

**CONFLICT OF INTEREST OPINION
EC-COI-90-10**

FACTS:

You anticipate appointment by the Mayor of a City as a member of the City Commission Commission (ABC), a position which has previously been classified as a special municipal employee position under G.L. c. 268A §1(n). Outside of your ABC activities, you are a director and shareholder of the XYZ Corporation (XYZ). As a director, you receive annual compensation as well as compensation for attending meetings. Your stock holdings in XYZ are less than one percent of the total stock.

A subsidiary of XYZ is negotiating with ABC for mutual participation in a co-project. The negotiations, if successful, would lead to a contract between the subsidiary and ABC. You state that you will at all times abstain as an XYZ director from any action relating to the matters resulting from these negotiations, and that your director compensation will be unrelated to the negotiations or their outcome.

QUESTION:

Can you may accept appointment as an ABC Commissioner of the City?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

As an ABC member, you will be considered a municipal employee and special municipal employee under G.L. c. 268A. Four sections of G.L. c. 268A are relevant to you.

1. Section 17

This section places certain limitations on you in your capacity as an XYZ director. While a special municipal employee, you will be prohibited from either receiving compensation from, or representing XYZ in connection with, any submission, contract, determination or other particular matter^{1/} which is within the official responsibility of the ABC, irrespective of whether you actually participate in these matters as an ABC member. Therefore, you may not contact or otherwise communicate with ABC officials or employees on behalf of XYZ or its subsidiary. Further, you may not receive director compensation

which is attributable to the subsidiary's matters before the ABC. EC-COI-87-5. To avoid violating the compensation restriction, you must avoid participating as an XYZ director in any action relating to the subsidiary's dealings with ABC and must also arrange to memorialize in writing with XYZ the fact that your director compensation will not be attributable to the subsidiary's activities with ABC.^{2/}

2. Section 19

This section prohibits your participation as an ABC member in any decision, contract or other particular mater in which XYZ has a foreseeable financial interest. The abstention requirement applies both on account of your status as an XYZ director and your financial interest as a stockholder. EC-COI-84-96. Assuming that you and/or XYZ have a financial interest in contracts made by XYZ's subsidiaries, §19 requires your abstention from participation as an ABC member in any matter affecting the subsidiary's financial interest, including the proposed project agreement. This result will continue to apply unless and until you receive written permission from the mayor to participate, pursuant to the conditions established in §19(b)(1).

3. Section 20

Under this section, a municipal employee may not have a financial interest in a contract made by a municipal agency, unless an exemption applies. While §20 is relevant to you in light of your stock ownership in a company which may have an indirect financial interest in an ABC contract, your ownership of less than 1% of XYZ stock qualifies you for an exemption. This result will continue to apply as long as your stock ownership remains at less than one percent of XYZ's total stock. EC-COI-83-147.

4. Section 23

This section establishes certain safeguards to avoiding actual or apparent undue favoritism towards the project proposal in your official ABC capacity. Assuming that you receive written permission under §19(b)(1) to participate, §23 should pose no problems for you. We would add, however, that:

1. you many not use your official position to secure unwarranted privileges or exemptions of substantial value for XYZ (§23(b)(2)), and

2. you may not disclose the XYZ or its subsidiary any confidential information which you have acquired

as an ABC member (§23(c)).

DATE AUTHORIZED: August 1, 1990

1/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

2/We concur with your view that appreciation in your XYZ stock cannot be regarded as compensation for §17 purposes in view of the absence of "services" and is more appropriately addressed under §20. See, G.L. c. 268A, §1(a). EC-COI-89-13.