



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 10, 2025

Stephanie Haffner
Administrative Law Judge
General Jurisdiction Division - Oakland
Office of Administrative Hearings
1515 Clay Street, Suite 206
Oakland CA 94612

Re: Your Request for Informal Assistance
Our File No. I-25-007

Dear Ms. Haffner:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that 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. Your request for advice is general in nature and does not specifically identify a governmental decision. Accordingly, we are treating your request as one for informal assistance.²

Also, 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. Are you disqualified from participating in Office of Administrative Hearings decisions due to your stock ownership in either Prudential Financial, an insurance company, or your investment interest in the Real Estate Select Sector SPDR Fund, an exchange-traded fund (“ETF”)

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 18104 through 18998 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).)

focused on the real estate sector, where each investment is valued at less than \$25,000 and is an interest of less one percent of the entity's shares?

2. Are you disqualified from participating in Office of Administrative Hearings decisions due to your stock ownership in Lincoln National, an insurance company, where your investment is valued at greater than \$25,000?

CONCLUSIONS

1. Generally, you meet the small shareholder exception for your investment interest in Prudential Financial and the Real Estate Select Sector SPDR Fund. Therefore, you may not take part in any decision involving Prudential Financial or the Real Estate Select Sector SPDR Fund (or any underlying holding as described below) if the decision may result in any of the following: (1) a change in the entity's annual gross revenues or the value of its assets or liabilities in an amount equal to or more than \$1,000,000 or five percent of its annual gross revenues or (2) the entity incurring or avoiding expenses in an amount equal to \$250,000 or one percent of its annual gross revenues. (Regulation 18702.1(a)(2), (3).) Additionally, you may not take part in the decision if you know or have reason to know that the entity has property affected by the decision, and there is clear and convincing evidence that the decision will have a substantial effect on the property. (Regulation 18702.1(a)(4)(B).)

2. As a general matter, you may not take part in a decision involving Lincoln National if the decision would meet any of the above-noted materiality standards in Regulations 18702.1(a)(2), (3), and (4)(B) as to its financial effect on Lincoln National. Additionally, because the small shareholder exception does not apply to this investment interest, you may not take part in the decision if Lincoln National is a named party in or the subject of the decisions as described below in Regulation 18701(a)(1), or you know or have reason to know that Lincoln National has an interest in real property and the property is a named party or the subject of the decision as described below in Regulation 18702.1(a)(4)(A).

FACTS AS PRESENTED BY REQUESTER

You recently joined the Department of General Services, Office of Administrative Hearings, as an Administrative Law Judge. The position is designated as reporting category 1 (all interests). The office makes proposed decisions for the Department of Insurance (among other agencies) concerning individuals' fitness to be licensed insurance salespersons (among other licenses). The office also makes proposed decisions for the Department of Real Estate concerning individuals' fitness to be licensed real estate brokers and real estate salespersons.

If a state agency or department decides that a person should not be licensed, the individual may request a due process hearing. Your role is to provide due process for the individual holding or seeking the license by conducting an administrative hearing, taking evidence, and writing a proposed decision. An insurance company could potentially be involved in an individual's fitness to be a licensed insurance salesperson proceeding. A license application would provide a list of who is working with the applicant or licensee, and the company or companies for which the applicant or licensee has sold policies could potentially be part of the evidence concerning the individual's licensing issue. When making a decision concerning an individual's fitness to be a licensed real

estate broker or salesperson, the decision does not necessarily solely involve the individual broker or salesperson. The Department of Real Estate sometimes brings actions against brokerages and developers, and those actions could come before you.

Ultimately, the state agency or department decides whether to adopt the proposed decision. If the individual seeking the license disagrees with the outcome, they may file a petition for writ of mandate in superior court. The court resolution would turn on the record created in the due process hearing, including the written proposed decision.

You hold individual stock in two insurance companies, Lincoln National and Prudential Financial. The holdings in Lincoln National company exceed \$25,000. The holdings in Prudential Financial company are valued at less than \$25,000. Both interests are less than one percent of the company's shares. You reported the stocks on your assuming office Statement of Economic Interests ("Form 700").

You also hold shares in "Real Estate Select Sector SPDR Fund," an ETF that focuses on the real estate sector, which you reported on your Form 700 filed upon hire. The ETF is not affiliated with any particular brokerage firm. You do not have any influence over the individual holdings within the ETF. More than 93% of the holdings are in various real estate investment trusts, "REITs"³ (property holdings), with a small portion (less than 7 percent) in "real estate management & development." It appears to you that the ETF may indirectly use the services of brokers and real estate salespersons by virtue of attenuated property holdings. The ETF also focuses on property ownership and development rather than sales and marketing. The ETF is valued at less than \$25,000.

It is possible that a property holding held in the ETF would be involved in a Department of Real Estate decision, but you understand that it would be very difficult to discover that any particular property is involved in a decision. The ETF consists of 29 separate REITs. Each REIT holds interest in specific properties unknown to you, absent extensive research. For example, one of the 29 REITs held in the ETF as of June 2024 currently holds 1,350 properties, according to its website. You further note that approximately 6 percent of the ETF consists of interests in two commercial real estate groups. Brokers, developers, or properties affiliated with those groups may be involved in a decision that comes before you, and you are uncertain whether this information would become known in the course of a decision. You calculate that your stake in each of the two commercial real estate groups whose shares are held in the ETF is approximately between \$400 and \$475.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using their official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).)

³ A REIT is a company that buys real estate properties and uses the rental cash flow to provide a dividend to its investors. (See [Investopedia.com/terms/r/reit_etf.asp](https://www.investopedia.com/terms/r/reit_etf.asp) as viewed 1/24/25.)

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Interests from which a conflict of interest may arise are defined in Section 87103.

Investment Interest in a Business Entity

Under Section 87103(a), an official has a financial interest in any business entity in which the public official has a direct or indirect investment worth \$2,000 or more. An “investment” means any financial interest in or security issued by a business entity, including, but not limited to, common stock, preferred stock, rights, warrants, options, debt instruments, and any partnership or other ownership interest owned directly, or indirectly, or beneficially by the public official. (Section 82034.) Regulation 18237 states that an “investment” does not include an ETF that is substantially similar to a diversified mutual fund registered with the Security and Exchange Commission and, among other requirements, does not have a stated policy of concentrating its holdings in the same industry or business.

You have a business entity interest in the two insurance companies due to your stock ownership and in your ETF due to its concentration in the real estate sector. You additionally have a business entity interest in any individual underlying business entity investment such as an REIT held in the ETF, if the value of the investment reaches \$ 2,000 or more. (See *Williams* Advice Letter, No. I-19-237.)⁴ No particular decision is before you at this time. You have identified that decisions may come before you regarding an individual’s fitness to be a licensed insurance salesperson, which may involve an insurance company. You have also identified that you could have decisions before you regarding an individual’s fitness to be a licensed real estate broker or salesperson that does not solely involve the individual. You may also have Department of Real Estate actions against brokerages and developers or properties affiliated with those groups come before you; however, there is no further information about this type of decision and how it may impact the parties or their interest in a real property parcel. We provide the following advice as general guidelines and recommend that you consider these guidelines and seek further advice, as needed, on a case-by-case basis.

Foreseeability & Materiality

To determine whether you have a disqualifying financial interest in a decision, we examine whether it is reasonably foreseeable that a decision would have a material financial effect on any of your noted investment interests. Generally, a financial effect is presumed reasonably foreseeable if the interest is explicitly involved as a named party in, or the subject of, a governmental decision before the official or the official’s agency. (Regulation 18701(a).) An interest is the “subject of a decision” if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlements to, or contract with, the financial interest and includes any decision affecting a real property financial interest as set forth in Regulation 18702.2(a)(1)-(6).⁵ If

⁴ Individual holdings, such as stock held within a retirement fund account, are reportable if the value of the holding is \$2,000 or more. Please seek additional advice if there is any indication that a decision may have a financial effect on a business entity interest that is a part of the ETF holdings.

⁵ Regulation 18702.2(a)(1)-(6) addresses decisions that involve any of the following: a development plan criteria that apply to the parcel; determine a parcel’s zoning; determine a parcel’s tax, fees, or assessments; authorizes

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. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(6).)

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Relevant to your investment interests, Regulation 18702.1 provides a list of circumstances under which a reasonably foreseeable effect on a business interest is material. Pertinent to the facts provided regarding a licensure issue, the foreseeable effect of a governmental decision on a business entity in which an official has a financial interest is material whenever the entity is explicitly involved as a named party in, or the subject of, the decision, including any decision in which the entity:

(A) Initiates the proceeding by filing an application, claim, appeal, or other request for action concerning the entity with the official's agency;

(E) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the agency;

(F) Is the subject of any inspection, action, or proceeding under the regulatory authority of the agency; or

(G) Is subject to an action taken by the agency that is directed at the entity.

(Regulation 18702.1(a)(1).)

Where the business entity is not a named party or the subject of the decision, the financial effect upon a business entity in which an official has a financial interest is material if the decision:

- May result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or more than \$1 million or 5 percent of the entity's gross revenues and the increase or decrease is at least \$10,000. (Regulation 18702.1(a)(2).)
- May cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than \$250,000 or 1 percent of the entity's annual gross revenues and the change in expenses is at least \$ 2,500. (Regulation 18702.1(a)(3).)

We note that the licensure types of proceedings described as coming before you do not appear to involve decisions about real property. For matters that may involve real property, the financial effect upon the business entity with a real property interest is material if the official knows

the parcel's sale, purchase or lease; involve the issuance, denial or revocation of a license, permit or other land use entitlement; or involve construction or improvements relating to the parcel.

or has reason to know that the entity has an interest in real property and either of the following applies:

- The property is a named party in or the subject of the decision under Regulations 18701(a) and 18702.2(a)(1) through (6); (Regulation 18702.1(a)(4)(A)) or
- There is clear and convincing evidence that the decision would have a substantial effect on the property. (Regulation 18702.1(a)(4)(B).)

Business Entity: Small Shareholder Exception

Regulation 18702.1(b) provides a “small shareholder exception” when an official has an investment interest in a business entity and the investment interest is valued at \$25,000 or less, and is less than one percent of the entity’s shares. Under this exception, the official has a disqualifying interest only if the decision’s effect on the official’s investment interest in the entity would be material under the regulation’s standards applicable to a decision’s effect on a business not explicitly involved in the decision, i.e., under the above-noted standards in Regulation 18702.1(a)(2)-(3) concerning gross revenues or expenses, or if there is clear and convincing evidence that the decision would have a substantial effect on the business entity’s real property under above-noted Regulation 18702.1(a)(4)(B).

Investment Interest: Prudential Financial & Real Estate Select Sector SPDR Fund

You have an investment interest in Prudential Financial and in the Real Estate Selector Sector SPDR Fund that meet the requirements for the small shareholder exception. Under the exception, you are not prohibited from taking part in a decision merely because the investment is a named party or subject of the decision. You are prohibited from taking part in a decision with a financial effect on the interest only to the extent it is reasonably foreseeable the decision would impact the business entity’s gross revenues, value of assets or liabilities, or cause the entity to incur or avoid expenses at the thresholds set forth above in Regulation 18702.1(a)(2) or (3) or if there is clear and convincing evidence that the decision would have a substantial effect on the business entity’s real property under above-noted Regulation 18702.1(a)(4)(B). Whether an official knows or has reason to know that an entity has an interest in real property requires a case-by-case determination. However, as noted above, a decision regarding the license of an insurance salesperson, a real estate salesperson, or a broker generally would not involve a business entity’s real property interests.

Investment Interest: Lincoln National

The small shareholder exception does not apply to any decision involving Lincoln National, as your stock is valued above \$25,000. Therefore, it is reasonably foreseeable that a decision will have a material financial effect on Lincoln National, and you may not take part in the decision if Lincoln National is the named party or subject of the decision. (Regulation 18702.1(a)(1).) You are also prohibited from taking part in the decision if it is reasonably foreseeable the decision would meet any of the materiality thresholds in Regulations 18701.1(a)(2) through (4), discussed in the preceding paragraphs.

We note that based on the facts provided it is not readily apparent that a decision regarding the licensing of an individual insurance salesperson or real estate salesperson or broker would explicitly involve Lincoln National or have a foreseeable financial effect on any of the identified investments interests in business entities or their real property reaching the applicable materiality thresholds above. However, we cannot reach a determinative conclusion absent the identification of a specific decision before you and we must caution that each decision involving Prudential Financial, Lincoln National, or the Real Estate Selector Sector SPDR Fund must be evaluated before you participate in any manner. We recommend that you seek further advice as needed in regard to specific decisions before you so that you are able to provide a full description of the decision, the parties involved, and your potential financial interests in the decision.

If you have other questions on this matter, please contact me at KHarrison@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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