

August 20, 2014

Alexandra Stupple  
Attorney  
California Department of Public Health  
Office of Legal Services  
1415 L Street, MS 0506  
Sacramento, CA 95814

Re: Your Request for Informal Assistance  
**Our File No. I-14-126**

Dear Ms. Stupple:

This letter responds to your request for advice on behalf of Mary Kay Sogge regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because you request general guidance and your request is not about a specific pending decision, we render informal assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Regulation 18329.) Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Finally, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application of other incompatible activities and conflict-of-interest laws that may apply.

### QUESTION

Does Ms. Sogge have a conflict of interest in the decisions she makes in performing her duties as a Health Facility Evaluator Nurse for California Department of Public Health based on her spouse's employment with Kaiser?

### CONCLUSION

Ms. Sogge will have a conflict of interest in any decision in which Kaiser is directly involved (as discussed below), or any decision that will result in the following in a fiscal year: an increase or decrease in Kaiser's gross revenues by \$10,000,000 or more or will result in

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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.

Kaiser incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500,000 or more. In addition, Ms. Sogge has a conflict of interest in decisions that will result in an increase or decrease in the value of the Kaiser's assets or liabilities of \$10,000,000 or more. This assumes that Kaiser is subject to Regulation 18705.1(c)(1).

## **FACTS**

Mary Kay Sogge is a Health Facility Evaluator Nurse with the Licensing and Certification Program Division (L&C) of the California Department of Public Health. Ms. Sogge works at CDPH headquarters in Sacramento in the Policy Section of the Licensing and Certification Program. Ms. Sogge's husband is Deputy Chief of Gastroenterology at Kaiser Foundation Hospital in Modesto, which is licensed as a general acute-care hospital and skilled nursing facility (long-term care) by the California Department of Public Health (CDPH).

Ms. Sogge's duty statement describes her duties, in pertinent part, as follows:

“This position will provide clinical analytical support to the Policy Section of the Licensing and Certification Program, and independently coordinates, reviews, researches, compiles and analyzes information to develop regulations governing the provider types licensed by the Program. This position assists with and independently develops recommendations, policies, procedures, and informational documents for L&C District Offices and for providers.

“Researches California law and departmental policies and procedures and makes independent determinations of the need for regulatory requirements for more than 30 different health facility categories. Consults with legal staff to determine the nature of the regulations ensuring they meet the standard to interpret, specify, or implement statutory requirements. Develops regulations for management approval. Apprises management of the determinations made based on the independent research and negotiates priority of promulgating the regulations.

“Independently reviews sensitive and complex issues affecting the Program. Provides clinical perspective and expertise in the development and implementation of public and program policy, procedures, regulations and legislation related to the L&C Program. Makes recommendations to immediate supervisor, and as necessary, upper management, related to the nursing aspects of controlled correspondence, AFLs and DOMs. Available as a resource for field leadership and staff in the interpretation and explanation of regulations and Program policy and procedures. Utilizes clinical nursing and surveyor experience to review and advise on sensitive issues such as complainant appeals, citations, and adverse events. May give oral presentations and must compose concise, well written reports. Conducts Special Projects as assigned.

“Creates regulation project management plans; determines the potential fiscal and economic impact of the regulations; coordinates and facilitates meetings with both internal and external stakeholders for inclusion in the process; identifies policy issues for management resolutions. Coordinates Rulemaking Project Teams and tracks the progress in project team goals and timelines.

“Independently investigates and prepares second level appeal reviews for complainants dissatisfied with the results of a complaint investigation and subsequent informal appeal conference held at the District Office level. Independently conducts investigations and prepares reports of findings and makes recommendations to management for final determinations. Interviews involved parties, reviews initial complaint investigation, appeal conference, and issuance of deficiencies/citations which resulted from the investigation. Prepares written notification to the complainant of the Deputy Director’s decision. Provides feedback to the district office staff on complainant appeal outcomes if different than the district office results. Maintains complainant appeal statistics as to volume, type of complaint and outcome. Keeps field operations Branch Chief informed of outcomes. May act as liaison with other Departments and State agencies.

“Participates as a member of the departmental rulemaking project team and independently drafts California Code of Regulations Title 22 regulations for health facilities licensed by the Licensing and Certification Program. Researches implementation needs, studies, and reports to justify proposed standards.

“Responds to inquiries about regulatory requirements from field staff and the public. Prepares communication for, tracks incidents in, and monitors various waiver programs for which L&C provides services to [Department of Health Care Services] DHCS. Communicates with District Offices and DHCS regarding surveys of the facilities in waived programs and coordinates communication of survey results and collection of Plans of Correction.

#### “Marginal Functions

“Prepares reports and reviews sensitive and complex public policy issues on a variety of health facility and related aging issues.

“Attends and participates in training. Travel to various healthcare facilities in order to conduct surveys, and investigations. Other duties as required to support the Licensing and Certification Policy Branch.”

Ms. Sogge is currently working on her first rulemaking package, a package that covers hospitals. The rules have not yet been promulgated. Her first- and second-line supervisors say

the regulations have already been written and Ms. Sogge is simply “making edits.” The regulation package has to do with adverse-event reporting in hospitals. Ms. Sogge’s second-line supervisor wrote that the costs to hospitals to comply with the regulations will only be the time it takes the person to enter the adverse-event incident into the state-wide CDPH database.

Her duty statement also indicates that she “investigates and prepares second level appeal reviews for complainants dissatisfied with the results of a complaint investigation.” Ms. Sogge’s first-line supervisor wrote that this involves long-term-care facilities only. Ms. Sogge also conducts independent informal dispute resolutions for long-term-care facilities, which include skilled nursing facilities, intermediate care facilities, congregate living facilities, nursing facilities, and pediatric day health and respite care facilities. According to her first-line supervisor, Ms. Sogge has never been involved with a Kaiser complaint, although Kaiser does have skilled nursing facilities.

Last, Ms. Sogge participates in developing “all-facilities letters,” which are directional letters to various types of health facilities—like guidance documents—as well as “district office memos,” which are aligned with all-facilities letters but give district offices more procedural information. Ms. Sogge’s first-line supervisor says she does not know of any of these two types of documents that Ms. Sogge has worked on, but her second-line supervisor wrote us that Ms. Sogge becomes involved when there is a “procedural question related to the operations of the RN Unit.” The duty statement says Ms. Sogge devotes 25% of her time to this activity.

## ANALYSIS

Section 87100 prohibits any state or local public 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 specified in Section 87103. A public official has a “financial interest” in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a conflict of interest under Section 87100.

**Steps 1 and 2: Is the individual a public official (Section 87100; Regulation 18700(b)(1)) that will be making, participating in making, or using his or her official position to attempt to influence a government decision? (Section 87100; Regulation 18700(b)(2).)**

A “public official” is “every member, officer, employee or consultant of a state or local government agency . . .” (Section 82048.) Ms. Sogge is a public official. (Sections 82003, 82041, and 82048(a).) A public official makes, participates in making, or uses his or her official position to attempt to influence a government decision when any of the following apply.

- Under Regulation 18702.1, an official “makes” a government decision when he or she, among other things, votes on a matter, enters into a contract on behalf of his or her

agency, or obligates or commits his or her agency to any course of action. (Regulation 18702.1(a).)

- Under Regulation 18702.2, an official “participates” in a government decision when, generally, he or she negotiates, without significant substantive review, regarding a government decision, or advises or makes recommendations to the decisionmaker directly or without significant substantive review. (Regulation 18702.1(a) and (b).)
- Under Regulation 18702.3, an official “uses his or her official position to influence” a government decision when he or she contacts, appears before or otherwise attempts to influence a member, officer, employee or consultant of the official’s own agency or, when appearing before another government agency, the official acts or purports to act on behalf of his or her own agency. (Regulation 18702.3(a) and (b).)

Since Ms. Sogge as a Health Facility Evaluator Nurse makes, participates in making and influences government decision, this step is met.

**Step 3: Identify the public official’s interests that may be affected by the government decision. (Sections 87100 and 87103; Regulation 18700(b)(3).)**

Section 87103 and Regulations 18703 through 18703.5 set forth the types of financial interests held by a public official that, when affected by a government decision, may expose the official to a possible conflict of interest. You have identified two interests under the Act that may result in a conflict of interest for Ms. Sogge.

- Any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.) “Income” means “a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse.” (Section 82030(a).) Thus, Ms. Sogge has an interest in her community property share of the income her spouse receives.<sup>2</sup>

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<sup>2</sup> Section 82030 also provides: “Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater.” You did not indicate that Ms. Sogge’s spouse owns a business. Note that ownership of the business could result in a different analysis in future decisions.

You noted that Mr. Sogge is employed by Kaiser Permanente Medical Group<sup>3</sup> and received greater than \$500 in salary. Therefore, Kaiser is a source of income.

- A personal financial interest, that is, an effect on his personal expenses, income, assets or liabilities of the official or his or her immediate family. (Section 87103 and Regulation 18703.5.)

A public official always has an interest in his or her personal finances. However, nothing in your facts indicate that any decision that Ms. Sogge will participate in will affect Mr. Sogge's salary or benefits. However, if in a future decision there will be a reasonably foreseeable material financial effect on Mr. Sogge's personal finances as a result of a governmental decision, this interest will be the basis for a conflict of interest.

**Steps 4, 5 and 6: Is it reasonably foreseeable that the decision will have a material financial effect on the public official's interest.**

The next three steps, when considered together, identify whether a given decision will have a reasonably foreseeable material financial effect on the officials' economic interest. This is the statutory test for disqualification. The first step is determining whether the interest of the official is directly or indirectly involved in a decision. This is an important question because if an interest is directly involved, generally a strict rule for materiality applies.

A person, including business entities and sources of income, is directly involved in a decision before an agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1(a).)

Kaiser is not directly involved in the regulations or in the other decisions that you describe. Therefore, Kaiser will be indirectly involved in decisions in question. (See, Regulation 18704.1(b).)

The materiality standard that applies depends on the financial size of the source of income. You have not provided information concerning the current financial size of Kaiser, but based on the size of Kaiser, as an example, we apply Regulation 18705.1(c)(1) because Kaiser's

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<sup>3</sup> You actually stated that Mr. Sogge is employed by the Permanente Medical Group. Ms. Sogge's Form 700 reports he is employed by Kaiser Hospital. However, it appears that these businesses are one in the same therefore we analyze them as a single employer. If this incorrect you should contact us for further advice.

revenue may meet fortune 500 standards.<sup>4</sup> Under the materiality standard in (c)(1), an effect is considered material as follows:

- The decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year of \$10,000,000 or more; or
- The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500,000 or more; or
- The decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$10,000,000 or more.

Finally, a conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).) A reasonably foreseeable financial effect on an interest indirectly involved in a decision is defined in Regulation 18706(b) as follows:

“A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.”

As you can see, these standards are very large and it is unlikely to be met frequently.<sup>5</sup>

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl

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<sup>4</sup> You should obtain and apply the appropriate standards applicable to Kaiser.

<sup>5</sup> However, keep in mind that where Kaiser is directly involved in a decision a conflict of interest is presumed unless it can be shown there is no financial effect on Kaiser.