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June 11, 2014

**VIA U.S. MAIL AND E-MAIL**


Zackery P. Morazzini  
General Counsel  
Fair Political Practices Commission  
428 J Street, Suite 800  
Sacramento, CA 95814

**RE: Appeal of Denied Petition to Add the Position of Port Agent to the Conflict of Interest Code of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun ("Board of Pilot Commissioners")**

Dear Mr. Morazzini:

Enclosed is the original of the **REPLY BRIEF OF BOARD OF PILOT COMMISSIONERS ON APPEAL FROM ORDER OF GENERAL COUNSEL**, which was e-mailed to you on Tuesday, June 11, 2014.

Sincerely,

  
DENNIS M. EAGAN  
Deputy Attorney General

For **KAMALA D. HARRIS**  
Attorney General

DME:lj

cc w/encl.: **Mike Jacob**  
Vice President & General Counsel  
Pacific Merchant Shipping Association

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9 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION  
10 STATE OF CALIFORNIA

11  
12 **IN THE MATTER OF:**  
13 **Pacific Merchant Shipping Association**  
14 **Appeal from the Decision of the Board of**  
15 **Pilot Commissioners for the Bays of San**  
16 **Francisco, San Pablo, and Suisun**

**REPLY BRIEF OF BOARD OF PILOT**  
**COMMISSIONERS ON APPEAL FROM**  
**ORDER OF GENERAL COUNSEL**

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1           Whether the Port Agent is a public official is only the first of four tests that must be met  
2 before one can determine whether the Port Agent is includable in the Board's Conflict of Interest  
3 Code. For an individual to be includable in a state agency's Conflict of Interest Code under the  
4 Political Reform Act, the answer must be yes to all of the following questions:

5           1.       Is the individual a **public official**? (See Gov. Code, §§ 81001, subd. (b), 81002,  
6 subd. (c), 82048, subd. (a).)<sup>1</sup>

7           2.       If so, is the individual a public official **of and within the state agency involved**?  
8 (See §§ 82019, subd. (a), 82048, subd. (a), 87302, subd. (a).)

9           3.       If so, does the individual **make or participate in the making of government**  
10 **decisions**? (See §§ 82019, subd. (a)(3), 87302, subd. (a); Cal. Code Regs., tit. 2, §§ 18219,  
11 18702.1(a), 18702.2.)

12           4.       If so, are there any **financial interests that foreseeably would be materially**  
13 **affected by the type of government decisions that the individual makes or participates in**?  
14 (See §§ 82019, subd. (a)(3), 87302, subd. (a).)

15           As both the California Supreme Court and this Commission have noted, the constitutional  
16 right to privacy requires this careful narrowing of the group of persons who can be compelled to  
17 publicly disclose their assets and sources of income. The constitutional right to privacy serves as  
18 a check on overbroad disclosure requirements. In *In re Alperin* (1977) 3 FPPC Ops. 77, this  
19 Commission insisted on strict adherence to the Act's disclosure requirements, concluding that it  
20 could not approve a Conflict of Interest Code that:

21                   designates positions that do not entail the "making or participation in the making  
22                   of governmental decisions" or which requires disclosure of financial interests that  
23                   may not foreseeably be affected materially by the decisions made or participated  
24                   in by employees holding any designated position.

24           (*Ibid.*)

25           In reaching this conclusion, the Commission found support in the constitutional right to  
26 privacy:

27 \_\_\_\_\_  
28           <sup>1</sup> All section references are to the Government Code unless otherwise indicated.

1           While our conclusion herein is based on an interpretation of the Act, we  
2 also are influenced by a concern that the right of privacy interest of public  
3 officials not be unduly invaded. [Footnote omitted.] The California Supreme  
4 Court has made it clear that although a properly drawn financial disclosure law  
5 meets constitutional standards, overbreadth must be avoided and a statute will be  
6 invalid if it:

7           . . . intrude[s] alike into the relevant and the irrelevant private  
8 financial affairs of the numerous public officials and employees  
9 covered by the statute and is not limited to only such holdings as  
10 might be affected by the duties or functions of a particular office.  
11 *County of Nevada v. MacMillen*, 11 Cal.3d 662, 671 (1974),  
12 quoting *City of Carmel-by-the-Sea v. Young* 2 Cal.3d 259, 272  
13 (1970).

14 (*Id.* at p. 81.)

15           For the reasons set forth in the Board’s opening brief, the answer to each of the four  
16 questions set forth above is no.

17 **I. THE PORT AGENT IS NOT A PUBLIC OFFICIAL OR PUBLIC OFFICER**

18           Concerning the first question, PMSA relies on *Board of Pilot Commissioners v. Superior*  
19 *Court* (2013) 218 Cal.App.4th 577, which applied the equitable doctrine of judicial estoppel to  
20 foreclose the Port Agent from arguing that he was not a “state officer” within the meaning of the  
21 California Public Records Act. That was the basis of the court’s decision. Contrary to PMSA’s  
22 statement at page 15 of its Comments, the court did not rely for authority on the federal district  
23 court case that had accepted the Port Agent’s argument that he was immune from suit in federal  
24 court under the Eleventh Amendment.

25           Here, it is the Board, not the Port Agent, who is arguing that the Port Agent is not a public  
26 official or a designated employee, and the Board is not estopped under any equitable principles  
27 from obtaining the sought-after ruling on that question. The Commission can and should  
28 independently determine whether the Port Agent is a “public official” or “designated employee”  
under the Act and the Commission’s regulations, free of any inhibitions concerning the doctrine  
of judicial estoppel, which has no application here.

          The Commission opinions that PMSA cites—*In re Vonk* (1981) 6 FPPC Ops. 1, and *In re*  
*Siegel* (1977) 3 FPPC Ops. 62—are not helpful on this issue. Both opinions concerned whether  
the entity in question was an “agency” for purposes of the Political Reform Act (the State

1 Compensation Insurance Fund in *Vonk* and the Pico Rivera Water Development Corporation in  
2 *Siegel*). That is not an issue here; the Board without question is a state agency. Neither opinion  
3 involved an issue like that here—whether certain persons were officers, members, or employees  
4 of the agency and thus “public officials” within the Act’s definition of that term. The identity and  
5 status of those persons in *Vonk* and *Siegel* were undisputed. So once agency status was  
6 established, that was the end of the matter. Here, in contrast, whether the Port Agent is an officer  
7 of the Board is the subject of dispute.

8 PMSA argues that the Port Agent “assists the Board in the exercise of its statutory duties”  
9 (listing pilot licensing, discipline, investigations, and the safety of pilots), and therefore must be  
10 regarded as a public official. (PMSA Comments, p. 10.) This assertion is insupportable on both  
11 factual and legal grounds.

12 The Port Agent’s Supplemental Declaration acknowledges that he reports navigational  
13 incidents involving pilots to the Board, but avers that he has no role in investigations, discipline,  
14 or pilot licensing:

15 As required by section 218 of the Board’s regulations, I make informational  
16 reports to the Board. Among these reports are reports of navigational incidents  
17 involving pilots. These incidents are then investigated by the Board’s Incident  
18 Review Committee, consisting of the Board’s Executive Director and one public  
19 member of the Board. Upon completion of its investigation, the Incident Review  
20 Committee makes a report to the Board that includes a recommendation. I do not  
21 advise or make any recommendation concerning these recommendations to the  
22 Board by the IRC, nor do I independently advise or make recommendations to the  
23 Board concerning whether to suspend or revoke a pilot’s license. I do not vote on  
24 the IRC’s recommendation and I do not go into closed session with the Board  
25 when it deliberates on the evidence introduced at the hearing. Further, I do not  
26 advise or make recommendations to the Board concerning whether to issue or  
27 deny a pilot’s license.

28 (Supp. Decl. of Peter McIsaac, ¶ 6.)

Concerning pilot safety, sections 1156.6 and 1156.7 of the Harbors and Navigation Code  
impose certain duties on the Board’s Executive Director regarding reports of unsafe pilot hoists,  
pilot ladders, or rigging for pilot hoists or pilot ladders, but these sections assign no role for the  
Port Agent. Some of the duties of the Port Agent set forth in section 218 of the Board’s

1 regulations implicate pilot safety, but these do not derive from any functions or responsibilities of  
2 the Board. As stated in the Declaration of the Board's Executive Director:

3       None of the duties of the Port Agent specified in section 218 of the Board's  
4 regulations . . . are duties of the Board.

5 (Decl. of Allen Garfinkle, p. 2, lines 6–7.)

6       Apart from the factual infirmities of PMSA's argument, a person's performance of duties  
7 imposed by government regulation or government contract does not render that person a "public  
8 official." *In re Leach* (1978) 4 FPPC Ops. 48, is instructive. The City of Bakersfield had adopted  
9 a tax to fund promotion of the city's downtown business district and business generally. To  
10 accomplish that goal, it contracted with a nonprofit corporation and the local chamber of  
11 commerce to do such things as decorate public places, promote public events, furnish music in  
12 public places, provide financial assistance to the redevelopment agency, construct and maintain  
13 public improvements, and operate a convention bureau. (*Id.* at p. 49.) The Commission rejected  
14 the idea that the employees and board members of the two entities were "consultants" who had to  
15 be included in the city's conflict of interest code:

16       We think [the employees and board members] would be consultants within the  
17 meaning of the Act if they make governmental decisions or act as quasi-employees  
18 of the City. However, in the instant case, we believe that only the City makes the  
19 governmental decisions. That is, the City has decided that it wishes to promote the  
20 downtown business district and business generally in the City of Bakersfield. In  
21 order to accomplish this purpose, it instituted a tax on downtown businesses and  
22 hired the Downtown Business Association and the Chamber of Commerce to  
23 perform certain services. In carrying out these services, we believe they were  
24 performing services for the City but not as public officials. Instead, they were  
25 performing private services in their private capacities which were contracted for by  
26 the City because these services were believed to be beneficial to the public.

27 (*Id.* at p. 53.)

28       Similarly here, the Port Agent's performance of duties required of him by regulation does  
not make him a "public official."

      Finally, although it does not appear that the General Counsel's Order and Memorandum  
view the Port Agent as other than an officer of the Board, the Port Agent, under section 18249 of  
the Commission's regulations, cannot be viewed as a separate "state agency." Section 82049

1 defines “state agency” to include “office,” but section 18249 of the Commission’s regulations  
2 narrows the definition to require, among other things, that the officer be “appointed by an elected  
3 state officer or an agency official or a state agency” (§ 18249(b)) and that the officer be “financed  
4 in part by any state funds or is subject to appropriation in the state budget” (§ 18249(c)). (See *In*  
5 *re Herr* (1977) 3 FPPC Ops. 11, 14.) Neither is true of the Port Agent. He is appointed by the  
6 other pilots and his income is from pilotage fees charged to the customers of the pilots. (Decl. of  
7 Peter McIsaac, ¶¶ 1, 2, 6, 7.)

8 **II. THE PORT AGENT IS NOT AN OFFICER “OF” OR “WITHIN” THE BOARD OF PILOT**  
9 **COMMISSIONERS**

10 The Board has a serious concern with this issue independent of whether the Port Agent is  
11 properly includable in the Board’s Conflict of Interest Code. A conclusion that the Port Agent is  
12 an officer of the Board and thus includable could have broad fiscal impacts beyond the narrow  
13 issue presented under the Political Reform Act. If the Port Agent is includable in the Board’s  
14 Code as an “officer” of the Board, it is a short step from there to the assertion that the Board is  
15 liable in damages for torts or other breaches of legal obligation committed by its “officer”—the  
16 Port Agent—under a theory of vicarious liability. Such vicarious liability could have serious  
17 fiscal implications for the Board and the State.

18 For the same reasons discussed under Heading I above, the Commission is free to make an  
19 independent judgment whether the Port Agent is an officer “of” or “within” the Board. (See  
20 §§ 82019, subd. (a), 82048, subd. (a), 87302, subd. (a).) The Board is not estopped from making  
21 this argument. An additional distinction that allows the Board to make the argument and the  
22 Commission to accept it is that this issue was not among those considered in *Board of Pilot*  
23 *Commissioners*.

24 Both the Port Agent and the pilots generally are subject to sets of regulatory directives  
25 contained in the Board’s regulations. Those directives that apply specifically to the Port Agent are  
26 set forth in section 218 of the Board’s regulations, and those that apply to the pilots generally are  
27 itemized in section 219 of the Board’s regulations. As discussed above and in the Board’s  
28 opening brief, obedience to those directives does not make those who comply officers of the



1 Board. The Court of Appeal specifically noted in *Board of Pilot Commissioners v. Superior Court*  
2 (2013) 218 Cal.App.4th 577, 583, that “The Port Agent does not serve as a member or officer of  
3 the Board . . . .”

4 **III. THE PORT AGENT DOES NOT MAKE OR PARTICIPATE IN THE MAKING OF GOVERNMENT**  
5 **DECISIONS**

6 This question has been covered in the Board’s opening brief. To recap, decisions such as  
7 assigning pilots to vessels and administering pilot vacation schedules are not “government”  
8 decisions; the Board has no authority itself to perform such functions. By including these  
9 functions in section 218 of its regulations and directing their performance by the Port Agent,  
10 however, the Board has established regulatory oversight over the Port Agent. In complying, the  
11 Port Agent does not thereby make “government” decisions. The “government decision” here was  
12 the Board’s decision to establish regulatory oversight.

13 The referenced decisions are decisions that have been and would be made in the course of  
14 running a pilotage business even if there were no regulation. The purpose of Harbors and  
15 Navigation Code section 1130 and section 218(b) of the Board’s regulations, which make the Port  
16 Agent “responsible for the general supervision and management of all matters related to the  
17 business and official duties of pilots” is not to impose new functions on the Port Agent. He is  
18 already performing them as president of the San Francisco Bar Pilots. The purpose is to make the  
19 Port Agent responsible to the Board for the efficient running of a business that, while private, has  
20 an important impact on maritime commerce and thus the economic health of the state.

21 That the Port Agent may exercise a measure of discretion in exercising these functions  
22 does not transform them into “governmental” decisions. Discretionary decisions are made every  
23 day in both private business and government. And even where a business is subject to  
24 government regulation, it may have a measure of discretion in how it complies with regulatory  
25 directives. PMSA’s discussion about whether the Port Agent’s duties are “purely ministerial” is  
26 therefore not helpful in reaching a decision whether his performance of those duties involves  
27 “governmental” decisions.

28

1           It may be helpful to contrast these business decisions of the Port Agent with decisions of  
2 private persons that are indeed “governmental,” and so render those persons “public officials.” *In*  
3 *re Herr* (1977) 3 FPPC Ops. 11, discussed such decisions. There, employees of the Del Monte  
4 Corporation served as “members of agricultural boards and committees involved in a variety of  
5 agricultural fields including the Processors Clingstone Peach Advisory Board, Prune Advisory  
6 Board, Raisin Advisory Board, Cannery Inspection Board and Pear Grading Committee.”  
7 Regarding three of the boards, “their consideration and recommendation regarding a variety of  
8 matters is required before the Director of the Department of Food and Agriculture can act.” (*Id.* at  
9 p. 17.) Another board had approval power regarding certain regulations. (*Ibid.*) The Pear Grading  
10 Committee was responsible for approving the grade, quality, and size regulations under the  
11 marketing program of the Agricultural Producers Marketing Law. (*Ibid.*) After concluding that  
12 the decisions of these various boards were “governmental,” the Commission concluded that the  
13 employee-members were “agency officials.” These decisions were not made as part of Del Monte  
14 Corporation’s business operations. Contrast the Port Agent’s decisions about such things as pilot  
15 assignments and pilot vacation schedules.

16 **IV. PMSA HAS NOT CARRIED ITS BURDEN OF (1) IDENTIFYING THE DECISIONS OF THE PORT**  
17 **AGENT WHICH MAY FORESEEABLY HAVE A MATERIAL EFFECT ON ANY FINANCIAL**  
18 **INTEREST AND (2) ENUMERATING THE TYPES OF FINANCIAL INTERESTS THAT MAY BE**  
19 **AFFECTED**

19           Before an agency may include one of its officers in its Conflict of Interest Code, it must  
20 (1) conclude that the officer is involved in “the making or participation in the making of decisions  
21 which may foreseeably have a material effect on any financial interest” (§ 87302, subd. (a)) and  
22 (2) make a “specific enumeration” of “the specific types of investments, business, positions,  
23 interests in real property, and sources of income which are reportable” (*ibid.*). Only those interests  
24 may be specified as reportable that “may foreseeably be affected materially by any decision made  
25 or participated in by the designated employee by virtue of his or her position.” (*Ibid.*)

26           The Board does not argue that an agency may include an individual in its COI Code only  
27 if it identifies in advance that particular individual’s actual conflicts involving the types of  
28 decisions made. (See PMSA Comments, p. 5.) It is not the function of a COI Code to identify

1 actual conflicts of interest for specific individuals, and the Board's opening brief did not suggest  
2 otherwise. The focus is instead on the types of *decisions* made and the impact that such *decisions*  
3 "may" have on specified types of interests. The Board simply echoed the statutory requirement of  
4 section 87302 by stating that it was PMSA's burden to at least identify what conflicts "might"  
5 arise in the Port Agent's execution of the duties required of him by regulation. (Board Brief,  
6 p. 20.) An opinion of this Commission is in accord. *In re Alperin* (1977) 3 FPPC 77, 78, 80 states  
7 that:

8 With respect to each such position, a code is required to list the specific types of  
9 investments, interests in real property and income which must be disclosed.  
(P. 78.)

10 It would be improper for a code reviewing body to require disclosure of interests  
11 which may not foreseeably be affected materially by decisions made or  
12 participated in by the designated employees. Such action would necessarily impose  
13 the same or similar disclosure requirements on persons with quite different  
14 responsibilities, and Section 87309(c) holds such a course to be impermissible.  
15 [Footnote omitted.] (P. 80.)

16 PMSA does not identify those decisions of the Port Agent "which may foreseeably have a  
17 material effect on any financial interest." Nor does it provide a specific enumeration of the  
18 specific types of financial interests that may foreseeably be affected materially by the types of  
19 decision made. Even assuming for purposes of argument that the Port Agent is an officer of the  
20 Board and that he makes governmental decisions, it is nonetheless PMSA's burden as petitioner  
21 here under section 87307 to go beyond that and satisfy the final predicate for inclusion of the Port  
22 Agent in the Board's Conflict of Interest Code. It has not done so.

23 PMSA goes only so far as to suggest vaguely that some conflict exists by virtue of the  
24 Port Agent making decisions affecting his "business partners":

25 [T]he Port Agent remains a business partner to those other licensees over whom he  
26 now exercises the authority to assign to the jobs, approve their vacation, or report  
27 to authorities in the case of incidents. . . . [T]hese facts . . . confirm that the Port  
28 Agent has regular and foreseeable potential conflicts.

(PMSA Comments, p. 11.)

PMSA does not describe how such decisions could have an effect on any financial  
interest, nor does it enumerate the types of financial interests that could be materially affected.  
Indeed, the argument actually proves too much, for if assignment of pilots to vessels involves a

1 financial conflict of interest, the Port Agent could be barred from performing what is arguably his  
2 most essential function.

3 **CONCLUSION**

4 The Board respectfully requests that the Commission affirm the Board's decision  
5 declining to add the Port Agent to the Board's Conflict of Interest Code.

6 Dated: June 11, 2014

Respectfully Submitted,

7 KAMALA D. HARRIS  
8 Attorney General of California

9 

10 DENNIS M. EAGAN  
11 Deputy Attorney General  
12 *Attorneys for Board of*  
13 *Pilot Commissioners*

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Pacific Merchant Shipping Association v. Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun**

No.: **None assigned**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On June 11, 2014, I served the attached **REPLY BRIEF OF BOARD OF PILOT COMMISSIONERS ON APPEAL FROM ORDER OF GENERAL COUNSEL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

Mike Jacob  
Vice President & General Counsel  
Pacific Merchant Shipping Association  
250 Montgomery Street, Suite 700  
San Francisco, CA 94104

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 11, 2014, at Oakland, California.

\_\_\_\_\_  
Larry Jefferson  
Declarant

\_\_\_\_\_  
  
Signature