

**REPORT BY THE
AUDITOR GENERAL
OF CALIFORNIA**

**A REVIEW CONCERNING ALLEGATIONS OF
CONFLICT OF INTEREST BY A BOARD MEMBER
OF THE BAY AREA RAPID TRANSIT DISTRICT**



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July 3, 1991

P-036

Honorable Robert J. Campbell, Chairman
Members, Joint Legislative Audit Committee
State Capitol, Room 2163
Sacramento, California 95814

Dear Mr. Chairman and Members:

Summary We have reviewed several allegations of potential conflict of interest involving Mr. John Glenn, a member of the San Francisco Bay Area Rapid Transit District's (BART) board of directors. John Glenn is also the owner of a firm that administers insurance claims for public and private entities.

In our review, we found that one of the alleged situations may constitute a conflict of interest under the Political Reform Act of 1974. Specifically, Director Glenn had a financial interest in BART's decisions on the terms and conditions of an agreement to expand rail service into San Mateo County. Although Director Glenn either was not present or abstained from voting on these decisions, on at least two occasions, he commented during the discussions preceding the decisions. However, we cannot conclude that he did so with the purpose of influencing the decisions of BART's board of directors.

Background BART was established in 1957 and started service in 1972. Operating trains on an interurban rail system with 71.5 miles of track, the system services the counties of Alameda and Contra Costa and the city and county of San Francisco. BART's board of directors (board) is the legislative body of the BART district and determines all questions of policy. The acts of the board are expressed by motion, resolution, or ordinance. These acts have validity or effect only when passed by a majority of the directors.

The board consists of nine directors who are elected for four-year terms by election districts established within the BART district. According to BART records, Director Glenn has been a member of the board since 1974 and was last reelected in November 1990. He is also the owner of John Glenn Adjusters and Administrators, a firm that administers insurance claims for public and private entities. As of February 1, 1991, Director Glenn's firm had contracts to adjust claims for the San Mateo County Transit District (SAMTRANS), the Santa Clara County Transit District, and the Golden Gate Bridge, Highway and Transportation District. As of this date, Director Glenn's firm also had a contract to adjust claims for the California Transit Systems Joint Powers Insurance Authority, which maintains a program that protects participants from liability claims and losses. The Central Contra Costa Transit Authority has been a participant in this program and has received services from Director Glenn's firm. Finally, in 1987, Director Glenn's firm received payments for services provided to the Alameda-Contra Costa Transit District.

The Political Reform Act of 1974, under the Government Code, Section 81000 et seq. (act), provides a conflict of interest law applicable to public officials in California. One purpose of the act is to ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interest. Section 87100 states that no public officials at any level of state or local government shall make, participate in making, or in any way attempt to use their official positions to influence governmental decisions in which they know or have reasons to know they have a financial interest.

The Fair Political Practices Commission (FPPC) has the primary responsibility for administering and implementing the act. In addition, the FPPC is authorized to adopt regulations to carry out the purposes of the act. These regulations are found in the California Code of Regulations, Title 2, Section 18000 et seq. The FPPC also issues opinions and advice letters and enforces the requirements of the act.

Scope and Methodology

The purpose of this audit was to review potential conflict of interest allegations against John Glenn. We received and reviewed approximately 15 allegations.

For each allegation, we conducted interviews or reviewed applicable documents, or both, to ascertain the nature of the allegation and to determine whether there was sufficient basis to continue our review of the issue. For some of the allegations, we did no additional work because the allegations described actions that were not unlawful or for which the statute of limitations had apparently expired. For example, some allegations related to how effectively Director Glenn represents his district. For the remaining allegations, we found sufficient evidence and basis to continue our review of the issues. The allegation that may have merit is described in this report. The others proved to be unfounded, or we could not find evidence to show that a violation occurred.

To identify the elements that constitute a conflict of interest, we reviewed state statutes and regulations. We also interviewed staff at the FPPC and the Department of Justice.

To determine the extent of his business relationships with transit agencies, we interviewed Director Glenn and, when appropriate, obtained copies of any contracts between his company and those transit agencies identified in the allegations. We also interviewed staff at some of these agencies to obtain information on the effects of various BART actions on its contracts with Director Glenn's company.

To determine the extent of Director Glenn's participation in the issues identified during our review, we reviewed the minutes and agendas for BART's board and committee meetings. We also listened to audio tapes of some of these meetings to determine if Director Glenn commented on the issues. Because prosecution for a conflict of interest under the act must be commenced within four years from the date the violation occurred, we limited our review to the BART meetings held from 1987 through 1991. We also interviewed BART directors, management, legal counsel, and staff to obtain background information on the issues included in our review.

**Glenn May Have
a Conflict of
Interest**

Director Glenn's actions on one of BART's projects may constitute a conflict of interest. The project involves a proposed extension of rail service into San Mateo County.

On March 1, 1990, SAMTRANS agreed to pay \$200 million to have BART construct BART stations in San Mateo County. Although, according to the board minutes, BART's board adopted this agreement on February 27, 1990, the board had discussed and made decisions for several years on the terms and conditions of this agreement. For example, in September 1987, the board authorized BART staff to negotiate the terms of the agreement with SAMTRANS. During the period of the negotiations from 1987 through the execution of the contract in 1990, Director Glenn's firm had contracts to adjust insurance claims for SAMTRANS.

**Glenn's Financial
Interest in
BART's
Agreement With
SAMTRANS**

The Political Reform Act of 1974, under the Government Code, Section 87100, restricts public officials' actions in governmental decisions in which they have a financial interest. According to the FPPC, a member of the BART board is a public official within the meaning of Section 87100. Consequently, Director Glenn is subject to the requirements of this code section and, as a BART director, should not be involved in a decision in which he has a

financial interest. Section 87103 states, in part, that an official 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 any source of income of \$250 or more provided to, received by, or promised to the public official within 12 months before the time when the decision is made. According to the Government Code, Section 82030(a), "income" includes a pro rata share of any income of any business entity in which the official owns a 10-percent interest or greater.

Thus, according to the act, if Director Glenn had a financial interest in the decisions relating to the extension into San Mateo County, the following elements must have been present:

- Director Glenn must have had a specified interest, such as a source of income, that was affected by these decisions;
- The effect on the source of income must have been reasonably foreseeable;
- The effect on the source of income must have been material; and
- The effect on the source of income must have been distinguishable from the effect on the public generally.

Source of Income

From 1987 through 1990, SAMTRANS was a source of income for Director Glenn. During this period, SAMTRANS paid Director Glenn's firm at least \$75,000 each year to adjust insurance claims. According to Director Glenn, he owned at least a 10-percent interest in the firm at that time. Because of this interest, at least 10 percent of the income received by his firm during each of these three years, or at least \$7,500 per year, constituted income to Director Glenn exceeding the \$250 limit.

Foreseeable Effect on SAMTRANS

In the proposed extension into San Mateo County, the effect on SAMTRANS was foreseeable. In its *Guide to the Political Reform Act of 1974*, the FPPC stated that the effect on an official's economic interest—in this case, for example, Director Glenn's source of income—is foreseeable when there is a substantial likelihood that it will ultimately occur as a result of a governmental decision. The FPPC further states that an effect does not have to be certain to be foreseeable; however, if it is only a mere possibility, it is not foreseeable.

The likelihood that this extension would affect SAMTRANS became apparent in 1980. At that time, the board included the project as part of BART's proposed extensions. Under the board's policy, this project is designed as a Phase I project. As a result, it will be implemented concurrently with all the other extensions in this first phase. At the same time, the board decided as part of its extension policy that the project would be subject to a satisfactory cost-sharing arrangement with San Mateo County. This decision later resulted in SAMTRANS' involvement in the project.

In 1987 and perhaps earlier, BART held negotiations with SAMTRANS to discuss the terms and conditions of the agreement. In June 1988, BART and SAMTRANS entered into "principles of agreement," which outlined some of the financial provisions of the project. In addition, BART and SAMTRANS signed an agreement in December 1989 that enabled BART to initiate some preliminary engineering work on the project. This agreement required SAMTRANS to deposit \$10 million into an escrow account. These factors increased the likelihood that the agreement with SAMTRANS would occur and that this project would affect SAMTRANS.

Material Effect on SAMTRANS

The effect of BART's decisions concerning its agreement with SAMTRANS was material to Director Glenn's source of income. Section 18702.1(a) of Title 2 of the California Code of Regulations establishes the materiality of the effect of the decisions to reach the agreement. This section states that the effect of a decision is material if any person, including a business entity, that has been a source of income to the official of \$250 or more in the preceding 12 months is directly involved in the decision. This section states that a business entity is directly involved in a decision when that entity is a named party in, or is the subject of, the proceeding concerning the decision before the official or agency. According to the regulation, a business entity is the subject of a proceeding if a decision involves the approval of any contract with the business entity.

In this project, BART's board was considering an agreement with SAMTRANS. In its advice letter to Director Glenn in August 1985, the FPPC treated SAMTRANS as a business entity for this analysis. Consequently, SAMTRANS was directly involved in BART's decision to expand rail services into San Mateo County. Moreover, since SAMTRANS was a source of income to Director Glenn's company of \$250 or more in the 12 months preceding the decisions made from 1987 through 1990, the effect of these decisions is material.

Effect Distinguishable

The final element to establish Director Glenn's financial interest in the decision to expand into San Mateo County is that the effect of this decision must be distinguishable from the effect of the decision on the public generally. According to the FPPC, the "public" for BART comprises "the residents, businesses, etc., within [BART's] district." In its advice letter to Director Glenn in 1985, the FPPC stated that the "public" for BART does not include San Mateo County. As a result, the decision's effect on SAMTRANS, which operates in San Mateo County, is distinguishable from the effect on BART's general public.

Thus, it appears that from at least 1987 through 1990 Director Glenn had a financial interest in BART's decisions on the terms and conditions of BART's agreement with SAMTRANS. Director Glenn may also have had a financial interest in the decisions made before this period. Specifically, according to staff at SAMTRANS, Director Glenn's firm has had a contract to provide services to SAMTRANS since 1978. In addition, Director Glenn requested and received an advice letter from the FPPC in 1985 concerning his financial interest in the agreement with SAMTRANS.

**Glenn's Actions
on the Proposed
Extension**

Because of his financial interest in the decisions about BART's agreement with SAMTRANS, Director Glenn should have disqualified himself from making, participating in, or using his official position to influence those decisions. The California Code of Regulations, Title 2, Section 18700.1(a), states that an official is attempting to use an official position to influence the decision if, for the purpose of influencing the decision, the official contacts or appears before, or otherwise attempts to influence, among others, any member of the agency. In its 1985 letter to Director Glenn, the FPPC advised him to disqualify himself from participating in the negotiations and ratification of the agreement. According to the FPPC, public officials "participate" in a governmental decision when they "take part in discussions." Moreover, in an advice letter, the FPPC stated that although public officials may be present while issues in which they have a financial interest are determined, they may not take testimony, ask questions, debate the issues, or say or do anything to influence the decisions.

Between 1987 and 1990, BART's board members discussed the terms and conditions of its proposed contract with SAMTRANS during at least seven board meetings and three committee meetings. During this period, Director Glenn either was not present or abstained from voting on the decisions that related to the terms and conditions of the agreement. Although in at least two instances, Director Glenn commented during the

discussions preceding these decisions, we cannot say whether he made these statements for the purpose of influencing the decisions.

For example, at a board meeting on October 22, 1987, a board member stated that he was considering presenting a motion that would have required the voters in nondistrict counties to vote on whether their counties should join the BART district. The proposed motion would have made this requirement a condition of any BART extension, including the proposed agreement with SAMTRANS. During the discussion of this proposed motion, Director Glenn acknowledged that he had a conflict of interest in the negotiations with SAMTRANS. However, in response to the proposed motion, Director Glenn stated that it was inappropriate for BART to tell other counties how to vote. In addition, he stated that if it insisted on this vote, BART would receive two to three new directors on the board who would favor extensions in San Mateo County over those in Contra Costa. These new directors would presumably represent San Mateo County. Director Glenn stated that if BART therefore planned to expand rail service to other areas besides San Mateo County, BART's board "was going the right way" in rejecting the motion.

In another instance, the board members discussed the status of the negotiations with SAMTRANS during a committee meeting held on February 23, 1988. During this meeting, Director Glenn stated that he had held an open meeting and that he had his own ideas about what BART should get out of San Mateo County. Director Glenn stated that at this open meeting he had explained that BART should get all of the local funding for other extension projects plus let San Mateo County provide the local funding for an extension to the airport.

According to Director Glenn, his comments at both of the above meetings related to the effect that the discussions would have on BART extensions in general.

To have had a conflict of interest, it must be demonstrated that through his comments Director Glenn attempted to use his position to influence the decisions necessary to reach the agreement with SAMTRANS. Although Director Glenn may have commented on the terms and conditions of the agreement, several factors may mitigate the effect of these comments. For example, Director Glenn acknowledged his potential conflict in this matter during the discussions of the agreement at several meetings. In addition, he disqualified himself from the decisions necessary to reach the agreement. These actions may have provided an awareness at the board meetings of Director Glenn's conflict of interest. With this awareness, the other board members may not have been influenced by Director Glenn's comments. Because of these mitigating factors, we cannot conclude whether Director Glenn's actions were an attempt to influence the decisions. Upon public release of this report, we will send a copy of the report to the FPCC and request the commission to review this matter.

We conducted this review under the authority vested in the auditor general by Section 10500 et seq. of the California Government Code and according to generally accepted governmental auditing standards. We limited our review to those areas specified in the audit scope section of this letter report.

Respectfully submitted,



KURT R. SJOBERG
Auditor General (acting)

Staff: Steve Schutte, Audit Manager
Frank Luera

**Responses to
the Audit**

San Francisco Bay Area Rapid Transit District

John Glenn, Director for BART District 6



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June 21, 1991

ERLENE DeMARCUS
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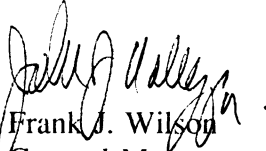
MICHAEL BERNICK
9TH DISTRICT

Mr. Kurt R. Sjoberg
Auditor General (Acting)
Office of the Auditor General
660 J Street, Suite 300
Sacramento, CA. 95814

Dear Mr. Sjoberg:

I have reviewed the draft copy of your report and have no comment. Thank you very much for the opportunity to review this preliminary document.

Sincerely,


Frank J. Wilson
General Manager

John Glenn
36601 Cuenca Court
Fremont, CA 94536

June 20, 1991

State of California
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660 J Street, Suite 300
Sacramento, CA 95814

Attn: Kurt R. Sjoberg
Auditor General (acting)

Dear Mr. Sjoberg:

This will acknowledge your draft of the report of the investigation of the allegations that I had conflicts of interest. I am gratified that "out of 15 allegations" which required almost 6 months of investigation you concluded there was no attempt to influence and you could not find anything of significance and you correctly observed that I abstained or was not present when relevant votes occurred.

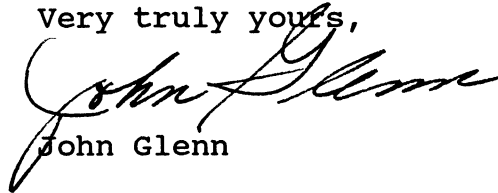
I felt that for the public to perceive the proper information the report conveys it should be arranged so that the first paragraph on the first page should be followed by BART's background, and then the paragraphs on the Government Code, followed by the paragraph on the FPPC and then the results of the investigation. A member of your staff explained the format used is the one used in all your reports.

My discussions on BART extensions always pertained to extensions in general as my goal was and is to build the Warm Springs extension which is entirely in my District.

I have been scrupulously clean in my activities on the BART Board. Not only did I consult BART's former General Counsel, Malcolm Barrett, and the current General Counsel, Sherwood Wakeman, on innumerable occasions but I also consulted FPPC made a personal visit to their office on one occasion and requested three written opinions from them in order to avoid conflicts.

Please notify me in advance the date the report is to be released to the public.

Very truly yours,

A handwritten signature in cursive script that reads "John Glenn". The signature is written in black ink and is positioned above the printed name "John Glenn".

John Glenn

JG:jw