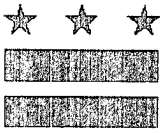
GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

September 5, 2013

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

This responds to your July 22, 2013 letter, in which you request an advisory opinion on whether you may participate further in the Council's consideration of Bill 20-348, the "Tax Clarity Equity Amendment Act of 2013" ("Bill"). Based on the information in your letter and in attachments to it, I conclude that you may permissibly continue to join in the Council's work on the Bill.

In your letter, you state that you co-introduced the Bill on June 18, 2013. You also state that a beneficiary of the legislation would be PEPCO,[1] in which you own 863 shares of stock valued at approximately $17,500.[2]

In order to respond to your request, a brief discussion of the Bill is necessary. Section 2(a) of the Bill would require the District government to "provide a tax credit to make whole a taxpayer whose taxable income for tax years preceding the Tax Clarity Act of 2000[3] was changed or corrected by the Commissioner of Internal Revenue." The tax credit would "equal the decrease in the District tax for such years computed using the changed or correctable taxable income as determined by the Commissioner of Internal Revenue." *Id.* Section 3 would make the legislation applicable to tax periods before 2001.

[1] In a July 1, 2013 letter to the District's Chief Financial Officer, a copy of which letter was included with your letter to me, you stated that "[t]he [Bill] was introduced in response to Pepco which...was audited by the IRS for several tax years – some or all of which preceded the Tax Clarity Act of 2000. This resulted in a 2010 determination to correct its returns. The correction would lead to a District refund except for a statute of limitations on refunds predating the Tax Clarity Act of 2000."

[2] For purposes of this response, I will assume that the approximate value of your shares of the PEPCO stock has remained the same, even though it may have changed since the date of your letter.

[3] Effective June 9, 2001, D.C. Law 13-305, 48 DCR 334.

There is nothing in the Bill, on its face, to suggest that PEPCO specifically would benefit from the legislation. The term "taxpayer" is not defined. However, section 2(c) of the Bill would leave it to the taxpayer to "designate the *tax type or types* for applying the credit by notifying the Office of Tax and Revenue at the time the credit is taken on a return." (Emphasis added.) In other words, the legislation reasonably appears to include within its reach both corporate entities, such as PEPCO, as well as individual taxpayers.

Given this background, section 223 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1162.23 (2012 Supp.),[4] applies. That section provides as follows:

> No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a *direct and predictable effect* on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

(Emphasis added.)[5]

Section 223 applies because, notwithstanding any effect on your personal financial interests, the Ethics Act defines the phrase "person closely affiliated with the employee" to include an "affiliated organization,"[6] which, in turn, is defined as including an organization "[i]n which the employee...is a director, officer, owner, employee, or holder of stock worth $1,000 or more at fair market value."[7] Assuming the Bill becomes law, the question is whether it is likely to have a direct and predictable effect[8] on PEPCO's financial interests, coming in the form of tax credits for several tax years.

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[4] Section 223 is part of the District's Code of Conduct by virtue of section 101(7)(F) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(F)).

[5] *Cf.* Rule 1(a), Council Rules of Official Conduct for Council Period 20 (containing identical language as section 223 of the Ethics Act). The Council Rules are, collectively, part of the Code of Conduct by virtue of section 101(7)(A) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(A)).

[6] *See* section 101(43) (D.C. Official Code § 1-1161.01(43)).

[7] Section 101(3)(A)(ii) (D.C. Official Code § 1-1161.01(3)(A)(ii)).

[8] Section 101(11) of the Ethics Act (D.C. Official Code § 1-1161.01(11)) defines the phrase "direct and predictable effect" as having three necessary elements: "(A) [a] close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest; (B) [a] real, as opposed to a speculative possibility, that the matter will affect the financial interest; *and* (C) [t]he effect is more than *de minimis*." (Emphasis added).

If so, absent an express or implied exemption, section 223 would require you either to recuse yourself from any further participation on the Bill or divest your interest in the PEPCO stock to less than $1,000. However, a federal criminal statute, 18 U.S.C. § 208, also applies here[9] and, as discussed below, provides for relevant exemptions that I believe to be instructive in interpreting how section 223 should be applied.

An individual is prohibited by 18 U.S.C. § 208(a) from "participat[ing] personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he...has a financial interest." Of note, given the language of Ethics Act section 223, 18 U.S.C. § 208(a) "has long been interpreted as applying where the matter will have a 'direct and predictable effect' on the employee's financial interest or on the financial interests of other persons or entities specified in the statute." Notice of proposed rules, *Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest)* ("Rulemaking Notice"), 60 Fed. Reg. 47208, 47209 (September 11, 1995) (citing 2 Op. Off. Legal Counsel 151, 155 (June 29, 1978)).[10]

Here, as a co-introducer of the Bill, you acted personally and substantially with respect to it. *See* 5 C.F.R. § 2640.103(a)(2) (stating that, for purposes of 18 U.S.C. § 208(a), "[t]o participate 'personally' means to participate directly" and "[t]o participate 'substantially' means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter.").

However, 18 U.S.C § 208(b) affords exemptions from the general prohibition against taking acts affecting personal financial interest. Of particular relevance here, paragraph (2) of the subsection provides that the general prohibition does not apply "if, by regulation issued by the Director of the [U.S.] Office of Government Ethics, applicable to all or a portion of all officers and employees covered by [18 U.S.C. § 208], and published in the Federal Register, the financial interest has been exempted from the requirements of subsection [208](a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies."

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[9] Section 208(a) applies to anyone who is "an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee." *See also* section 3206(1) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 ("CMPA"), effective March 3, 1979, D.C. Law 2-139, D.C. Official Code § 1-632.06(1) (2001) (providing that "provisions of Title 18 of the United States Code insofar as they affect employees of the District of Columbia government shall not be affected by [the CMPA]").

[10] *See also* David R. Flickinger, *Attracting the Best and the Brightest to Government Service: Requiring Scienter for Criminal Conflicts of Interest*, 25 Geo. J. Legal Ethics 519, 525-530 (2012) (discussing history, statutory framework, and judicial interpretation of section 208). Penalties for violation of section 208(a) are set out in 18 U.S.C. § 216.

Such regulations are in effect, one of which exempts individuals who participate in particular matters[11] in which their financial interest arises from holdings of publicly traded stock below certain levels. *See* 5 C.F.R. § 2640.202.[12] As a District government employee, you may take advantage of the exemption. *See* OGE Informal Advisory Letter 00x5 at 3 (May 18, 2000) ("District of Columbia employees may utilize any applicable exemptions found in subpart B of 5 C.F.R. part 2640."). The question, rather, comes down to the extent that you are able to do so, given the value of your PEPCO stock holdings. The resolution of that question depends on whether your work on the Bill involves what the federal regulations term a "particular matter involving specific parties" or a "particular matter of general applicability."

A "particular matter involving specific parties" is one that "includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter *involving a specific party or parties*." 5 C.F.R. § 2640.102(l) (emphasis added); *see also* Memorandum from Robert I. Cusick, Dir., U.S. Office of Government Ethics, to Designated Agency Ethics Officials on "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter," at 2 (DO-06-29; Oct. 4, 2006) (explaining that the phrase is used throughout the conflict of interest laws and OGE regulations, "but the meaning remains the same, focusing primarily on the presence of specific parties"). For a particular matter involving specific parties, an employee may not hold more than an aggregate market value of $15,000 in publicly traded stock issued by entities that are parties to the matter. *See* 5 C.F.R. § 2640.202(a)(2).[13]

A "particular matter of general applicability" is "a particular matter that is focused on the interests of a discrete and identifiable class of persons, but *does not involve specific parties*." 5 C.F.R. § 2640.102(m) (emphasis added). As such, this type of particular matter "provide[s] for broader exemptions from the conflict-of-interest regulations." Conley, 86 Tex. L. Rev. at 169. Not surprisingly, then, for a particular matter of general applicability, an employee may hold publicly traded stock, the market value of which cannot be more than $25,000 in any one entity or more than $50,000 in all affected entities. *See* 5 C.F.R. § 2640.202(c)(1)(i).[14]

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[11] *See* 5 C.F.R. § 2640.103(a)(1) (defining "particular matter" for purposes of 18 U.S.C. § 208(a) as including "only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons").

[12] *See also* Joe G. Conley, *Conflict of Interest and the EPA's Science Advisory Board*, 86 Tex. L. Rev. 165, 169-170 (2007) (discussing exemptions).

[13] The section heading for subsection (a) of 5 C.F.R. § 2640.202 is "[d]e minimis exemption for matters involving parties." *See Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings are tools available for the resolution of [any] doubt about the meaning of a statute.") (internal editing and quotation marks omitted)).

[14] The section heading for subsection (c) of 5 C.F.R. § 2640.202 is "[d]e minimis exemption for matters of general applicability."

Here, the Bill constitutes a particular matter of general applicability. First, the relief that it would afford would extend to everyone in that class of persons who could demonstrate eligibility for the tax credit to the satisfaction of the taxing authorities.[15] Second, to the extent that the Bill does not define the term "taxpayer," it does not involve a specific party or parties. Last, in any event, "the phrase [particular matter involving specific parties] *does not cover particular matters of general applicability*, such as rulemaking, *legislation*, or policy-making of general applicability." Cusick memorandum at 4 (emphasis added).[16]

To be sure, "[m]any Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties." *Id.* However, I do not see such an evolution with respect to the Bill. A reverse process may even be taking place. In your July 1 letter to the Chief Financial Officer, you stated that PEPCO representatives had indicated to you that "there were two other taxpayers in a similar situation." In his reply letter of July 9, a copy of which you enclosed with your letter to me, Dr. Gandhi noted that "an inquiry at the Office of Tax and Revenue...led to the identification of a fourth likely beneficiary," and he ended by saying that "it is likely that there will be additional beneficiaries."[17]

In sum, you may participate further in the Council's consideration of Bill 20-348. Section 223 of the Ethics Act and 18 U.S.C. § 208(a) both deal with financial conflicts of interest and, accordingly, may be interpreted *in pari materia*.[18] I am persuaded, therefore, that your continued participation on the Bill is not likely to have a direct and predictable effect on either yours or PEPCO's financial interests because the $17,500 approximate value of your PEPCO stock is, for purposes of both statutes, too remote and inconsequential to trigger the prohibition. The

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[15] *Cf.* House Comm. on Standards of Official Conduct, *House Ethics Manual*, 110th Cong., 2nd Sess., at 234 ("where legislation affect[s] a class as distinct from individuals, a Member might vote") (citation omitted)); Senate Select Comm. on Ethics, *Senate Ethics Manual*, 108th Cong., 1st Sess., at 70 ("Legislation may have a significant financial effect on a Senator because his holdings are involved, but if the legislation also has a broad, general impact on his state or the nation, the prohibitions of the [Senate Rule prohibiting the use of legislative power to advance personal financial interests] would not apply.") (citation omitted)).

[16] Mr. Cusick qualifies this statement by noting that, "usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties." Memorandum at 4 n.4. He cites OGE Informal Advisory Opinion 83x7, involving "private relief legislation" for "specified parties," as one example of such an exception. *Id.* However, for the reasons discussed in the text above, the Bill here is clearly not currently drafted so as to operate as private relief legislation. Also, see discussion in footnote 12.

[17] Indeed, in his letter, Dr. Gandhi also stated that "Bill 20-348 is so broadly written that it would authorize credits for refunds upon which the statute of limitations ran more than 60 years ago."

[18] Generally, all statutes *in pari materia* ("upon the same matter or subject") must be construed together as if they were one law. *See, e.g., Gondelman v. District of Columbia Dept. of Consumer & Regulatory Affairs*, 789 A.2d 1238, 1245 (D.C. 2002) ("We construe statutory provisions not in isolation, but together with other related provisions.") (citations and internal punctuation omitted)). Further, state and federal statutes on the same subject may be *in pari materia*. *See Hargrove v. United States*, 55 A.3d 852, 855 n.2 (D.C. 2012) (noting "the reach" of a certain exemption from District's concealed weapons statute "by virtue of" provision in federal concealed weapons statute); *see also Morton v. Hammond*, 604 P.2d 1, 4 (Alaska 1979) (where state and federal statutes deal with same subject matter and state scheme relies on federal scheme, statutes are *in pari materia*).

following example, used to illustrate the exemption for particular matters of general applicability provided by 5 C.F.R. § 2640.202(c), serves to support my conclusion:

> The Bureau of Export Administration at the Department of Commerce is in the process of formulating a regulation concerning exportation of portable computers. The regulation will affect all domestic companies that sell portable computers. An employee of the Department who is assisting in drafting the regulation owns $17,000 worth of stock in CompAmerica and $20,000 worth of stock in XYZ Computer Inc. Even though the employee owns $37,000 worth of stock in companies *that will be affected by the regulation*, she may participate in drafting the regulation because the value of the securities she owns does not exceed $25,000 *in any one affected company* and the total value of stock owned in *all affected companies* does not exceed $50,000.

(Emphasis added).

This conclusion also reflects the realities that legislators often own interests in stock or other securities and that they are sometimes called upon to act on legislative matters that affect those interests. From a government ethics standpoint, the question is not one of prohibiting a legislator from owning securities. Rather, in any given case, the question is one of striking a proper, yet flexible, balance. The U.S. Office of Government Ethics was clearly mindful of these factors when it proposed the regulations governing the *de minimis* exemptions in particular matters of general applicability, as noted in the following passage from the Rulemaking Notice:

> The Office of Government Ethics considered proposing to set the *de minimis* standard at no more than $1,000 because that is the minimum value for assets that must be reported on an employee's public financial disclosure statement (SF 278). Setting the *de minimis* level at $1,000 would have permitted agency ethics officials who review financial disclosure reports to counsel employees that [18 U.S.C. §] 208(b)(2) exempts all interests in securities they own whose values fall below the threshold for reporting on the SF 278 statement. However, the actual financial interest one might have in a matter because of the ownership of stock worth no more than $1,000 *would have been a significantly lower amount than OGE believes can be considered "inconsequential" within the meaning of section 208(b)(2) and would have clearly limited the exemption's usefulness.*[19]

To be clear, the *in pari materia* doctrine does not *require* the District to apply the same standard where a different one is intended. However, I do not believe the Council intended to impose a harsher standard for District employees when it enacted the Ethics Act. Moreover, the federal

[19] Rulemaking Notice, 60 Fed. Reg. at 47217 (emphasis added).

standard, as demonstrated above, appears to be a reasoned and thoughtful approach to application of the conflict of interest law – one that I believe may, and should, be applied to the District as well. To the extent that our conflict of interest law is designed, in part, to prevent government officials from personally profiting from official actions, I am not concerned that there is any such incentive or potential to do so here. PEPCO is a publicly traded company with billions of dollars in assets and over 200 million shares of outstanding stock. To suggest that a tax benefit to PEPCO of the type contemplated by this legislation would ultimately result in an appreciable increase in a $17,500 ownership interest, such that you would personally profit, would be to stretch the bounds of reasonableness. I am also concerned that applying too strict an interpretation of the conflict of interest provision would work a hardship on the Council in accomplishing its legislative functions, if members were required to recuse themselves every time a similar type matter arises, no matter how remote or inconsequential.

Alternatively, because the ultimate decision is yours, you may wish to consider taking a conservative course by either divesting your interest in the PEPCO stock above $15,000 – the upper limit for the value of stock holdings in cases of particular matters involving specific parties – or by recusing yourself from any further participation on the Bill altogether. Again, though, you would not be required to do so.

Please note that this advice is provided to you pursuant to section 219 of the Ethics Act (D.C. Official Code § 1-1162.19), which authorizes me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

Finally, you are advised that section 219 of the Ethics Act also requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that identifying information will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

Please let me know if you have any questions or wish to discuss this matter. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

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