuant to a contract with a state or local government agency, perform the same or substantially all the same functions that would otherwise be performed by the public officials described in subdivision (b)(1)(B).

"Public investments" is defined as "the investment of public moneys in real estate, securities, or other economic interest for the production of revenue or other financial return." (Regulation 18700.3(c).) Moreover, "public money is defined as "all money belonging to, received by, or held by, the state...." (Regulation 18700(d).)

In this case, the money held in the Savings Plus Programs is received by and held by the State and DGHM has been contracted to provide the ongoing and primary management of the investment of these public moneys. Accordingly, DGHM's primary manager of the investment fund is a public official who manages a public investment and a statutory filer under Section 87200 subject to full disclosure. Based on the facts provided, the primary manager of the investment fund must file Statements of Economic Interests as directed by CalHR.

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

Sincerely,

Dave Bainbridge
General Counsel

By:  John M. Feser Jr.
Senior Counsel, Legal Division