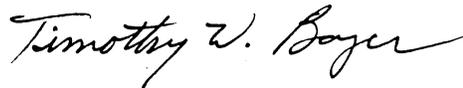


M e m o r a n d u m

To : Ms. Marcy Jo Mandel
Deputy Controller

Date: January 25, 1999

From : Timothy W. Boyer
Chief Counsel



Subject: **Contribution Disclosure Opinion 99-1**
Appeal of Huffly Corporation 96R-1263

Background

As you stated in your memorandum of January 15, 1999, questions concerning contribution disclosures have arisen in connection with the Appeal of Huffly Corporation, 96R-1263. Companies, which to your knowledge are not affiliated with Huffly through their employees, officers and representatives, have expressed concern with the Board's pending decision in Huffly and have asked, and will ask, the Board to take certain action in that case. You expect these outside interests will attempt substantive discussions with, and will submit position papers to, Board Members and/or their staffs. These companies are interested in the Huffly case because of the potential impact the Board's decision will have on their past and future tax liabilities which you believe may be significant.

Question

Are some or all of the companies interested in the Huffly case "participants" and are persons who advance their arguments and suggestions to the Board Members and/or their staffs "agents" or possibly "participants" for purposes of contribution disclosure?

Analysis

Government Code section 15626(c) provides that no Member of the State Board of Equalization:

shall make, participate in making, or in any way attempt to use his or her official position to influence, the decision in any adjudicatory proceeding pending before the board if the member knows or has reason to know that he or she received a contribution or contributions in an aggregate amount of two hundred fifty dollars (\$250) or more within the preceding 12 months from a party or his or her agent, or from any participant or his or her agent, and if the member knows or has reason to

know that the participant has a financial interest in the decision, as that term is used in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9.

According to Government Code section 15626(h)(3) a person who is not a party is a participant if he or she “actively supports or opposes a particular decision in an adjudicatory proceeding pending before the board and ... has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9. A person actively supports or opposes a particular decision if he or she lobbies in person the members or employees of the board, testifies in person before the board, or otherwise acts to influence the members of the board.”

In order for Board Members to know whether a person meets both prongs of the test set forth in 156265(h)(3), the Board Proceedings Division sends possible participants¹ a contribution disclosure form that asks the following questions:

Do you have a financial interest in this matter?

Have you lobbied a Member or employee of the Board, or the State Controller or his or her deputy, on this matter; or have you testified, or do you plan to testify, before the Board on this matter, or have you acted to influence the Board’s decision in this matter?

If the answer to either one of these two questions is no, then no information regarding contributions is requested. It is incumbent on the person completing the form to determine the answer to the questions.

While determining the answer to the “[h]ave you lobbied ...” question is normally straightforward, determining the answer to the financial interest question can be much more difficult. The provisions of Government Code section 87100 et seq. are not specifically designed to deal with whether a person has a financial interest in a Board decision.² Nonetheless, those who are possible participants (because they actively support or oppose a particular decision in Huffy) must use Government Code section 87100 et seq., and its corresponding regulations (2 Cal Code of Regulations section 18700 et seq.), for guidance in determining whether or not they have a financial interest in the Huffy decision.

Generally, a person has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on an economic interest. (Government Code section 87103). 2 Cal. Code of Regs. section 18705 et seq. provides standards for determining whether a financial effect on an economic interest is material. Specifically, regulation 18705.1(b) addresses the materiality of a governmental decision which affects a business entity that is indirectly involved in (i.e. is not a party to) the governmental decision. A copy of regulation 18705.1 is attached.

¹ Possible participants (or agents) are those whose names appear in the file, or those whom Board Members or employees have identified, as possibly having lobbied, testified (or plan to testify), or otherwise acted to influence the Board’s decision in a matter.

² As you know, the regulations adopted by the Fair Political Practices Commission were designed to determine whether a public official has a financial interest in a governmental decision.

Pursuant to regulation 18705.1(b), the determination of whether a corporation is a participant depends on the financial status of the corporation and the reasonably foreseeable impact that the Huffy decision will have on the liabilities of that corporation. For example, if the corporation in question is listed on the New York or American Stock Exchange (but is not listed in the most recently published issue of Fortune magazine's Directory of the 1,000 largest U.S. corporations), the corporation has a financial interest in the decision if it is reasonably foreseeable that the decision will increase or decrease the liabilities of the corporation by \$250,000 or more. (Regulation 18705.1(b)(1)(C).) On the other hand, a small corporation (i.e., one not covered by subdivisions (b)(1) through (b)(6) of regulation 18705.1) has a financial interest in the Huffy decision if it is reasonably foreseeable that it will increase or decrease the corporation's liabilities by \$10,000 or more. (Regulation 18705.1(b)(7)(C).) Because the applicable materiality standard depends on knowledge of both the overall financial status of the corporation and the financial impact that the decision may have, in this case, as in most cases, the Board does not have sufficient information to determine whether a possible participant has a financial interest in the Huffy decision. It is the possible participant who has the information necessary to make and disclose that determination.

Section 15626(h)(4) defines "agent" as:

any person who represents a party to or participant in an adjudicatory proceeding pending before the board. If a person acting as an agent is also acting as an employee or member of a law, accounting, consulting, or other firm, or a similar entity or corporation, both the entity or corporation and the person are agents.

Given the issue involved in the Huffy appeal, it is unlikely that a representative would be a participant in his or her own right in this case; however, a representative could be an agent for a participant. Consequently, before completing a contribution disclosure form, a possible agent must determine whether the person he or she represents is a participant.

Conclusion

Only the persons who have contacted the Board Members or employees can determine, based on the reasonably foreseeable material financial effect that the Huffy decision will have on them, or the companies they represent, whether or not they are participants or agents. Upon request, the Board Proceedings Division will provide all persons who have contacted the Board Members or employees of the Board regarding the Huffy case with contribution disclosure forms so that these persons can determine whether or not they, or the companies they represent, are agents or participants as provided in Government Code section 15626. We are of the opinion that, unless a Board Member knows, or has reason to know, information contrary to the disclosure provided, he or she may proceed based on the representations made in the contribution disclosure forms.

If you have further questions regarding this matter, please call me at 445-4380.

Ms. Marcy Jo Mandel

January 25, 1999

Page 4

Attachment

cc: Honorable Johan Klehs
Honorable Dean F. Andal
Honorable Claude Parrish
Honorable John Chiang
Honorable Kathleen Connell
Mr. E. L. Sorensen, Jr.
Mr. Rick Chivaro
Ms. Julie Bornstein
Mrs. Janice Masterton
Contribution Disclosure Binder Distribution List

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TITLE 2. ADMINISTRATION
DIVISION 6. FAIR POLITICAL PRACTICES COMMISSION
CHAPTER 7. CONFLICTS OF INTEREST
ARTICLE 1. CONFLICTS OF INTEREST; GENERAL PROHIBITION

2 CCR 18705.1 (1999)

@ 18705.1. Economic Interests in Business Entities

(a) Directly involved business entities. The effect of a decision is material if any business entity (other than one covered by subsections (b)(1) or (b)(2)) in which the official has a direct or indirect investment of \$ 1,000 or more, any business entity covered by subsections (b)(1) or (b)(2) in which an official has a direct or indirect investment of \$ 10,000 or more, or any business entity in which the official is an officer, director, partner, trustee, employee, or holds any position of management, is directly involved in a decision before the official's agency.

[NOTE: With respect to any business entity covered by subsections (b)(1) or (b)(2) in which an official has a direct or indirect investment of \$ 1,000 or more, but less than \$ 10,000, materiality must still be analyzed pursuant to subsection (b).]

(b) Indirectly involved business entities. The effect of a decision is material as to a business entity in which an official has an economic interest if any of the following applies:

(1) For any business entity listed on the New York Stock Exchange or the American Stock Exchange:

(A) The decision will result in an increase or decrease to the gross revenues for a fiscal year of \$ 250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 1,000 largest U.S. corporations, in which case the increase or decrease in gross revenues must be \$ 1,000,000 or more; or

(B) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$ 100,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 1,000 largest U.S. corporations, in which case the increase or decrease in expenses must be \$ 250,000 or more; or

(C) The decision will result in an increase or decrease in the value of assets or liabilities of \$ 250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 1,000 largest U.S. corporations, in which case the increase or decrease in assets or liabilities must be \$ 1,000,000 or more.

(2) For any business entity listed on the National Association of Securities Dealers National Market List (securities of companies on this over-the-counter market list are registered with and subject to the Security and Exchange Commission's rule requiring tape reporting of last sale information [17 CFR section 240.77 Aa3-1]):

(A) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$ 150,000 or more; or

(B) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$ 50,000 or more; or

(C) The decision will result in an increase or decrease in the value of assets or liabilities of \$ 150,000 or more.

(3) For any business entity not covered by subdivisions (b)(1) or (b)(2) but which is listed on the Pacific Stock Exchange or is qualified for public sale in this state and is listed on the Eligible Securities List maintained by the California Department of Corporations (which applies to partnerships and other business entities as well as corporations):

(A) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$ 30,000 or more; or

(B) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$ 7,500 or more; or

(C) The decision will result in an increase or decrease in the value of assets or liabilities of \$ 30,000 or more.

(4) For any business entity not covered by subdivision (b)(1) which meets the financial standards for listing on the most recently published Fortune Magazine Directory of the 1,000 largest U. S. corporations, the tests in subdivision (b)(1) applicable to non-Fortune 1,000 business entities listed on the New York or American Stock Exchanges may be applied.

(5) For any business entity not covered by subdivisions (b)(1) or (b)(2) which meets the financial standards for listing on the New York Stock Exchange, the tests in subdivision (b)(2) may be applied. The standards are as follows: The business entity has net tangible assets of at least \$ 18,000,000 and had pre-tax income for the last fiscal year of at least \$ 2,500,000.

(6) For any business entity not covered by subdivisions (b)(1) or (b)(2) which meets the financial standards for listing on the National Association of Securities Dealers National Market List, the tests in subdivision (b)(3) may be applied. The standards are as follows: The business entity has net tangible assets of at least \$ 4,000,000, and had pre-tax income for the last fiscal year of at least \$ 750,000, with net income from that period of at least \$ 400,000.

(7) For any business entity not covered by subdivisions (b)(1) through (b)(6), inclusive:

(A) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$ 10,000 or more; or

(B) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$ 2,500 or more; or

(C) The decision will result in an increase or decrease in the value of assets or liabilities of \$ 10,000 or more.

AUTHORITY:

Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5, 87102.6, 87102.8, 87103, Government Code.

HISTORY:

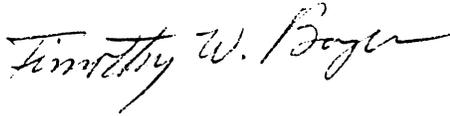
1. New section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11390.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).

Memorandum

To : Mr. James Tucker, Chief of Staff
First District

Date: February 19, 1999

From : Timothy W. Boyer
Chief Counsel



Subject: **Supplemental Opinion #1 for CDO 99-1
Participants in the *Huffy* Appeal**

You have asked for further clarification of the advice provided to the Board in Contribution Disclosure Opinion 99-1 regarding who is considered a participant for purposes of Government Code section 15626.

Government Code section 15626, in pertinent part, requires that prior to rendering any decision in any adjudicatory proceeding pending before the State Board of Equalization, each Board Member who knows or has reason to know that he or she received a contribution or contributions within the preceding 12 months in an aggregate amount of \$250 or more from *any participant or his or her agent*, must disclose that fact on the record of the proceeding.

Moreover, no Board Member may make, participate in making, or in any way attempt to use his or her official position to influence the decision in any adjudicatory proceeding pending before the Board if the Member knows or has reason to know that he or she received a contribution or contributions in an aggregate amount of \$250 or more within the preceding 12 months from *any participant or his or her agent*, and if the member knows or has reason to know that the participant has a financial interest in the decision.

As we noted in Opinion 99-1, a person is a participant if he or she "actively supports or opposes a particular decision in an adjudicatory proceeding pending before the board and ... has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9." (Government Code section 15626(h)(3).)

"A person actively supports or opposes a particular decision if he or she lobbies in person the members or employees of the board, testifies in person before the board, or otherwise acts to influence the members of the board." (Government Code section 15626(h)(3).)

Mr. Timothy Boyer
February 19, 1999
Page 2

Board Regulation 7008 provides that a Board Member has reason to know that a person may have a financial interest in a decision if the person reveals facts in his or her written or oral support or opposition before the Board which make the person's financial interest apparent. While the term "apparent" is not defined, the general test for constructive notice is what a reasonable person would have known under the same or similar circumstances. Consequently, a practice of advising the Board Proceedings Division to send contribution disclosure forms to those persons who have communicated with a Board Member, as set forth in Regulation 7006, avoids having to determine whether a reasonable person would have been on notice of the financial interest of the participant.

If you have further questions regarding this matter, please call me at 445-4380.

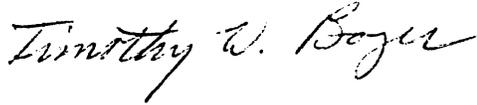
cc: Honorable Johan Klehs
Honorable Dean F. Andal
Honorable Claude Parrish
Honorable John Chiang
Honorable Kathleen Connell
Mr. E. L. Sorensen, Jr.
Mrs. Janice Masterton
Contribution Disclosure Binder Distribution List

Memorandum

To: Mr. James Tucker, Chief of Staff
First District

Date: February 19, 1999

From: Timothy W. Boyer
Chief Counsel



Subject: **Supplemental Opinion #2 for CDO 99-1**
Huffy Appeal - Public Generally

You have asked for further clarification of the advice provided to the Board in Contribution Disclosure Opinion (CDO) 99-1, specifically, whether the fact that the *Huffy* decision will impact the business industry at large, rather than just a single taxpayer, effects whether a participant has a financial interest in the decision.

Generally, a person has a financial interest in a decision "if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally," on an economic interest. (Government Code section 87103).

Regulation 18707(a)(1) states:

Notwithstanding any determination that the reasonably foreseeable effect of a governmental decision is material, a public official does not have a disqualifying conflict of interest in the governmental decision if the governmental decision affects the public official's economic interest [for purposes of *Huffy* this would mean the participant's economic interest] in a manner which is not distinguishable from the manner in which the decision will affect the public generally as set for in this section [and] section 18707.1.

Regulation 18707.1(a) provides:

The financial effect of a governmental decision on the [participant's] economic interest is indistinguishable from the decision's effect on the public generally if

(a) The decision is to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions which are applied on a proportional basis on the

Mr. Timothy Boyer
February 19, 1999
Page 2

[participant's] economic interest and on a significant segment of the jurisdiction, as defined in 18707(b)(1).

Regulation 18707(b)(1) provides:

The governmental decision will affect a "significant segment" of the public generally as set forth below: ...

(B) For decisions that affect a business entity in which the [participant] has an economic interest, fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; or ...

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivision (b)(1)(A) through (b)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.¹

The provision that appears to be most applicable in these circumstances is Regulation 18707(b)(1)(B). However, the significant segment criteria in this provision is not met because the *Huffy* decision will not affect fifty percent of all businesses in the jurisdiction or the district the official represents. Also, the criteria in Regulation 18707(b)(1)(D) is inapplicable because the Fair Political Practices Commission (FPPC) has explained "that this provision is a very narrow exception that was adopted in conjunction with Regulation 18707.6 (applicable to states of emergency) to apply in exceptional circumstances where large numbers of persons were affected." (*Tobias Advice Letter A-98-315.*) As such, the "public generally" test would not be met with regard to its application to the *Huffy* circumstances.

If you have further questions regarding this matter, please call me at 445-4380.

Attachments

cc: Honorable Johan Klehs
Honorable Dean F. Andal
Honorable Claude Parrish
Honorable John Chiang
Honorable Kathleen Connell
Mr. E. L. Sorensen, Jr.
Mrs. Janice Masterton
Contribution Disclosure Binder Distribution List

¹ (A) and (C) were not quoted because they are clearly not applicable.

2 CCR 18707 (1999) printed in FULL format.

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TITLE 2. ADMINISTRATION
DIVISION 6. FAIR POLITICAL PRACTICES COMMISSION
CHAPTER 7. CONFLICTS OF INTEREST
ARTICLE 1. CONFLICTS OF INTEREST; GENERAL PROHIBITION

2 CCR 18707 (1999)

@ 18707. Public Generally

(a) Introduction.

(1) Notwithstanding any determination that the reasonably foreseeable effect of a governmental decision is material, a public official does not have a disqualifying conflict of interest in the governmental decision if the governmental decision affects the public official's economic interest in a manner which is not distinguishable from the manner in which the decision will affect the public generally as set forth in this section, Title 2, California Code of Regulations, section 18707.1.

(2) Even if the specific provisions of subsections (b) and Title 2, California Code of Regulations, section 18707.1 do not apply, the following shall apply, provided that all of the requirements are met.

(A) Public Generally: Small Jurisdictions; Principal Residence--Title 2, California Code of Regulations, section 18707.2.

(B) Public Generally: Industries, Trades, or Professions--Title 2, California Code of Regulations, section 18707.3.

(C) Public Generally: Appointed Members of Boards and Commissions--Title 2, California Code of Regulations, section 18707.4.

(3) For purposes of Government Code section 87102.5 (Members of the Legislature) and Government Code section 87102.8 (elected state officers), Government Code section 87102.6(b)(2) applies.

(b) General Rule: Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply:

(1) Significant Segment: The governmental decision will affect a "significant segment" of the public generally as set forth below:

(A) For decisions that affect the official's economic interests (excluding interests in a business entity which are analyzed under subdivision (B)):

(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents, or

2 CCR 18707 (1999)

(ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(B) For decisions that affect a business entity in which the official has an economic interest, fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; or,

(C) For decisions that affect any of the official's economic interests, the decision will affect 5,000 individuals who are residents of the jurisdiction; or,

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (b)(1)(A) through (b)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.

(2) Substantially the Same Manner: The governmental decision will affect the official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation.

AUTHORITY:

Note: Authority cited: Section 83112, Government Code. Reference: Section 87103, Government Code.

HISTORY:

1. New section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11390.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).

2 CCR 18707.1 (1999) printed in FULL format.

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TITLE 2. ADMINISTRATION
DIVISION 6. FAIR POLITICAL PRACTICES COMMISSION
CHAPTER 7. CONFLICTS OF INTEREST
ARTICLE 1. CONFLICTS OF INTEREST; GENERAL PROHIBITION

2 CCR 18707.1 (1999)

@ 18707.1. Special Rule for Rates, Assessments, and Similar Decisions

The financial effect of a governmental decision on the official's economic interest is indistinguishable from the decision's effect on the public generally if any of the following apply:

(a) The decision is to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions which are applied on a proportional basis on the official's economic interest and on a significant segment of the jurisdiction, as defined in Regulation 18707(b)(1).

(b) The decision is made by the governing board of a landowner voting district and affects the official's economic interests and a significant segment of the landowners or water users subject to the jurisdiction of the district (using the thresholds set forth in Regulation 18707(b)(1)) in proportion to their real property interests or by the same percentage or on an "across-the-board" basis for all classes.

(c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or "across-the-board" basis on the official's economic interests and a significant segment of the property owners or other persons receiving services from the official's agency using the thresholds set forth in Regulation 18707(b)(1).

AUTHORITY:

Note: Authority cited: Section 83112, Government Code. Reference: Section 87103, Government Code.

HISTORY:

1. New section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11390.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).