

August 8, 2013

Assemblymember Philip Y. Ting
Nineteenth District
State Capitol
P O Box 942849
Sacramento, CA 94249-0019

Re: Your Request for Informal Assistance
Our File No. I-13-103

Dear Assemblymember Ting:

This letter responds to your request for advice regarding application of the Political Reform Act (the "Act")¹ to employment outside your position as a member of the Assembly. Because your question is general in nature and not limited to a specific governmental decision, we are treating your request as one for informal assistance.² Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws, or on any outside employment restrictions that may apply to members of the Assembly such as encompassed in the California Constitution, Section 8920 or legislative rules or policy.

QUESTION

Does the Act prohibit you from accepting payments for your work as a private consultant while at the same time serving as an Assemblymember?

CONCLUSION

The Act does not prohibit you from serving as an Assemblymember and also performing private consulting services for compensation. Instead, the Act prohibits you from making,

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requester with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; Regulation 18329(c)(3).)

participating in making or using your position to influence certain governmental decisions which will have a reasonably foreseeable material financial effect on your financial interests.

FACTS

You were elected to the State Assembly in November 2012. Prior to that, you were a national real estate financial advisor, appraiser and analyst, providing fiscal management and property assessments. You worked for Arthur Andersen, CB Commercial (now called CB Richard Ellis) and SSR Realty Advisors (now called Blackrock Realty). After working for those firms, you contracted out as a real estate advisor while earning your real estate agent and broker's licenses.

In 2005, you were appointed to serve as San Francisco Recorder/Assessor, where your responsibilities involved technical functions relating to tax assessments, real property valuation, and management of programs related to property assessments. While there, you earned a certification as a real estate appraiser by the California State Board of Equalization. In addition, you were instrumental in creating hundreds of "green-collar" jobs and attracting new businesses to the City of San Francisco. You served as Recorder/Assessor until 2012, when you were elected to the Assembly.

You are currently considering entering into a consulting services contract with a law firm to provide professional advice concerning real estate investments. The advice is intended to assist the firm in the acquisition of real estate and to promote the adoption of green building techniques in the state and national market. Under the proposed terms of the agreement, you will be compensated between \$10,000 and \$100,000 per year for your consultation services.

ANALYSIS

The Act does not prohibit an official from holding a public position and also performing work for a private business or firm. However, the Act does prohibit an official from making, participating in making or using his or her official position to influence a government decision in which the official has a financial interest. (Section 87100.) Section 87103 of the Act provides that an official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided to, received by or

promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating [\$440] or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

As a member of the Assembly, you are considered a “public official” under the Act, and are therefore subject to the disqualification provisions of the Act. (Section 82048; Regulation 18700.) If you do private consulting work, the law firm that pays you for your services would become a source of income to you under Section 87103(c) because under the terms of the proposed contract, you would receive more than \$500 per year. In addition, assuming you have an investment in your business of at least \$2,000, you would have an interest in your consulting business as a business entity. Therefore, you would be prohibited from making, participating in making or using your position to influence certain³ governmental decisions that would have a material financial effect on these interests under the Act.⁴

In addition, because the Commission is authorized only to render advice on public officials' obligations under the Act, we do not address other laws outside the purview of the Act that may also bear on your situation. These include Section 1090, which bars public officials from acting in their governmental capacity to participate in making a contract in which they are financially interested, Section 8314, which prohibits the use of government resources (including your paid Assembly time) for a private purpose, and provisions of the California Constitution and Section 8920 that may bear on outside employment and income for legislators. Also, rules or policies of the Assembly may place restrictions on your outside employment activities that are incompatible with your Assembly employment. We recommend you contact your agency's legal counsel for advice on these potential issues.

You inquired whether accepting payments for your consulting services under the proposed contract would be prohibited by the Act's honorarium provisions. Section 89502(a) provides that no elected state officer shall accept any honorarium. The term “honorarium” is defined as any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering. (Section 89501(a).) “Speech given,” as used in Section 89501, means a public address, oration, or other form of oral presentation, and includes participation in a panel,

³ Please note that despite being public officials subject to the Act's conflict-of-interest rule in Section 87100, members of the Legislature are only subject to administrative penalties for violations of the conflict-of-interest provisions in connection with the decisions specified in Section 87102.5, enclosed for your review.

⁴ If you are called upon to make or participate in making any governmental decision in which you have an interest by reason of your outside employment, we suggest that you contact the Commission for guidance tailored to the specific circumstances of the decision before you.

seminar, or debate. (Regulation 18931.1.) However, Section 89501(b)(1) provides that the term “honorarium” does not include: “[e]arned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business or profession is making speeches.” According to your facts, the predominant activity of your proposed work you plan to perform is consulting to a law firm, not making speeches. Therefore, the income you receive would not constitute an honorarium, as it is earned income for personal services customarily provided in connection with the practice of a bona fide business.

Finally, you should also be aware of the prohibition concerning influencing prospective employment contained in Section 87407 of the Act. That section provides that no public employee shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating prospective employment.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Counsel, Legal Division

JW:jgl