

Memorandum

CONFIDENTIAL: ATTORNEY/CLIENT PRIVILEGE

To : Honorable Betty T. Yee, Chairwoman
Honorable Judy Chu, Ph.D., Vice Chair
Honorable Bill Leonard
Honorable Michelle Steel
Honorable John Chiang

Date: March 15, 2007

From : Kristine Cazadd
Chief Counsel



Subject : **Contribution Disclosure Opinion 2007-01**

The mere filing of an amicus brief does not make the person¹ who filed the brief a “participant” for purposes of the Kopp Act. However, that person may still qualify as a “participant” if other conditions are met.

Question Presented:

Whether a person who files an amicus brief is a “participant” for Kopp Act purposes?

Conclusion:

The purpose of this Contribution Disclosure Opinion is to discuss whether a person who files an amicus brief in a case before the Board is a “participant” for purposes of the Kopp Act. As discussed below, the mere filing of the amicus brief, by itself, does not make that person a “participant.” However, a person who files an amicus brief would be a “participant” if that person also has a “financial interest” in the decision. Accordingly, it would be prudent to provide a contribution disclosure form to any person who files an amicus brief.

Law and Analysis

The Kopp Act requires that all parties, participants, and agents in adjudicatory proceedings² before the Board disclose contributions made to Board Members. (Gov. Code, § 15626,

¹ As used in this memo, “person” refers to an individual or entity.

² We note that local tax allocation hearings are not considered “adjudicatory” under the Kopp Act because there is no taxpayer before the Board. The taxes have already been collected, and the only issue is allocation. Thus, the Kopp Act, and its disclosure provisions, are not applicable to cities and counties and their representatives in these proceedings.

subd. (e).) Within the relevant preceding 12-month period (hereafter 12-month period), a contribution or contributions of \$250 or more in the aggregate from a party or participant, or their agents, disqualifies the Board Member who received the contribution from voting on the matter. (Gov. Code, § 15626, subd. (c).) For purposes of the Kopp Act:

“‘Participant’ means any person who is not a party but who actively supports or opposes a particular decision in an adjudicatory proceeding before the board and who has a financial interest in the decision”

(Gov. Code, § 15626, subd. (h)(3) [emphasis added].)

Note that the test for a “participant” has two prongs: First, the person must actively support or oppose a particular decision, and, second, the person must have a financial interest.

Under the first prong, a person actively supports or opposes a particular decision by communicating, either in person or in writing, with the Members or employees of the Board, for the purpose of influencing the decision. (Cal. Code Regs., tit. 18, § 7006, subd. (d).) A person has a “financial interest” in a decision if there is a financial interest within the meaning of the Political Reform Act. (Gov. Code, § 15626, subd. (h)(3); Cal. Code Regs., tit. 18, § 7006, subd. (d).) Generally, a financial interest exists when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the person or the person’s investments. (Gov. Code, § 87103.)

Because an amicus brief is a written communication that attempts to influence the Board’s decision on a particular appeal, a person who files an amicus brief is actively supporting or opposing a particular decision, thereby satisfying the first prong of the test for a participant. However, a person who files an amicus brief does not necessarily have a financial interest in the decision, and, without a financial interest, he or she does not satisfy the second prong of the test for a participant. Therefore, the filing of an amicus brief does not, by itself, make a person a “participant” for purposes of the Kopp Act.

Under the second prong, determining whether any person has a financial interest in a decision can be problematic. As stated above, the Kopp Act adopts the definition of “financial interest” from the Political Reform Act, which in turn requires that there be a *material financial effect distinguishable from the effect on the public generally*. There are detailed regulations that explain whether a financial effect is material. (Cal. Code Regs., tit. 2, § 18705 et seq.) We have noted in prior opinions that those regulations require specific knowledge of an individual’s or entity’s financial condition that likely is not in the possession of the Board; only the potential participant will have the information necessary to determine whether there is a material financial interest. (Cont. Disc. Opn. 99-1,

Jan. 25, 1999; Cont. Disc. Opn. 99-3, Apr. 6, 1999). Thus, as a matter of practice, we send contribution disclosure forms to *potential* participants and rely upon their declarations for whether there is a material financial interest. (*Id.*)³

For example, a potential participant generally has a material financial interest in a decision that affects his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family, when these amounts are reasonably likely to go up or down by more than \$250 or more in a 12-month period as a result of the decision. (See, e.g., Cal. Code Regs., tit. 2, § 18705.5.) As another example, a potential participant may have a material financial interest in a decision which affects a business entity in which he or she has economic interest limited to an investment interest between \$2,000 and \$25,000, when the business entity in question is listed on the New York Stock Exchange. (See, e.g., Cal. Code Regs., tit. 2, §§ 18703.1, 18705.1.) We note that under the Kopp Act, the material financial interest of the potential participant is determinative. Accordingly, a representative's contribution disclosure (see Form BOE-1400-C) is based upon the material financial interest of the potential participant.

A contribution is disqualifying under the Kopp Act only if a Board Member has actual or constructive knowledge that a party or participant, or their agents, made a contribution or contributions of \$250 or more in the aggregate during the 12-month period. (See Gov. Code, § 15626, subs. (c) & (h)(6).) If a potential participant makes a \$250 contribution, then declares that he or she does not have a financial interest in the decision, the Members cannot be said to have actual or constructive knowledge that a "participant" made a disqualifying contribution. In this way, the provision of a contribution disclosure form to a potential participant provides a "safe harbor" for the Members. (Cont. Disc. Opn. 99-3, Apr. 6, 1999.)

By filing an amicus brief, a person has satisfied the first prong of the test for a participant. The best way to know whether that person has a financial interest – and whether he or she is a participant – is by obtaining a declaration from that person on a contribution disclosure form. Even if the person filing the brief was a spouse or a relative of the appellant, the two-prong test would still have to be satisfied and, as to the second prong, persons would have to determine for themselves if they had a financial interest in the case before the Board.⁴ Thus, it would be prudent to provide a contribution disclosure form to any person who files an amicus brief.

For the reasons set forth herein, it is our opinion that the mere filing of an amicus brief does not make a person a "participant" for purposes of the Kopp Act. However, a person who

³ The contribution disclosure form for potential participants (Form BOE-140-B) asks the person to state whether he or she has a financial interest in the matter and to list contributions to Board Members.

⁴ It is noted that the likelihood of having a financial interest increases in the case of a spouse; however, even in that instance, only the "potential participant" spouse will have the requisite information to determine whether an actual material financial interest exists.

files an amicus brief would be a “participant” if that person also has a financial interest in the decision. Moreover, only that person can determine for certain whether he or she has a financial interest.

Accordingly, because the filing of an amicus brief makes a person a *potential* participant, it would be prudent to provide a contribution disclosure form to any person who files an amicus brief. The form will ask the person to indicate whether he or she has a financial interest in the decision and to list any contributions made to Board Members. If the person indicates that he or she has a financial interest in the decision, then that person is a “participant” and any contribution or contributions of \$250 or more in the aggregate during the 12-month period would be disqualifying.

Please direct any questions to Deborah Cooke, Lead Tax Counsel, at (916) 324-2603, or Windie Scott, Senior Tax Counsel on the Administrative Oversight Team, at (916) 323-2267.

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