



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

September 13, 2000

Patricia Tyrrell
Deputy County Counsel
Napa County
1195 Third Street, Room 301
Napa, California 94559

**Re: Your Request for Advice
Our File No. I-99-171**

Dear Ms. Tyrrell:

This letter is in response to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Since your request does not include material facts necessary to fully assess the situation of each Napa County Children and Families Commission member, we are unable to provide you with formal written advice.² However, in order to provide you with some guidance, we are providing you with informal assistance which we hope will be helpful to you. Please bear in mind that this letter is based on the facts you have presented to use. The Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May a member of the Napa County Children and Families Commission ("NCCFC") participate in a decision involving fund allocations which might result in a reasonably foreseeable material financial effect on the economic interest of the member?

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

² Please note that only formal written advice confers the immunity provided under Section 83114(b) and Regulations 18329(b)(7). Informal assistance does not provide immunity. (Section 83114(b); Regulation 18329(c)(3).)

2. Would an ordinance specifying that each member of NCCFC be appointed to represent a particular economic interest make the "public generally" exception applicable for purposes of the conflict of interest analysis?

CONCLUSION

1. A NCCFC member may not participate in a decision involving a funding allocation to an economic interest of that member. However, where all the requirements of the "public generally" exception provided by 18707.4(a) are met, a NCCFC member may participate in funding allocation decisions relating to other similar entities.

2. Such an ordinance is unnecessary since all statutory requirements for the "public generally" exception are contained in California Health and Safety Code Section 130140(a)(1)(A).

FACTS

According to your correspondence and phone conversations with FPPC staff counsel, you are Deputy County Counsel for the County of Napa and are writing to request advice on behalf of the appointed members of the Napa County Children and Families First Commission ("NCCFC").

The NCCFC was established pursuant to the California Children and Families Act ("CCF Act"), passed by voters in 1998. (California Health and Safety Code Sections 130100 - 130155.) This law requires that an additional surtax on cigarettes and tobacco products be distributed to counties for developing a comprehensive, integrated system of early childhood development services.

The CCF Act has the purposes of promoting, supporting, and improving the early development of children from the prenatal stage to five years of age through the establishment, institution, and coordination of appropriate standards, resources and integrated and comprehensive programs emphasizing community awareness, education, nurturing, child care, social services, health care, and research. (California Health and Safety Code Section 130100.) Members of the county commissions established by the CCF Act are appointed as follows:

"(i) Two members of the county commission shall be from among the county health officer and persons responsible for management of the following county functions: children's services, public health services, behavioral health services, social services, and tobacco and other substance abuse prevention and treatment services.

(ii) One member of the county commission shall be a member of the board of supervisors.

(iii) The remaining members of the county commission shall be from among the persons described in clause (i) and persons from the following categories: recipients of project services included in the county strategic plan; educators specializing in early childhood development; representatives of a local child care resource or referral agency, or a local child care coordinating group; representatives of a local organization for prevention or early intervention for families at risk; representatives of community-based organizations that have the goal of promoting nurturing and early childhood development; representatives of local school districts; and representatives of local medical, pediatric, or obstetric associations or societies.” (California Health and Safety Code Section 130140(a)(1)(A).)

Individuals appointed to represent the categories identified in subsection (iii) are referred to as “community members” in the “Community Planning Process” chapter of the NCCFC document entitled *Community Plan of the Napa County Children and Families Commission* (“Community Plan”).

Because a number of the members of NCCFC own or work for such nonprofit or for-profit entities, you are inquiring as to whether a potential conflict of interest will preclude these members from participating in decisions involving funding allocations.

You have also inquired about the “public generally” exception. You would like to know if the County should amend its NCCFC ordinance to identify the economic interest each member is appointed to represent in order for this exception to be applicable.

You have provided the following information based on the “assuming office” Statements of Economic Interests³ (“SEI”) for each NCCFC member⁴:

1. Kristie Brandt: Ms. Brandt is appointed to represent Napa County Health and Human Services where she serves as the Health Programs manager and director of the Maternal and

³ If a member has acquired any additional economic interests in the time since his or her SEI was submitted, such economic interests also must be examined under the conflict of interest analysis. Since we cannot analyze economic interests which are not included herein, this advice letter does not draw conclusions nor confer immunity with regard to any economic interests which are not identified in this letter. Alternatively, if a particular source of income did not make payments to a member within 12 months prior to the time the decision is made, that source of income will not be considered an economic interest under the conflict of interest rules. However, for purposes of this letter, we assume the time threshold for a decision will be within 12 months of the time payments from sources reported on the submitted SEIs were received.

⁴ We have not received information for Connie Battisti. Therefore, we cannot conduct a conflict of interest analysis for this NCCFC member.

Child Health Division. Ms. Brandt also works for a private medical practice as a nurse practitioner. She has received \$250 or more in the last 12 months from each of these entities. She also receives income for providing consulting services such as training and speaking as part of seminars and engagements.⁵ Entities which have contracted with Ms. Brandt for these services and from whom she has received \$250 or more in income are the Harvard Children's Hospital, WestEd/Infant Mental Health Development Program (state-funded nonprofit program), Alameda County, and Madera County. Both Harvard Children's Hospital and WestEd are nonprofit programs.

In conjunction with her duties as a board member of the Brazelton Foundation, Ms. Brandt has received payments over \$250 for travel expenses associated with training, board meetings, and events of this nonprofit organization. Additionally, she received a reimbursement of over \$300 for travel expenses from the Northern Trust Bank, a for-profit entity. Her husband is a California Highway Patrol Officer who receives a salary from the State of California. They own a personal residence in Napa, California

2. Dan Corsello: Mr. Corsello is appointed to NCCFC as a community member. He is the executive director of the Van Loben Sels Foundation, a private for-profit entity from whom he has received \$250 or more of compensation. He also receives PERS retirement benefits in addition to income for his services as a health care consultant under a contract with the county of Napa.

He and his wife own a primary residence in the city of Napa. Ms. Corsello has received \$250 in payments from Napa County under a personal services contract with the Flood Control Project.

3. Jackie Dollar: Ms. Dollar was appointed to the NCCFC as a community member and serves as the chairperson of the commission. She is the Director of Napa/Solano Head Start, a federally funded, nonprofit program. She has been paid \$250 or more for her work with Head Start. Additionally, she provides and receives income for training and consultation services to certain federal and nonprofit agencies nationally. However, she does not provide consultation services to any entities within Napa county. Ms. Dollar has an investment of \$1,000 or more in a mutual fund. Her husband is employed full-time with the State of California. Both reside in the city of Napa where they own a home.

4. Patricia Jennings: Ms. Jennings was appointed to the NCCFC as a community stake holder. She is the Executive Director of the Montessori Family Center, a nonprofit, educational

⁵ Please be aware that the Act contains a ban against the receipt of honoraria. (Section 89502.) We are unable to analyze this issue as part of this advice request. However, we have enclosed a honoraria fact sheet which may provide additional guidance on this matter.

corporation located in St. Helena. She serves as a lecturer and Director of Intern Teachers at St. Mary's College Graduate School of Education located in Moraga, California and is an early child development instructor at Pacific Union College located in Angwin, California. She also engages in private consulting for West Ed, a nonprofit, educational corporation. Additionally, Ms. Jennings is the CEO for Jennings Artist Management, a private music management business. From each of these entities, she has received payments of \$250 or more in the last 12 months.

She is married to Andre La Velle who is compensated for his services as a music teacher and maintenance supervisor by the Montessori Family Center. Mr. La Velle also is a musician and leader of the Andre La Velle Jazz Quartet. She has an outstanding loan of \$250 or more with an individual residing in Napa. Ms. Jennings owns a home in Napa.

5. Teresa Longoria: Ms. Longoria was appointed to represent Napa County Health and Human Services where she serves as director. As such, she has received \$250 or more in payments as salary from Napa County within the past 12 months.

She has an outstanding student loan for an amount over \$10,000 with FNB, Chicago, a commercial lending institution. She owns a primary residence in Napa with her spouse. Her spouse is employed as a supervisor with Pacific Bell of Napa.

6. Tina Persaud: Ms. Persaud was appointed to NCCFC as a community member. She currently serves as the director and trustee of Young World of Learning, Inc., a private for-profit business entity. She has received payments of \$250 or more from Young World of Learning in the last 12 months as compensation for this position.

Ms. Persaud owns rental properties located on Republic Street (three units) and Tallac Street. She also owns her primary residence. All properties are in Napa. Ms. Persaud receives rental income for each property she owns.

Ms. Persaud has an outstanding loan with William D. Johns which exceeds \$10,000 and which is not secured by her principal residence. She has another outstanding loan from First Nationwide Mortgage Company not secured by her principal residence with a balance exceeding \$10,000.

7. Ardis Troedson: Ms. Troedson was appointed to NCCFC as a community member. She is the Executive Director of Child or Parent Emergency ("COPE"), a nonprofit organization with 501(c)(3) tax exempt status, from whom she has received payments of \$250 or more in the past 12 months. Ms. Troedson has an investment of over \$10,000 in Emerson Electric stock. Emerson Electric is listed on the New York Stock Exchange.

Ms. Troedson owns her personal residence and rental property on Lorac Court, both in Napa. She collects rental income from a tenant residing at the Lorac property. Her husband is a retired elementary educator.

8. Kathryn Winter: Ms. Winter was appointed to NCCFC because she is a member of the Napa County Board of Supervisors. She also serves as a Hub Manager for the Napa County Council for Economic Opportunity, a nonprofit agency, and has received payments of \$250 or more within the preceding 12 months as compensation for her services. Additionally, she has received \$125 in a gift or gifts from the Napa Valley Wine Auction.

She is married to a writer who receives compensation from the Napa County Council for Economic Opportunity and from a magazine doing business outside of Napa County. The Winters own their personal residence in Napa.

ANALYSIS

The primary purpose for the conflict of interest provisions of the Act is to ensure that public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their own financial interests. (Section 81001(b).) In furtherance of this goal, Section 87100 of the Act prohibits a 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.

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 any of several economic interests identified in Sections 87103(a) through (e).

Determining whether a conflict of interest exists under Section 87100 of the Act generally requires analysis of the following questions:

Step One: Is each member of the NCCFC a “public official” within the meaning of the rules?

As a member of the NCCFC, a local government agency established by the CCF Act (California Health and Safety Code Sections 130100 - 130155), each commissioner is a “member, officer, employee, or consultant of a state or local government agency” and, therefore, is subject to the conflict of interest provisions of the Act. (Section 82048; Regulation 18701(a).)

Step Two: Is each member of the NCCFC making, participating in making, or influencing a governmental decision?

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; Regulations 18702.1(a)(1), 18702.1(a)(3), and 18702.1(a)(4).) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (Section 87100; Regulation 18702.2(a); 18702.2(b).) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Section 87100; Regulation 18702.3(a).)

Consequently, under these conflict of interest regulations, voting to allocate NCCFC funds constitutes making or participating in making a governmental decision. A public official is also influencing a governmental decision if he or she appears before a member, officer, employee, or consultant of the NCCFC for the purpose of influencing that individual regarding a decision to allocate funds.

Step Three: What are the economic interests of each member of the NCCFC — the possible sources of a financial conflict of interest?

Under Section 87103 of the Act, there are several types of economic interests that may potentially pose a conflict of interest for a public official:

- 1) A business entity where the public official either has a direct or indirect investment of \$1,000 or more in the business entity. (Section 87103(a); Regulation 18703.1(a).)
- 2) A business entity where the public official is in any of several business relationships specified in Regulations 18703.1(b) through (e). (Section 87103(d); Regulation 18703.1.)
- 3) Any real property in which the public official has a direct or indirect interest worth \$1,000 or more in fair market value. (Section 87103(b); Regulation 18703.2.)
- 4) Any person from whom he/she has received income aggregating \$250 within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c); Regulation 18703.3.)

5) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$300⁶ 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. (Section 87103(e); Regulation 18703.4.)

A public official will have a conflict of interest under the Act only if he or she possesses one of these disqualifying economic interests provided by Regulations 18703 through 18703.5. Since you request advice on behalf of eight individuals, whether each individual has a cognizable economic interest at stake in a given decision must be addressed separately for each member.

Before turning to the individualized analyses for the respective commission members, note that each commissioner also must consider whether he or she has a financial interest at stake in a funding allocation decision due to the financial effect the decision may have on the member personally or on his or her immediate family. (Section 87103.) This is known as the "personal effect" rule. Under this rule, each member of the NCCFC may have a financial interest in a funding allocation decision if the reasonably foreseeable impact of the decisions results in the personal expenses, income, assets, or liabilities of the member or his or her immediate family increasing or decreasing by at least \$250 in any 12-month period. (Section 87103; Regulation 18703.5) Note that this does not apply to a financial effect on the value of real property owned directly or indirectly, or a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the director or his or her immediate family has an investment interest. (*Ibid.*) The direct and indirect effects on those interests are analyzed independently of Regulation 18703.5. Once a decision has been identified, each member must evaluate whether he or she will experience a personal financial effect as a result of that decision based on the particular facts available to him or her.

⁶ The gift limit amount is adjusted biennially by the Commission to reflect changes in the Consumer Price Index. As of January 1, 1999, the amount is \$300. (Section 89503(f); Regulation 18940.2(a).)

The following economic interests, aside from any personal financial effects, have been identified for each member of the NCCFC:

1. Kristi Brandt.

Sources of Income⁷:

(a) A public official has an economic interest in any person from whom he/she has received income⁸ aggregating \$250 or more within 12 months prior to the time when the relevant decision is made. (Section 87103(c); Regulation 18703.3(a).) For purposes of the Act, a public official's income includes income which has been promised to the public official but not yet received by him or her. (*Ibid.*) Because Ms. Brandt has received payments of more than \$250 in the preceding 12 months from the private medical practice for which she works as a nurse practitioner, this practice is a source of income for her, and she has an economic interest in the practice. Ms. Brandt also has an economic interest in the private practice because she is an employee there. (Sections 87103(d) and 82005.)

(b) Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code are not included as "income" under the Act. (Section 82030(b)(2).) Additionally, the "government salary" exclusion provided by Section 82030(b)(2) does not generally apply to payments from a government entity which are received by the public official as an independent contractor. (*Riddle* Advice letter, No. A-97-294.) Payments received from a state, local, or federal governmental agency as an independent contractor do not fall into the definition of salary, and are therefore not exempt from the definition of income as provided in Section 82030(b)(2). (*Soldani* Advice Letter, No. A-94-042.) Consequently, the government salary exclusion does not apply to Ms. Brandt's receipt of income from Alameda County and Madera County for independent contractor services.

⁷ "Income," other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under the Act. (Section 82030(a).) The Commission is currently reviewing the meaning of this jurisdictional requirement as part of its Phase II Project N. To provide a more thorough analysis, we assume that each economic interest does business in the jurisdiction of the NCCFC. If any member would like our office to revisit this issue, he or she must write in providing relevant facts in this regard.

⁸ "Income" means a payment received. (Section 82030(a).) "Payment" means a payment, distribution, transfer, loan, advance, deposit, gift, or other rendering of money, property, services, or anything else of value, whether tangible or intangible. (Section 82044.)

(c) It is not clear from the facts which you provided whether WestEd is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. If WestEd has 501(c)(3) status, payments for travel expenses and per diem will not be included as income. (Section 82030(b)(2).) In contrast, if WestEd does not have 501(c)(3) status, all of the payments Ms. Brandt received from this source will be considered income. In either case, if income received from WestEd by Ms. Brandt aggregates to \$250 or more in the 12 months preceding the time of the decision, she will have an economic interest in this entity.

(d) Ms. Brandt has an economic interest in Harvard Children's, a nonprofit entity, if she has received income of \$250 or more from this entity in the last 12 months. (See prior discussion above in subsection (c).)

Gift:

(a) "Gift" is defined as any payment received which confers a personal benefit on the recipient to the extent that consideration of equal or greater value is not returned. (Section 82028.) If a public official provides consideration of equal or greater value, the payment from a nonprofit will be analyzed as income, not a gift. (*Hanson* Advice Letter, I-95-028.) If the Brazelton Foundation received consideration from Ms. Brandt in the form of her attendance and participation at the organization's events, then Ms. Brandt received travel funding from this nonprofit organization as part of her board member duties. Therefore, the travel funding of \$500 to Ms. Brandt constitutes income as long as she provided consideration in exchange, and she will have an economic interest in this entity.

(b) A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$300 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. (Sections 87103(e) and (f); Regulations 18703.4 and 18940.2(a).) Because Ms. Brandt has received payments in the form of reimbursements for travel from Northern Trust Bank and did not provide consideration to the NTB of equal or greater value in exchange for this funding, the reimbursements from NTB constitute a gift. Therefore, Ms. Brandt has an economic interest in Northern Trust Bank under the Act.

Real Property:

(a) A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more in fair market value. (Section 87103(b); Regulation 18703.2.) Assuming Ms. Brandt has an investment of \$1,000 or more in her primary residence, she will also have an economic interest in this property located in Napa County.

2. Dan Corsello.

Sources of Income:

(a) Mr. Corsello has an economic interest in the Van Loben Sels Foundation because he has received income aggregating \$250 or more within the last 12 months. (Section 87103(c); Regulation 18703.3(a).)

(b) Napa County is a source of income to Mr. Corsello in two respects. First, the "government salary" exclusion does not apply to Mr. Corsello's receipt of income from Napa County as an independent contractor. (See prior discussion at Step Three, Brandt, Sources of Income, (b).) Second, Napa County is a source of income to him because his income includes his community property share, or 50%, of his wife's income from the county if his share aggregates to \$250 or more. (Section 82030(a).) This is so because these payments were received by his wife as an independent contractor, so they are not excluded from the definition of income under the "government salary" exclusion. As a result, Mr. Corsello has an economic interest in Napa County since the county is a source of income to him in these two ways.

Real Property:

(c) Assuming Mr. Corsello has an investment of \$1,000 or more in his primary residence, he will also have an economic interest in this property located in Napa County. (Section 87103(b); Regulation 18703.2.)

3. Jackie Dollar.

Source of Income:

(a) Napa/Solano Head Start is a source of income to Ms. Dollar since she has received payments of \$250 or more in the last 12 months and because the government salary exclusion does not apply to payments received from federal and nonprofit agencies. (Section 82030(b)(2).) Therefore, Ms. Dollar has an economic interest in this entity.

Investments:

(b) The term "investment" does not include an interest in a diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940. (Section 82034.) If the mutual fund in which Ms. Dollar owns an interest meets this criterion, then this interest will not be considered an "investment" under the Act. However, if the mutual fund does not meet this criterion, then her interest will be considered an investment and she will have an economic interest in each of the entities of the mutual fund in which she invests over \$1,000. (*Ibid.*)

Additionally, if Ms. Dollar's investment in a non-registered mutual fund results in her having a 10 percent or greater interest in the fund, she has a pro rata interest in any investment made by the fund. Where such an investment totals \$1,000 or more, she will have an economic

interest in any business entity in which an investment is made if the entity does business in Napa County. (Section 82034; *Moll* Advice Letter, I-99-134.)

However, without additional information regarding Ms. Dollar's investment, we are unable to determine whether she has an economic interest in this fund.

Real Property:

(a) Ms. Dollar has an economic interest in her primary residence if she has an investment of \$1,000 or more in this property. (Section 87103(b); Regulation 18703.2.)

4. Patricia Jennings.

Sources of Income:

(a) Montessori Family Center is a source of income to Ms. Jennings in two ways. First, she has received salary consisting of payments of \$250 or more in the preceding 12 months.

(Section 82030.) Additionally, Montessori Family Center is a source of income in a second manner because Ms. Jennings' income includes her community property share of her husband's income from the Montessori Family Center.

(b) Ms. Jennings has an economic interest in both Pacific Union College and St. Mary's College because she has received \$250 or more in payments from these entities over the preceding 12 months.

(c) If income received from WestEd by Ms. Jennings aggregates to \$250 or more in the 12 months preceding the time of the decision, she will have an economic interest in this entity. (See prior discussion at Step Three, Brandt, Sources of Income, (c).)

(d) Ms. Jennings has an economic interest in Jennings Artist Management, a source of income from whom she has received \$250 or more in the preceding 12 months. She also has an economic interest in this entity by virtue of her position as CEO. (Section 87103(d); Regulation 18703.1(b).)

(e) The Andre La Velle Jazz Quartet is also a source of income to Ms. Jennings because her income includes her community property share of her husband's income from the Quartet separate and aside from any income received from Jennings Artist Management. As a result, Ms. Jennings has an economic interest in the Andre La Velle Jazz Quartet if her share of this income equals \$250 or more.

Real Property:

(a) Ms. Jennings has an economic interest in her primary residence if she has an investment of \$1,000 or more in this property. (Section 87103(b); Regulation 18703.2.)

5. Teresa Longoria.

Sources of Income:

(a) Pacific Bell is a source of income to Ms. Longoria because her income includes her community property share of her husband's income from his salary. Therefore, she has an economic interest in Pacific Bell assuming her community property share aggregates to \$250 or more from this business entity in the preceding 12 months. Ms. Longoria's salary from Napa County is not included as income under the government salary exclusion.

(b) "Income" includes an outstanding loan. (Section 82030(a).) However, Section 87103(c) states that a loan does not include any loan or loans from a commercial lending institution which are made in the lender's regular course of business on terms available to members of the public without regard to official status. Therefore, although the loan is reportable, it will not give rise to a conflict of interest. (*Stausboll* Advice Letter, No. I-99-128.)

Real Property:

(c) Assuming Ms. Longoria has an investment of at least \$1,000 in her primary residence, she has an economic interest in this real property. (Section 87103(b); Regulation 18703.2(a).)

6. Tina Persaud.

Sources of Income:

(a) Ms. Persaud has an economic interest in the Young World of Learning because she has received income from this entity aggregating \$250 within the last 12 months. (Section 87103(c); Regulation 18703.3(a).)

(b) Each of the tenants from whom she has received \$250 or more in the preceding 12 months is a source of income to Ms. Persaud. (Regulation 18703.3(a).) Consequently, she has an economic interest in any tenants who paid her \$250 or more in rent for use of the properties on Republic Street, Tallac Street, or her personal residence in the preceding 12 months. (Section 87103(c); Regulation 18703.3(a).)

(c) If Ms. Persaud's outstanding loan with William D. Johns is non-commercial, the person extending that loan will be a source of income to her, and she will have an economic interest in that person.

Real Property:

(b) Ms. Persaud has an economic interest in any real property in which she has \$1,000 invested. (Section 87103(b); Regulation 18703.2(a).) Assuming she has invested this amount in each of her properties, she will have an economic interest in each of the properties located on Republic Street and Tallac Street as well as her personal residence.

7. Ardis Troedson.

Sources of Income:

(a) Under the government salary exclusion, income from COPE, an entity with 501(c)(3) tax exempt status, does not include reimbursement for travel expenses and per diem. (Section 82030(b)(2).) Therefore, if Ms. Troedson has received payments of \$250 or more, not counting payments for travel expenses or per diem, in the last 12 months from COPE, she has an economic interest in this entity.

(b) Ms. Troedson has an economic interest in the tenant who resides at her Lorac Court property assuming this tenant has paid her \$250 or more in rent in the preceding 12 months. (Section 87103(c); Regulation 18703.3(a).)

Investments:

(b) Because Ms. Troedson holds \$1,000 or more worth of Emerson Electric stock, she has an economic interest in this business. (Section 87103(a); Regulation 18703.1(a).)

Real Property:

(a) Assuming Ms. Troedson has an investment of at least \$1,000 in her primary residence, she has an economic interest in her home. (Section 87103(b); Regulation 18703.2(a).)

(b) Assuming Ms. Troedson has an investment of at least \$1,000 in her rental property located on Lorac Court, she has an economic interest in this property. (Section 87103(b); Regulation 18703.2(a).)

8. Kathryn Winter.

Sources of Income:

(a) The Napa County Council for Economic Opportunity is a nonprofit agency separate from Napa County government. Therefore, the "government salary" exclusion will not apply to salary from this agency.⁹ As a result, the Napa County Council for Economic Opportunity is a source of income to Ms. Winter in two respects. (Section 87103(c).) First, she has received compensation consisting of \$250 or more in the preceding 12 months. Second, the Napa County Council for Economic Opportunity is a source of income if she has received \$250 or more as her community property share of her husband's income from this nonprofit organization. Therefore, Ms. Winter has an economic interest in the Napa County Council for Economic Opportunity. (Section 87103(c); Regulation 18703.3.)

⁹ This exclusion does apply to her salary received from Napa County for her work as a member of the Napa County Board of Supervisors. Therefore, her salary from Napa County is not included as income.

Real Property:

(a) Ms. Winter has an economic interest in any real property in which she has \$1,000 invested. (Section 87103(b); Regulation 18703.2(a).) Assuming she has invested this amount in her primary residence, she will have an economic interest in her home.

Please note that a public official has an economic interest in any donor of a gift or gifts aggregating \$300 or more received by the public official within 12 months prior to the time the decision is made. (Regulation 18703.4.) Since Ms. Winter has received only \$125 worth of a gift or gifts from the Napa Valley Wine Auction, she does not have an economic interest in this source of gift(s).

Step Four: Are each of the public officials' economic interests directly or indirectly involved in the governmental decision?

Business Entities, Sources of Income, and Sources of Gifts

A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's 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." (Section 87103; Regulation 18704.1(a).)

Interests in Real Property

An interest in real property is directly involved in a governmental decision under the following circumstances:

- "(1) The decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of real property in which the official has a direct or indirect interest (other than a leasehold interest) of \$1,000 or more, or a similar decision affecting such property;
- (2) The decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of such property;
- (3) The decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on such property; or

(4) The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.”
(Section 87103; Regulation 18704.2(a).)

Without information on an actual funding allocation decision, we are unable to determine whether the economic interests identified for each of the NCCFC members would be directly or indirectly involved under this Step Four analysis. However, you have specifically inquired about economic interests which are entities that strive to provide services to children and families. If this type of economic interest applies for a fund allocation, that economic interest would be directly involved in the decision since it would be the subject of the decision. (Section 87103; Regulation 18704.1(a)(2).)

Additionally, we have previously advised that an economic interest will also be indirectly involved in decisions regarding contracts to competing entities. (*Bennett Advice Letter*, No. A-98-239.) Grants are analogous to contracts in this situation since both confer similar financial effects on the economic interest. Therefore, the economic interest of a NCCFC member may also be indirectly involved in a decision where another entity competes with the public official’s economic interest for limited funds.

Any of the economic interests of each member, excluding real property interests, might be directly or indirectly involved in a funding allocation decision by NCCFC.¹⁰

Step Five: Materiality standard — what kinds of financial impact on your economic interests from the decision are considered material?

The materiality standard for a particular economic interest depends on the type of economic interest and its degree of involvement in the governmental decision. To determine the applicable materiality standard, the public official must consult Regulations 18705.1 to 18705.5. (Section 87103; Regulation 18705.) The implications for direct and indirect involvement of the identified economic interests are discussed generally below.

¹⁰ The members’ real property may also be directly or indirectly involved in a decision. (Section 87103; Regulation 18704.2.) However, your question does not appear to involve decisions that affect real property.

DIRECT INVOLVEMENT

Any reasonably foreseeable financial effect, even a penny's worth, on a public official's economic interest which is *directly involved* in a decision before the official's agency is deemed to be material. (Section 87103; Regulation 18705.3(a).) Therefore if a decision is to allocate funds to any of the members' economic interests (business entities or individuals), as identified in Step Three of this letter, the effect of the decision is material.

Business entities, such as Emerson Electric in which Ms. Troedson has an economic interest, are treated differently than other economic interests. Specifically, the effect of a decision is material if any "large"¹¹ business entity in which the official has a direct or indirect investment of \$10,000 or more is directly involved in a decision before the official's agency. (Section 87103; Regulation 18705.1(a).) Therefore, any financial effect from a decision by NCCFC on Emerson Electric, a business entity listed on the New York Stock Exchange, is material.

INDIRECT INVOLVEMENT

Where the economic interest is a source of income *indirectly* involved in a decision, the official must similarly locate the applicable monetary threshold to determine whether the effect of the decision is material. However, in addition to being material by meeting an applicable threshold, the effect of the decision may be deemed material if the "nexus test" applies. (See *Bennett* Advice Letter, No. A-98-239.) The purpose of the nexus test is to prohibit a public official from accomplishing as an official that for which the official receives compensation in his or her private capacity. (*Ibid.*) Under the nexus test, any reasonably foreseeable effect of a decision is deemed to be material if there is a nexus between the purpose for which the official receives income and the governmental decision. (Section 87103; Regulation 18705.3(c).) Consequently, where a decision involves a grant to another entity which competes with the public official's economic interest for NCCFC funds and the public official is compensated to obtain such funds, *any* reasonably foreseeable effect is material, and the materiality standards identified in the "Direct Involvement" section will be applicable.

Where a public official's economic interest is indirectly involved in a decision but the public official is *not* compensated to obtain funding for the economic interest, the materiality standard will depend on the type of economic interest, as previously mentioned. Without facts regarding a specific decision, we are unable to determine the applicable materiality standard for the relevant economic interest(s) of each NCCFC.

¹¹ A large business entity is one listed on the New York Stock Exchange, American Stock Exchange, or the National Association of Securities Dealers National Market List. (Section 87103; Regulation 18705.1(b)(1) and (2).)

Step Six: Is it reasonably foreseeable that a decision to allocate funding to a particular applicant will result the applicable materiality standard being met?

A material financial effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards are met. (Regulation 18706.) Since it is certain that a funding allocation decision to fund or not fund a particular applicant will result in some financial effect upon that applicant, it is reasonably foreseeable that the materiality standard will be met where an economic interest of a NCCFC member is the applicant for funding. Where an economic interest of a NCCFC member is indirectly involved in the decision but the nexus test has been met as described in Step Five, the materiality standard will also be met.

In contrast, if the economic interest is indirectly involved in the decision and the nexus test does *not* apply, the public official must determine whether it is reasonably foreseeable that the applicable materiality standard identified in Step Five will be met. If so, then a disqualifying conflict of interest exists for the NCCFC member.

We are unable to make a determination regarding the “reasonable foreseeability” of an applicable materiality standard being met without additional facts.

Step Seven: If a member has a conflict of interest, does the “public generally” exception apply? Or is the conflict disqualifying?

The “public generally” exception provides that if the reasonably foreseeable material financial effect of a decision on the public official’s economic interest is indistinguishable “from its effect on the public generally,” then the public official does not have a disqualifying conflict of interest. (Section 87103; Regulations 18700(b)(7), 18707(a).) This exception exists because a public official is less likely to be biased by a financial impact on his or her economic interests when a significant part of the community is substantially likely to feel essentially the same impact from the governmental decision. (*Dickens* Advice Letter, No. A-99-228.)

The “public generally” exception applies to appointed members of boards and commissions who are appointed to represent a specific economic interest, if all of the following apply:

“(1) The statute, ordinance, or other provision of law which creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.

(2) The member is required to have the economic interest the member represents.

(3) The board's or commission's decision does not have a material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.

(4) The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent." (Section 87103; Regulation 18707.4(a).)

Here, the first requirement is met because Section 130140(a)(1)(A) of the California Health and Safety Code, creating the NCCFC, contains a declaration that members of the commission deemed "community members" in the Community Plan shall be from among persons in specified categories including: recipients of project services included in the county strategic plan; educators specializing in early childhood development; representatives of a local child care resource or referral agency, or a local child care coordinating group; representatives of a local organization for prevention or early intervention for families at risk; representatives of community-based organizations that have the goal of promoting nurturing and early childhood development; representatives of local school districts; and representatives of local medical, pediatric, or obstetric associations or societies. We have previously advised that where a member of a health commission was appointed to represent the interests of the minority community in the county, the first requirement will be met. (*Bennett Advice Letter*, No. A-98-239.) In comparison, the NCCFC requires appointees to be from identified categories of persons who possess economic interests under the purview of the NCCFC according to its mandates. As a result, the first requirement is met.

Based on the information you have provided, the second requirement is also met since each individual appointed to the NCCFC as a "community member" was appointed to represent one of the categories identified above and, as such, has an economic interest in these types of persons.¹²

In the absence of information regarding a particular fund allocation decision, we are unable to determine whether the third requirement is met. Specifically, for this third requirement, we are unable to ascertain whether a NCCFC decision will *not* have a material financial effect on an economic interest held by a particular member, other than the economic interest he or she was appointed to represent. To determine if the third requirement is met, each NCCFC member must identify the economic interest he or she was appointed to represent and then confirm that only that specific economic interest, and no others the public official may have, will experience a material financial effect from the funding allocation decision.

¹² Person means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert. (Section 82047.)

Even if these first three requirements are met, for the Regulation 18707.4(a) exception to apply, a NCCFC funding allocation decision must affect a member's economic interest in a manner that is substantially the same, or proportionately the same, as the decision financially affects a significant segment of persons or entities similar to the persons or entities the member was appointed to represent.

In the *Bennett* Advice Letter, No. A-98-258, we have previously advised that the "public generally" exception will not apply to any decision relating to a contract for enhancement funding between the public official's economic interest and the public official's agency because such decisions would have a unique effect on the official's economic interest, distinguishable from an effect on the public generally.

However, the Commission has recently interpreted the "public generally" exception to allow greater participation by members of appointed boards or commissions in limited circumstances. (See *Bennett* Advice Letters, No. A-98-239 and A-98-258, enclosed.) In particular, the Commission concluded that, where the decision regards a contract for enhancement funding with an entity other than the public official's economic interest, the "public generally" exception permits the official to participate provided that the decision affects the official's economic interest in substantially the same manner as a significant segment of persons the official was appointed to represent. (*Bennett* Advice Letter, No. 98-258.) We require additional information regarding a specific funding allocation decision and the identity of a particular economic interest to assess whether the "public generally" exception would apply to your question in this same manner.

Step Eight: Even if you have a disqualifying conflict of interest, is your participation legally required?

If more than one member turns out to have a disqualifying conflict and the committee is unable to reach a quorum, the "legally required participation" rule may apply. (Section 87101; Regulation 18708, copy enclosed.) Section 87101 permits an official who is otherwise disqualified from making a governmental decision to participate in the decision when the official's participation is legally required. You have not posed a "legally required participation" question, thus we merely refer you to the statute.

Segmentation

In rare instances, it may be possible for a member of the NCCFC to participate in certain fund allocation decisions even if he or she could not participate in decisions where his or her economic interest was directly or indirectly involved. Generally, decisions are analyzed independently to determine if there will be a foreseeable material financial effect on an official's financial interest. (*In re Owen*, 2 FPPC Ops. 77 (1976)). Therefore, under certain circumstances, a public official disqualified from one decision may participate in other related decisions

provided that the official's participation does not affect the decision in which he or she has a conflict of interest. (*Ball* Advice Letter, No. A-98-124.). However, certain decisions are too interrelated to be considered separately, and in that event, a public official's conflict on one decision will be disqualifying for the other. Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. (*Ibid.*) Thus, a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of another. For example, in a decision to select one of two autopark sites, a decision to select one of the sites is essentially a decision against the other autopark site. (*Boogaard* Advice Letter, No. I-90-347.) The Commission has also advised that where a city annually distributes funds to nonprofit organizations by the city council deciding on the total amount of funding available, reviewing applications, and determining which organizations will be funded and how much funding each will receive, the series of decisions are too interlinked to be decided separately. (*Barker* Advice Letter, No. A-99-211.) Similarly, a member of the NCCFC may not participate in a decision where he or she has a conflict in another interrelated decision.

Assuming that a decision can be logically segregated from other related decisions, the public body must then procedurally segregate the decision prior to allowing the public official with a related conflict to participate in the decision-making process. This entails three steps:

- “(1) the decisions in which the public official has a disqualifying financial interest should be segregated from the other decisions on the public body's agenda;
- (2) the decisions from which the public official is disqualified should be considered first, and a final decision should be reached by the public body without the disqualified official's participation in any way; and
- (3) once a decision has been reached on the issues in which the official is disqualified, the disqualified official may participate in the deliberations regarding the other related issues so long as his or her participation does not result in a reopening of the previous issues or in any other way affect the decisions concerning the previous issues in which the public official was disqualified from participation.” (*Huffaker* Advice Letter, No. A-86-343; *Sweeney* Advice Letter, No. A-89-639.)

This procedure might be applicable in the situation where a member of the NCCFC has a conflict with regard to one funding applicant. The applicability of segmentation depends on each governmental decision and the facts surrounding that decision.

For example, where more than one public official has an economic interest involved in a funding decision, the likelihood of being able to use the segmentation process decreases since step two becomes more difficult: two decisions, each involving the economic interest of a different NCCFC member, cannot *both* be considered first. Difficulty also may arise where the

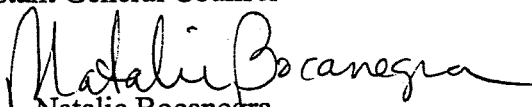
applicants are considered for funding in a decision where grouping and ranking¹³ are used because making a decision as to one applicant will affect the decision with regard to all the others. Therefore, where one member has more than one economic interest involved in a series of decisions, care must be taken by the disqualified member to abstain from participating in every decision in which that member has a conflict.

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

Sincerely,

Luisa Menchaca
Assistant General Counsel

By:


Natalie Bocanegra
Staff Counsel, Legal Division

Enclosures

¹³ Please note that a disqualifying conflict will arise not only in a final decision to allocate funds but also in any prior interlinked decisions such as ranking and scoring.