



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 30, 2021

Kelly Jenkins
Assistant CEO
433 Aviation Boulevard, Suite 100
Santa Rosa CA 95403
Sonoma County Employees' Retirement Association

Re: Your Request for Advice
Our File No. A-21-032

Dear Jenkins:

This letter responds to your request for advice on behalf of the Sonoma County Employees' Retirement Association ("SCERA") regarding the conflict of interest code provisions of the Political Reform Act (the "Act").¹

Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Are relevant personnel of TCW TALF Opportunities Fund, LP²/ ("TCW Opportunities Fund" or the "Fund") and the Fund's General Partner, TCW TALF GP LLC, required to submit Statements of Economic Interests (Form 700s) as consultants subject to full disclosure?

CONCLUSION

Yes. As the manager of an investment portfolio for the SCERA, relevant personnel must file a Form 700 as a consultant subject to full disclosure as directed by SCERA.

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 Term Asset-Backed Securities Loan Facility, or TALF, was a program created by the U.S. Federal Reserve in November, 2008 to boost consumer spending in order to help jumpstart the economy. It did this by issuing loans to banks using asset-backed securities (ABS) as collateral. A new version of the program was started in 2020 to purchase ABS during the economic disruption of the COVID-19 crisis. The program stopped making new loans as of December 31, 2020. <https://www.investopedia.com/terms/t/talf.asp> (retrieved March 3, 2022).

FACTS AS PRESENTED BY REQUESTER

The SCERA Board of Retirement engaged the TCW Opportunities Fund by purchasing a limited partnership in the Fund for a guaranteed capital commitment of \$35 million. The General Partner of TCW Opportunities Fund was TCW TALF GP LLC.

TCW Opportunities Fund called 10% of the capital commitment (\$3.5 million) to have cash available if it were to find attractive investments. SCERA transferred that amount to the Fund. The Fund ultimately determined that there were no securities appropriate for the strategy, so the Fund eventually returned the called capital, plus some earnings from a money market fund in which it had been held. The Fund never charged SCERA any management fee or administrative fee. Still, TCW did make a capital call, did invest SCERA's assets (albeit not in TALF), and did make an investment decision to not invest in any TALF opportunities.

SCERA has taken the position that relevant personnel of TCW qualify as a "consultants;" however, it has not specified who should fill out the Form 700. In most instances the investment portfolio manager would have the obligation to file a Form 700. In this instance, it would be the individual(s) working for the General Partner, TCW TALF GP LLC.

Key Document Language

SCERA has adopted a Conflict of Interest Code which provides, *inter alia* (bold added for emphasis):

Any SCERA trustees, employees or consultants already required to file a disclosure statement (Form 700) pursuant to Government Code Section 87200, et seq. are identified in Appendix C and no additional disclosure is required by this Code. Officials designated in Appendix C shall file their original disclosure statements with the SCERA Retirement Chief Executive Officer, who shall make and retain a copy, and forward the original to the Fair Political Practices Commission or to the appropriate agency pursuant to 2 Cal. Code of Regs. Section 18753(d) at the discretion of the Fair Political Practices Commission.

* * *

APPENDIX C

AGENCY POSITIONS THAT MANAGE PUBLIC INVESTMENTS FOR PURPOSES OF SECTION 87200 OF THE GOVERNMENT CODE.

Trustees
Retirement Chief Executive Officer
Retirement Assistant Chief Executive Officer
Chief Retirement Investment Officer
Senior Retirement Investment Officer

Consultants

The Subscription Agreement for the limited partnership granted the General Partner:

...full power of substitution, as [SCERA's] true and lawful agent and attorney-in-fact ... to execute, acknowledge, verify, swear to, deliver, record and file ... all instruments that the General Partner determines to be appropriate in connection with forming and operating an investment vehicle ... [and] any other instruments determined by the General Partner to be necessary or appropriate in connection with the proper conduct of the investment or other activities of the Partnership....”

The TCW Opportunities Fund limited partnership agreement provides, *inter alia*:

3.1 Management in General. Subject to the other provisions of this Agreement, the management, operation and policies of the Partnership shall be vested exclusively in the General Partner, which shall have the power by itself and shall be authorized and empowered on behalf of and in the name of the Partnership to delegate or carry out any and all objects and purposes of the Partnership and to perform all acts and enter into and perform all contracts and other undertakings that it may in its discretion deem necessary or advisable in connection therewith or incidental thereto, provided that the management and the conduct of the activities of the Partnership shall remain the sole responsibility of the General Partner and all decisions relating to the selection and disposition of the Partnership's investments shall be made exclusively by the General Partner in accordance with this Agreement.

3.2 Powers of the General Partner. Without limiting the foregoing, except as expressly provided otherwise in this Agreement, the General Partner, on behalf of and in the name of the Partnership, shall have the power without any further act, approval or vote of the Limited Partners or any other Person to:

(a) Purchase, acquire, hold, invest, reinvest, sell or otherwise dispose of Securities and other property, in accordance with and subject to this Agreement;

(b) Purchase, acquire, hold, invest, reinvest, sell or otherwise dispose of, write, endorse, guarantee, exchange and trade (on margin or otherwise), within and without the United States and whether or not readily marketable, Securities, instruments and other assets of any Person, sell any such Securities short and cover such sales, and to hold cash uninvested;

(c) Vote or otherwise take any action, directly or indirectly, required of or allowed to the Partnership with respect to any Securities or other property;

(d) Cause the Partnership to participate in, and to obtain financing from or through the U.S. federal government's Term Asset-Backed Securities Loan Facility (as such program may be amended, revised or otherwise modified from

time to time, “TALF”) and to take any and all actions that may be necessary, advisable or convenient to, or in connection with, the foregoing and to enter into any and all agreements, instruments, arrangements and understandings (including, without limitation, customer agreements with dealers) (“Customer Agreements”) relating thereto or in connection therewith;

(e) Lend and pledge, with or without security, any Securities, instruments or other property, including by entering into reverse repurchase agreements, and from time to time without limit as to amount, borrow or raise funds, including by entering into repurchase agreements, and secure the payment of obligations of the Partnership by mortgage upon, or pledge or hypothecation of, or by granting a security interest in, all or any part of the Partnership Property;

* * *

As to the obligations to report fiscal activities to SCERA, the limited partnership agreement of TCW Opportunities Fund provides, *inter alia*:

9.3 Reports to Current Partners. Each Limited Partner [such as SCERA] shall receive (i) unaudited quarterly account statements, and (ii) within 120 days after the end of each Fiscal Year, or as soon as practicable thereafter, annual audited financial statements together with copies of his, her or its Schedule K-1 to the Partnership’s income tax return. The Partnership’s financial statements will be prepared on the basis of accounting standards generally accepted in the United States of America. The General Partner [TCW TALF GP LLC], in its sole discretion, may from time to time furnish additional reports to Limited Partners.

Also, the Side Letter Agreement for the investment provides:

15. Additional Disclosure and Reports. As required by California Government Code Section 7514.7, the General Partner shall at least annually deliver the following reports, disclosures and information to Investor [SCERA]:

- a. The fees and expenses that the Investor pays directly to the Partnership, the General Partner, the Investment Manager and their “Related Parties” (as defined below);
- b. The Investor’s pro rata share of fees and expenses not included in paragraph (1) that are paid from the Partnership to the General Partner, the Investment Manager and their Related Parties (as defined below);
- c. Any additional information described in subdivision (b) of Section 6254.26 of the California Government Code, which is the following:
 - i. Name address and vintage year of the Fund
 - ii. Dollar amount of Investor’s commitment to the Fund since inception
 - iii. Dollar amount of cash contributions Investor has made to the Fund since

inception

iv. Dollar amount of cash distributions received by Investor on a fiscal year-end basis

v. Dollar amount of cash distributions plus remaining value of Fund assets attributable to Investor

vi. Net internal rate of return of the Fund since inception

vii. Dollar amount of the total management fees and costs paid on a fiscal year-end basis by Investor

For the purpose of this section, the term “Related Party” means

(A) Any current or former employee, manager, or partner of any related entity that is involved in the investment activities or accounting and valuation functions of the General Partner, Investment Manager, Partnership, or any of their respective family members (each, a “Related Person”).

(B) Any operational partner, senior adviser, or other consultant or employee whose primary activity for the General Partner or Investment Manager is to provide operational or back office support to the Partnership or its investments (each, an “Operational Person”).

(C) Any entity more than 10 percent of the ownership of which is held directly or indirectly, whether through other entities or trusts, by a Related Person or Operational Person regardless if the Related Person or Operational Person participates in the compensation received by the General Partner or Investment Manager.

ANALYSIS

The threshold inquiry is whether, under the Act, these individuals are “public officials.” Section 82048 defines “public official” as every member, officer, employee or consultant of a state or local government agency.

Under the Act, certain state and local public officials file periodic statements of economic interests for the purpose of disclosing pertinent economic interests. These individuals are required to file the Form 700 pursuant to either Section 87200 or Section 87300.

“Other Public Officials Who Manage Public Investments” Under Section 87200 and Regulation 18700.3(b)(1).

Section 87200 lists those officials with the broadest decision-making authority, including certain high-ranking local officials like the members of City Councils, mayors, city treasurers, city managers, and public officials who manage public investments, and imposes on them the broadest disclosure requirements under the Act.

“Other public officials who manage public investments” must file financial disclosure forms pursuant to Section 87200. Individuals who file statements pursuant to Section 87200 do so

because their position is specifically enumerated in that section, not because they are designated in an agency's conflict-of-interest code. Section 87200 filers have a uniform disclosure level throughout the state that does not vary with each agency's unique conflict-of-interest code. We have advised that no individual whose position is enumerated in Section 87200 may be designated in an agency's conflict-of-interest code. This includes "members of local government agencies, boards or commissions who manage public investments on behalf of their agency" and who file their statements of economic interests with the city clerk as their filing officer pursuant to Regulation 18753. (Sections 82019(b)(1), 87302(b).)

For purposes of Section 87200, Regulation 18700.3(b)(1) sets forth the following definitions of "other public officials who manage public investments":

(A) Members of boards and commissions, including pension and retirement boards or commissions, or of committees thereof, who exercise responsibility for the management of public investments;

(B) High-level officers and employees of public agencies who exercise primary responsibility for the management of public investments, such as chief or principal investment officers or chief financial managers. This category shall not include officers and employees who work under the supervision of the chief or principal investment officers or the chief financial managers; and

(C) Individuals who, pursuant to a contract with a state or local government agency, perform the same or substantially all the same functions that would otherwise be performed by the public officials described in subdivision (b)(1)(B).

Regulation 18700.3 sets forth the following definitions:

"Public investments" is defined as "the investment of public moneys in real estate, securities, or other economic interest for the production of revenue or other financial return." (Regulation 18700.3(c).) Moreover, "public moneys" includes "all money belonging to, received by, or held by, the state, or any city, county, town, district, or public agency...." (Regulation 18700.3(d).)

"Management of public investments" means the following nonministerial functions: directing the investment of public moneys; formulating or approving investment policies; approving or establishing guidelines for asset allocations; or approving investment transactions. (Regulation 18700.3(e).)

We now analyze whether employees of the Fund, which contracted with the County, are "other public officials who manage public investments" under Regulation 18700.3(b)(1). Initially, we observe that the Subscription Agreement grants to the Fund's general partner "the full power of substitution, as [SCERA's] true and lawful agent and attorney-in-fact" and that the general partner has authority to "[p]urchase, acquire, hold, invest, reinvest, sell or otherwise dispose of Securities and other property" as well as "take any action, directly or indirectly, required of or allowed to the Partnership with respect to any Securities or other property" and that "all decisions relating to the selection and disposition of the Partnership's investments shall be made exclusively by the General

Partner.” The duties performed by these consultants -- active management of County investments, with full discretion to invest, reinvest, or sell all assets under their management in any type of security they deem appropriate -- fits the definition of “management of public investments” set forth in Regulation 18700.3(e).

In order to fit within the last category of “other public officials who manage public investments,” these private employees must be “[i]ndividuals who, pursuant to a contract with a state or local government agency, perform the same or substantially all the same functions that would otherwise be performed by the public officials described in subsection (b)(1)(B).” (Regulation 18700.3 (b)(1)(C).)

Because the investment managers have full discretion to direct the purchase, exchange, sale and reinvestment of SCERA assets, as well as the responsibility to prepare and submit annual investment activity reports on the performance of SCERA’s investments to SCERA, they fit the definition of Regulation 18700.3(b)(1). These are duties that would customarily be performed by the SCERA Treasurer, Administrative Services Director, or other SCERA employees. Thus, the power of SCERA to enter into investment contracts has been delegated to the investment consultants. Therefore, these investment managers fit the definition of “other public officials who manage public investments” and are required to file statements of economic interests under Section 87200.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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