

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance/Administration
(916) 322-5660

Executive/Legal
322-5901

Enforcement
322-6441

Conflict of Interest
322 6444

January 4, 1978

Gilbert E. Elmore
Administrative Law Judge
Office of Administrative Hearings
1220 N Street
Sacramento, CA 95814

78-01-98

Re: Opinion Request
No. 77-021

Dear Judge Elmore:

Thank you for your letter of July 28, 1977, requesting an opinion with respect to several questions concerning disclosure of economic interests. The purpose of this letter is to inform you that the Commission will issue an opinion in response to your first two questions. Because your other questions do not raise any substantial questions of interpretation under the Political Reform Act, those questions will not be addressed in the formal opinion. I trust, however, that the following informal comments provided pursuant to Government Code Section 83114(b) will be helpful.

In your third question, you asked whether the ownership of shares in mutual funds such as Dreyfus, Chemical Fund or Penn is an interest in a trust within the meaning of Government Code Section 82034, so that an interest of less than 10% need not be disclosed. Shares in a mutual fund are an "investment" within the meaning of Section 82034 if their value exceeds \$1,000 and must be disclosed on statements of economic interests, Section 82034 states:

"Investment" means any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights, warrants, options, debt instruments and any partnership or other ownership interest.... Investments of an individual includes a pro rata share of investments of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a ten percent interest or greater....

Gilbert E. Elmore

January 4, 1978

Page Two

The 10% standard does not mean that an interest of less than 10% in a mutual fund need not be disclosed. Instead, the 10% threshold is a "pass through" or "piercing" standard and applies to a disclosure of the investments or shares held by the mutual fund itself. For example, if you own 1% of the shares of the ABC Mutual Fund, your interest would have to be disclosed if its value exceeds \$1,000, but it would not be necessary to disclose the interest that ABC Mutual Fund owns in XYZ Automobile Corporation. On the other hand, if you own 11% of the shares of ABC Mutual Fund, you would be required to disclose, in addition to your interest in the fund itself, the fund's interest in XYZ Automobile Corporation so long as the value of 11% of the fund's interest in XYZ exceeds \$1,000. Since any individual is unlikely to own 10% of a particular mutual fund, the 10% rule, in most cases, eliminates the need for disclosure of the interests of the mutual fund.

Your fourth question asked whether the answer to question 3 would be any different if the mutual fund is a tax exempt fund. The answer is no. Although the assets of a mutual fund may consist entirely of tax exempt securities, your interest is not directly in those tax exempt securities, but rather is in the mutual fund itself. An interest in such a mutual fund is an "investment" under Government Code Section 82034 even though the fund may be composed entirely of debt instruments issued by government agencies, which are not investments.

Next, you asked what is the obligation of the employee if the spouse refuses to disclose the investment of her separate property on the grounds of invasion of privacy. In a recent case, a judge and his wife challenged, on the grounds of invasion of privacy, the provisions of the Political Reform Act that require disclosure of investments which are the separate property of the public official's spouse. The court rejected the invasion of privacy claim and held that the Act requires a public official to make a good faith effort and to use reasonable diligence to determine what the spouse's interests are. Baty v. Bales, No. 83978 (Marin Cty. Super. Ct., June 20, 1977). A copy of that opinion is attached for your information.

Finally, you noted that "investment" as defined by Government Code Section 82034, does not include an interest in a business entity which has no real property in the jurisdiction nor does business in nor plans to do business in the jurisdiction. You asked if an employee owns stock in an

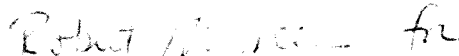
Gilbert E. Elmore
January 4, 1978
Page Three

eastern company such as Consolidated Edison of New York, what is an acceptable procedure of ascertaining if it owns property in California or if it plans to do business in California?

A public official must make a good faith and diligent effort to determine whether the business entity in which he has an interest does or plans to do business or owns property in California. In determining whether a business entity does business in the state, the Fair Political Practices Commission staff has advised that a "minimum contacts" standard be used. This standard, as set out in International Shoe Co. v. Washington, 326 U.S. 310 (1945) requires only a minimum business presence in the state -- employees, salesmen, buyers -- for the corporation to be considered doing business in the state. However, the Commission has accepted for consideration an opinion request that could result in a change in the applicable standard for determining whether a firm does business in California, Opinion Request No. 77-011, Judge David R. Baty.

If you wish to appeal the denial of your opinion request, you may do so pursuant to 2 Cal. Adm. Code Section 18321. If you have any questions, please contact Ted Prim, Chief of the Commission's Conflict of Interests Division.

Sincerely,



Michael Bennett
Executive Director

MB:NEW:plh
Attachments