

March 27, 2014

Lois Fisher, CNU, LEED AP ND  
Fisher Town Design  
440 Duncan Drive  
Windsor, CA 95492

Re: Your Request for Advice  
**Our File No. A-14-011**

Dear Ms. Fisher:

This letter responds to your request for advice regarding the statement of economic interests reporting and conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Please note that because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. We also note that we do not provide advice on past conduct and our advice is based solely on the provisions of the Act.

### QUESTION

Do you have to report clients of your husband’s business as sources of income on your Statement of Economic Interests (Form 700) when you and your husband have a prenuptial agreement that states that his business and income are separate assets?

### CONCLUSION

No. You are not required to report income from clients of your husband’s business on your Form 700 as long as the income from those clients is not comingled with community funds, used to pay community expenses or used to produce or enhance your husband’s separate income.

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<sup>1</sup> 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.

## FACTS

You are a member of the Windsor Planning Commission and have been on the Planning Commission for ten years. The Planning Commission has been reviewing a developer's proposal for a shopping center with a grocery store during the last three years. On November 30, 2013, you were married and your husband is an accountant. Your husband owns over 50% of a multi-partner accounting practice in Santa Rosa. A non-equity partner of your husband's firm has a grocery store client with the firm, your husband does not. Your husband has not received any payment from the grocery store, but the firm has. The grocery store account is valued at about \$40,000-50,000 per year for the firm's non-equity partner. Your husband's firm has hundreds of clients, most of which pay \$1,000 or more for tax preparation. During our phone conversation on March 10, 2014, you informed me that you and your husband have a prenuptial agreement in which his income is separate from yours. You also stated that his income is not comingled with community funds, is not used to pay community expenses and community efforts are not used to enhance his separate income. You would also like to know if you can talk with planning staff and council members if they will be having a hearing on an issue involving the grocery store client.

## ANALYSIS

### **Statement of Economic Interests (Form 700) Reporting**

As a Planning Commissioner you have full disclosure under the Act (Section 87200). As a result, you are required to report on your Statement of Economic Interests (Form 700) interests in real property, investments, and sources of income (Section 87202).

You have identified your spouse's income as a potential reportable interest. The Commission has long advised that a public official has a reportable interest in the source of a spouse's income, once the income from that source aggregates to a total of \$1,000 or more within any 12-month period.<sup>2</sup> This is because California is a community property state where the default presumption of the law is that each spouse has equal rights in property of "the community." Because community property law provides that a public official has rights in the income earned by his or her spouse, the source of a spouse's income is a source of income to the public official under the Act. The Act's definition of the term "income," at Section 82030 expressly refers to community property interests in a spouse's income, consistent with state law in this area.

The Commission has, however, advised that for purposes of the Act an official has no community property interest in the income of his or her spouse when the couple has an effective

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<sup>2</sup> The Commission presumes an equal community interest in the income of a spouse. As a result, when an official's spouse earns \$1,000 or more from any one source during a 12-month period, the official's share of that income is \$500. The income reporting threshold specified by the Act is \$500 (Section 87207).

separate property agreement.<sup>3</sup> (See the *Vassey* Advice Letter, No. A-86-201; the *Morales* Advice Letter, No. A-99-246(a); the *Fussel* Advice Letter, No. A-08-149.) The purpose of a separate property agreement is to opt out of community property rules. With an effective separate property agreement, an official does not receive income that is specifically reserved as the separate property of his or her spouse. However, to be considered separate property income, the income must be maintained in separate accounts, the separate funds may not be commingled with community funds or used to pay for community expenses, and community efforts must not be used to produce or enhance the separate income of either spouse. (See *Hackard* Advice Letter, No. A-84-070, *Katz* Advice Letter No. A-86-335 and *Barker* Advice Letter No. I-00-265.) During our phone conversation you stated that your agreement meets all of these criteria and therefore you do not have to report clients of your husband's firm on your Form 700.

### **Conflict of Interest**

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

You have stated that you are a member of the Planning Commission and there will be governmental decisions regarding a grocery store coming up before the Planning Commission, therefore we will begin at Step 3 of the analysis where we examine what interests you may have.

A public official has a financial interest in a decision within the meaning of Section 87103 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 any one of five enumerated interests. (Section 87103; Regulations 18703-18703.5.) Because you have a separate property agreement with your husband that keeps

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<sup>3</sup> Note, there is a distinction between an interest in "a source of income" as opposed to an investment interest of an official's spouse is based on the statutory definitions of "income," and "investment." Section 87103(a) and Section 82034, which refer to "investments" provide that an official also has an economic interest in a business entity in which he or she has an indirect investment worth \$2,000 or more. Neither Section 87103(a) nor Section 82034 refer to "community property." An "indirect interest" means any investment in a business entity owned by the spouse of an official or by a member of the official's immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) This definition is not dependent on community property law. Rather, an "indirect" interest includes an investment owned by the spouse, whether the investment is community property or not.

his income separate from yours, you do not have an interest in his firm or its clients as a business or source of income. You have not identified any other potential interests and therefore you do not have a conflict of interest under the Act in participating in the decisions regarding the grocery store and our analysis concludes at this step.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Sukhi K. Brar  
Senior Counsel, Legal Division

SKB:jgl