



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

July 13, 2010

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EXECUTIVE DIRECTOR

Michael Kim
Managing Partner
Cendana Capital
One Maritime Plaza, 3rd Floor
San Francisco, CA 94111

Dear Mr. Kim:

You asked for an informal written opinion from the Ethics Commission about whether your communications with the San Francisco Employees Retirement System (“SFERS”) on behalf of your firm, Cendana Capital (“Cendana”), would violate the conflict of interest laws of the City and County of San Francisco.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *See* S.F. Charter § 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 have requested informal advice, this letter does not provide you or any other person immunity under Charter section C3.699-12. Nothing in this letter should be construed to evaluate any conduct that has already taken place.

Statement of Facts

You provided the following information. You were appointed to serve a five-year term on the Retirement Board of the SFERS beginning on March 17, 2004. You served of the Board until September 16, 2009. You are the sole owner of Cendana, where you serve as its managing partner and only employee. Cendana is an investment company marketing newly formed investment fund (called a “fund of funds”) that invests in small and early-stage venture capital firms. Cendana is currently seeking to raise \$100 million in investments in its fund of funds.

You indicate that on April 13, 2010, in response to an invitation from staff at SFERS, you met with SFERS staff to provide information about Cendana and its investment strategy. This was followed by a telephone conference call with and further email from SFERS staff. You understand that the SFERS investment staff and Portfolio Advisors (SFERS’s alternative investment consultant) are evaluating the potential twelve-year

investment of \$25 million in Cendana. You have committed that during the 12-year term, Cendana will not charge SFERS any management fee or carried interest. In comparison, Cendana will charge other investors a 1.0 percent annual management fee on committed capital and 10 percent carried interest. You state that because of the zero management fee and carried interest offered to SFERS, Cendana would not benefit either directly or indirectly by the participation of SFERS. You also state that Cendana, which was formed this year, has not previously marketed any funds to the City. You also state that as the sole employee, you are the only individual who can communicate with the City on behalf of Cendana, and you will not use any confidential information obtained during your services as a City commissioner to aid Cendana.

Discussion

The Commission has identified one local law that may potentially affect your communications with SFERS. San Francisco Campaign and Governmental Conduct Code (“SF G&GC Code”) section 3.234(a)(2) bars a former City officer, for one year after termination of service with a City department, board, commission, officer or other unit of the City, from communicating on behalf of any other person, except the City, with any officer or employee of the department, board, commission, office or other unit of government for which the officer served, in order to influence a government decision. Ethics Commission Regulation 3.234-2(b) sets out the basic rule and guide to determining whether the one-year ban applies. The regulation states:

To determine whether subsection 3.234(a)(2) prohibits a current or former City officer or employee from communicating orally, in writing or in any other manner with the department, board, commission, office or unit of government for which the officer or employee served, proceed with the following analysis:

- (1) Determine whether the officer or employee has terminated his or her service to the particular department, board, commission, office or unit of government. If the officer or employee has not terminated his or her service to the department, board, commission, office or unit of government, the prohibition does not apply. If the officer or employee remains an officer or employee of the City but has terminated his or her service with the department, board, commission, office or unit of government, then the prohibition may apply.
- (2) Determine whether more than one year has elapsed since the officer or employee terminated his or her service with the department, board, commission, office or unit of government. If more than one year has elapsed, the prohibition does not apply.
- (3) Determine whether the officer or employee is representing a person or entity other than himself, herself or the City. If the officer or employee is representing himself, herself or the City, the prohibition does not apply.
- (4) Determine whether the communication from the officer or employee is being made with an intent to influence a government decision. If the communication is not being made with an intent to influence a government decision, the prohibition does not apply.

In analyzing the facts you presented, you served as an officer of the Retirement Board of the SFERS until your service was terminated on September 16, 2009; thus, you meet criterion (1). You also meet criterion (2) because a year has not elapsed from the time you terminated service.

Criterion (3) asks us to determine whether you will be communicating with SFERS on behalf of a person or entity other than yourself or the City. The Commission has not previously addressed the issue of whether section 3.234 prohibits former City officers from lobbying their former departments within the one-year period on behalf of entities that they entirely own and that have no other employees. The question presented in these circumstances is whether the former employee is representing the entity in violation of section 3.234 or, alternatively, is representing himself when he speaks on behalf of the entity. Because the Commission has not addressed this question, we look for guidance to the California Fair Political Practices Commission's ("FPPC") interpretation of analogous state statutes.

In the Soto Advice Letter, CA FPPC Adv. A-09-144, 2009 WL 176609, the FPPC interpreted the one-year post employment ban in the Political Reform Act, which is similar to section 3.234 in scope and language. The FPPC concluded that the state law did not bar a former city councilmember from appearing before the San Juan Capistrano City Council to bid on a city maintenance contract within one year of terminating his service.¹ The former city official, Mr. Soto, and his wife were the sole owners of The Soto Company, a professional landscaping and maintenance firm. Mr. Soto wished to submit a bid on behalf The Soto Company. Noting that the post-employment ban applied to appearances or communications that are made "on behalf of any person as an agent, attorney, or representative," the FPPC cited to state regulations that expressly provide that appearances or communications made to represent one's personal interests, are not prohibited by the one-year ban. An official's "personal interests" include, among other things, "a business entity wholly owned by the official or members of his or her immediate family;" or "a business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control." *See* FPPC Regulations 18702.3 and 18702.4(b)(1).

The legal and policy reasoning of the Soto Advice Letter are instructive here and the facts are analogous. You are the sole owner and sole employee of Cendana, and you are the only person authorized to communicate on behalf of the company. Applying the reasoning of the Soto Advice Letter, you would be representing your personal interests when you communicate with SFERS on behalf of Cendana. Under criterion (3) of Ethics Regulation 3.234-2(b), because you are representing yourself, you are not subject to the one-year ban of SF C&GC Code section 3.234(a)(2). Because the ban does not apply under criterion (3), there is no need to analyze criterion (4).

¹ The state's one-year post-employment ban provides:

A local elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district who held a position with a local government agency as defined in Section 82041 shall not, for a period of one year after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal communication to, that local government agency, or any committee, subcommittee, or present member of that local government agency, or any officer or employee of the local government agency, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Calif. Gov't Code § 87406.3(a).

Although section 3.234(a)(2) does not bar you from communicating with the SFERS, staff nevertheless recommends that you avoid such communications until at least September 16, 2010. The purpose of the one-year post-employment ban is to eliminate both actual and perceived undue influence, favoritism or preferential treatment to ensure that government decisions made by City officers and employees are, and appear to be, made on a fair and impartial basis. Although we do not know all the facts, SFERS staff may have initially contacted you to discuss business opportunities because they knew you as a former commissioner. And although you have explained that you will receive no profit from SFERS's investment, it appears that your company could benefit from the SFERS investment. That investment will aid the company's efforts to attract other investors as it attempts to achieve its \$100 million goal. For those reasons, in keeping with the spirit of section 3.234, staff recommends that you wait until one year has elapsed from your service at SFERS before engaging in communications regarding Cendana.

I hope you find this information helpful. Please do not hesitate to contact me if you have further questions.

Sincerely,

John St. Croix
Executive Director

By: Mabel Ng
Deputy Executive Director

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