



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

EMI GUSUKUMA
CHAIRPERSON

November 10, 2005

WAUKEEN Q. MCCOY
VICE-CHAIRPERSON

Gregory E. Swanson, Treasurer
Bank of America California PAC
600 Peachtree Street, Suite 300
Atlanta, Georgia 30308

MICHELE ANGLADE
COMMISSIONER

EILEEN HANSEN
COMMISSIONER

Dear Mr. Swanson:

JOE LYNN
COMMISSIONER

You have requested a formal opinion letter from the Ethics Commission regarding the application of Campaign and Governmental Conduct Code ("C&GC Code") sections 1.114(d) and 1.126 to the Bank of America ("Bank") and the Bank of America California Political Action Committee ("Bank PAC").

JOHN ST. CROIX
EXECUTIVE DIRECTOR

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *S.F. Charter Section C3.699-12*. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. *See id.* Informal advice does not provide similar protection. *See id.*

Because you seek advice regarding specific actions that the Bank PAC may take in the future, the Commission is treating your question as a request for a formal opinion.

Question

You asked if the affiliated entity rule in section 1.114(d) of the C&GC Code extends the contribution ban imposed by section 1.126 of the C&GC Code to the political action committee of a bank that is forbidden by federal law from making campaign contributions.

Summary of Advice

The prohibition in section 1.126 applies to any person who contracts with the City and County of San Francisco, the San Francisco Unified School District and the San Francisco Community College District. Because the political action committee is created and sponsored by the Bank of America, it is deemed a person who contracts with the City for purposes of section 1.126. Accordingly, the Bank PAC may not make contributions to any City officer who approves the Bank's contracts or to any

candidate for such office at any time from the commencement of negotiations for a contract until either the termination of such negotiations or three months have elapsed from the date the contract is approved. Because section 1.126 applies directly to the Bank PAC, there is no need to determine whether the affiliated entity rule in section 1.114(d) applies.

Brief Statement of Facts

You informed us that the Bank is a national bank that has extensive business relationships with the City and County of San Francisco and that section 1.126 of the Campaign and Governmental Conduct Code applies to the Bank as a contractor doing business with the City. As a national bank, the Bank is prohibited by federal law from making campaign contributions in connection with any election to any political office, including local, state or federal offices. 2 U.S.C § 441b; 11 C.F.R. § 114.2.

The Bank has established and administers the Bank PAC. The Bank PAC, which is registered as a sponsored general purpose committee with the California Secretary of State, makes contributions to state and local candidates in California.¹ The Bank PAC has a steering committee of seven voting members including representatives from key geographic markets of California and lines of businesses. You do not identify who these committee members are. In a telephone conversation with staff, you stated that “key geographic markets” includes areas such as San Diego and the Central Valley, and that “lines of businesses” includes consumer, commercial or governmental banking. You state that the steering committee “is governed by bylaws and written policies and procedures to ensure compliance with the laws and promote consistency in making political contributions across the company.”

You also provided information about the process that the Bank PAC has established to consider and approve contributions to candidates for public office in local jurisdictions including the City and County of San Francisco. The relevant facts regarding this process are as follows. Each local race is thoroughly reviewed by the local leadership team, which consists of executive employees of the Bank in the local market. The local leadership team then makes a decision regarding which candidates, if any, to support with a contribution. The leadership team then submits its recommendation to the Bank PAC's administrator, who automatically approves requests up to \$1,000. Requests for contributions over \$1,000 are presented to the steering committee for approval.

Brief Statement of Applicable Law

¹ A sponsored committee is a committee other than a candidate controlled committee with one or more sponsors. A person sponsors a committee if any of the following applies: (1) the committee receives 80 percent or more of its contributions from the person or its members, officers, employees,, or shareholders; (2) the person collects contributions for the committee by use of payroll deductions or dues from its members, officer, or employees; (3) the person alone or in combination with other organizations, provides all or nearly all of the administrative services for the committee; or (4) the person, alone or in combination with other organizations, sets the polices for soliciting contributions or making expenditures of committee funds. See Cal. Gov't Code § 82048.7.

A. *The Federal Election Campaign Act*

The Federal Election Campaign Act (FECA) prohibits national banks from using their general treasury funds to make contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b(a). National banks are prohibited from making any contribution in connection with any election to political office, including local, state and federal offices. 11 C.F.R § 114.2. However, a national bank may set up a separate segregated fund (“SSF”), which is also known as a political action committee, to make contributions to and expenditures on behalf of candidates and other committees. *See* 2 U.S.C. § 441b(b)(2)(C). An organization that establishes and administers an SSF may solicit contributions only from individuals associated with the connected or sponsoring organization. *Id.* at § 441b(b)(4).

B. *Section 1.126 – Contractor Contribution Limits*

CFRO limits the amount of campaign contributions a person may donate to candidates for City elective office. *See, e.g.*, C&GC Code § 1.114(a) (imposing a limit of \$500 per person). Among these limits is a prohibition on making a campaign contribution to a City elective officer, or candidate for that office, by any “person who contracts with” the City, the Community College District, or the Unified School District, where the elective officer, or the board on which the officer sits, approves the contract. The ban applies during the negotiation of the contracts and until either the termination of negotiations or three months after the contract is approved. *See* C&GC Code § 1.126.²

C. *Section 1.114(d) Aggregation of Affiliated Entity Contributions*

Section 1.114(d) provides that for the purposes of the contribution limits, the contributions of an entity whose contributions are directed and controlled by any individual “shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual.” C&GC Code § 1.114(d).

Discussion

² Section 1.126 provides, “No person who contracts with the City and County of San Francisco, the San Francisco Unified School District or the San Francisco Community College District, for the rendition of personal services, for the furnishing of any material, supplies or equipment to the City, the Unified School District or the Community College District, or for selling or leasing any land or building to or from the City, the Unified School District or the Community College District, whenever such transaction would require approval by a City elective officer, or the board on which that City elective officer serves, shall make any contribution to such an officer, or candidate for such an office, or committee controlled by such officer or candidate at any time from the commencement of negotiations for such contract until (1) the termination of negotiations for such contract; or (2) three months have elapsed from the date the contract is approved by the City elective officer, or the board on which that City elective officer serves.” Ethics Commission Regulation 1.126-1 defines the commencement, completion and termination of negotiations for the purposes of this section.

You inquire whether the affiliated entity rule in section 1.114(d) applies to the Bank PAC to prohibit it from making campaign contributions because the Bank contracts with the City. You cite to the Ethics Commission Lazarus opinion letter (July 2004), in which the Commission opined that the affiliated entity rule did not apply to officers or directors of the San Francisco Museum and Historical Society (“SFMHS”), which was negotiating a contract with the City, because section 1.126 had no effect on the SFMHS itself, which was barred from making campaign contributions under federal law. You believe that based on the Commission’s Lazarus advice letter, the affiliated entity rule does not apply to the PAC, because like the SFMHS, the Bank itself is barred from making campaign contributions under federal law. For the reasons discussed below, we conclude that the Lazarus advice letter does not apply to the Bank PAC and that section 1.126 bars the PAC from making campaign contributions to elective officers, or candidates for such office, who approve City contracts with the Bank.

A. *The Contractor Ban*

Because federal law already prohibits the Bank from making any campaign contributions, section 1.126 has no actual effect on the Bank itself. *See* 2 U.S.C. § 441b(a). Thus, your question is whether section 1.126 applies to the Bank PAC, which is not prohibited by federal law from making campaign contributions. As explained above, section 1.126 places contribution limits on any "person who contracts" with the City, the Unified School District and the Community College District for certain periods of time. Local law does not define the phrase "person who contracts." Thus, we must interpret the meaning of this phrase to answer your question.

This inquiry presents a question of statutory interpretation. In any case involving statutory interpretation, the fundamental task is to determine the legislative intent in order to effectuate the law's purpose. *See White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572. In determining the legislative intent, we must first look first to the words of the ordinance themselves, "giving to the language its usual, ordinary import and according significance, if possible to every word, phrase and sentence in pursuance of the legislative purpose." *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-1387. But the literal meaning of an ordinance must be in accord with the ordinance's purpose. *See Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798. Accordingly, we must consider "the object to be achieved and the evil to be prevented by the legislation." *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.

Although local law does not define the phrase "person who contracts," it does define the term "person" to include any "individual, partnership, corporation, association, firm, committee, club or other organization or group of persons, however organized." *See* S.F. C&GC Code § 1.104(m). Relying upon this definition, it is clear that the Bank is a person who contracts with the City and is therefore subject to the limits in Section 1.126. But your inquiry requires us to answer whether the Bank PAC is also deemed a person who contracts with the City under Section 1.126.³ To answer this question we must look to the purposes of the contractor ban and what it means to be a “person who contracts with the City.”

³ In the Lazarus letter, we relied upon the definition of person to determine that SFMHS was subject to the contribution limit in section 1.126. But, unlike your inquiry, in the Lazarus letter we were not asked and did not

The contractor ban was adopted as part of Proposition N, a referendum petition placed on the ballot in the November 7, 1995 election. Among other things, Proposition N established voluntary limits on the amount candidates for City elective offices may spend on election campaigns; in addition, the proposition placed new restrictions on campaign contributions “by people negotiating to do business with the City. These people could not make campaign contributions to any elected officer involved in approving the contract, or any candidate for such office.” *See* Ballot Simplification Committee Digest, Voter Information Pamphlet for November 7, 1995 Consolidated Municipal Election (“VIP”). The purpose was “to eliminate or reduce the appearance or reality that ... contributors may exert undue influence over elected officials,” and “restore public trust in governmental ... institutions.” Text of Proposed Ordinance, Proposition N, at p. 196, now S.F. C&GC Code § 1.100(b)(7) and (8). Thus, it appears that the provision was designed to ensure that the award of a contract is based on merit and is not influenced by the amount a contractor can contribute to a City elective officer or candidate.

The Bank PAC acts as a surrogate for the Bank in making contributions to candidates, and does for the Bank indirectly what the Bank cannot do directly. The Bank PAC complies with bylaws, written policies and procedures designed to ensure that there is “consistency in making political contributions across the company.”⁴ The Bank PAC can only accept contributions from persons affiliated with the Bank, and under state and local law, the Bank is deemed the sponsor of the Bank PAC. Thus, contributions by the Bank PAC are assumed to be connected to the Bank and to further policies and candidates aligned with the Bank's interests. Finally, all decisions related to contributions made by the Bank PAC are made by Bank employees. In fact, under the Bank PAC's procedures, decisions regarding contributions are made by a local leadership team, which includes Bank executives from the San Francisco market.⁵ Indeed, you informed staff that these executives, who serve as the management leaders of the Bank's lines of business, may very well be the same persons with whom City officers and employees interact when negotiating or administering contracts. Under these circumstances, we believe that the phrase “person who contracts” in section 1.126 includes a PAC of the corporation that formed the PAC. Thus, when the Bank is engaged in negotiations for a contract with the City, the Unified School District or the Community College Board, section 1.126 prohibits the Bank PAC from making contributions to an officer or candidate for such office that must approve the contract. This advice is consistent with the contractor ban's purpose in ensuring that the award of contracts is not influenced by a contractor's campaign contribution to a City elective officer or candidate who is in a position to approve the contract.

B. The Affiliated Entity Rule

Because we find that section 1.126 applies directly to ban the Bank PAC from making campaign contributions, there is no need to determine whether the affiliated entity rule applies. The facts

need to answer whether any person other than SFMHS was deemed a “person who contracts” for the purposes of section 1.126. Your inquiry requires us to answer this question.

⁴ You informed staff that “the company” refers to the Bank of America Corporation.

⁵ The maximum amount a person may contribute to a candidate for City elective office is \$500. *See* C&GC Code § 1.114. You informed us that the local leadership team is authorized to request contributions of up to \$1,000 without needing approval of the Bank PAC's steering committee. Thus, based on these facts, the local leadership team is the ultimate decision maker with regard to contributions to candidates for City elective office.

presented in the Lazarus letter are distinguishable. There, the question was whether section 1.126 and the affiliated entity rule prohibited individual officers and directors of a nonprofit corporation from making campaign contributions in their individual capacities to a City officer, or candidate for such an office, who approved a contract with the nonprofit. The individual officers and directors could not be viewed as a person under section 1.126 because in their individual capacities they could not be said individually to stand in the shoes of the nonprofit. We then looked to determine whether the affiliated entity rule would preclude such an individual from contributing to anyone to whom the contractor could not contribute. We concluded that because the nonprofit could not make a campaign contribution, the affiliated entity rule by its terms did not apply because it applies only to someone who directs and controls the campaign contributions of the entity.

I hope you find this letter responsive to your inquiry. Please contact me at (415) 581-2300 if you have any additional questions.

Sincerely,

John St. Croix
Executive Director

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