



## FAIR POLITICAL PRACTICES COMMISSION

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August 10, 2011

Jerry Scribner, General Counsel  
California Health and Human Services Agency  
1600 Ninth Street, Room 460  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our File No. A-11-145**

Dear Mr. Scribner:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note, that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other ethics laws such as common law conflict of interest rules.

### QUESTION

Do payments from a defined benefit pension plan qualified under Internal Revenue Code Section 401(a) create a conflict of interest for Mr. Barnhart requiring disclosure of the payments or disqualification from decisions involving his former employer, Kaiser Foundation Health Plan Inc. ("Kaiser")?

### CONCLUSION

No. Payments from a defined benefit pension plan qualified under Internal Revenue Code Section 401(a) are not considered "income" for purposes of the Act. Therefore, these payments are not reportable on Mr. Barnhart's Form 700, nor do they form a basis for a conflict under the Act.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## FACTS

Brent Barnhart will soon be appointed as Director of the Department of Managed Health Care (the "Department"). He retired two years ago and receives a pension from his former employer, Kaiser. Kaiser is an entity regulated by the Department.

Mr. Barnhart was an employee of Kaiser, a 501(c)(3) non-profit, for 13 years until May of 2009. After five years of employment, he vested in the Kaiser Retirement plan, a defined benefit pension plan qualified under Internal Revenue Code Section 401(a). Under the plan, Mr. Barnhart was entitled to retire with a full pension based on his salary and years of service after reaching age 62. He retired at age 66 in May 2009. He performed some paid consulting for Kaiser during the first six months of his retirement.

Since the end of 2009, Mr. Barnhart has not performed any services for Kaiser and has received no income (aside from his pension) from Kaiser. He also receives a social security pension. Mr. Barnhart's wife is retired and receives a monthly Public Employees Retirement pension.

As director of the Department, Mr. Barnhart will be called upon to participate in governmental decisions that affect Kaiser, as the Department regulates Kaiser and the health care coverage it sells to individuals, families, employers, and state, federal, and local government programs.

## ANALYSIS

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 87100.) Public officials will have a conflict of interest in any decision that will have a reasonably foreseeable material financial effect on their financial interests. (Section 87103.) Pursuant to Regulation 18700, an eight-step analysis is applied to determine whether a public official has a conflict of interest in a given governmental decision.

### **Step One: Is the individual a "public official?"**

The Act defines the term "public official" as "every member, officer, employee or consultant of a state or local government agency...." (Section 82048.) It is clear under the statute, and assumed by your letter, that Mr. Barnhart will be a public official under the Act.

### **Step Two: Is the public official 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. (Regulation 18702.1.)

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

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. (Regulation 18702.3.)

Therefore, if Mr. Barnhart participates in discussions, votes on decisions, or attempts to influence any member of the Department involving regulating Kaiser and the health care coverage it provides, he will be making, participating in making, or influencing governmental decisions under the Act.

### **Step Three: What are the possible sources of a conflict of interest?**

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.) Absent some “economic interest” in a decision as defined in Section 87103, Mr. Barnhart will not have a conflict of interest in the governmental decision.

The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).) An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule. (Section 87103, Regulation 18703.5.)

Sources of Income

*Kaiser's Defined-Benefit Pension Plan and Spouse's Public Employee's Pension*

The term "income" under the Act means, in pertinent part, a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, loan, etc. The term "income" does not include payments received under a defined benefit pension plan qualified under Internal Revenue Code Section 401(a). (Section 82030.)

Section 82030(b)(11) states that, "Payments received under a defined benefit pension plan qualified under Internal Revenue Code Section 401(a)" are excluded from the definition of income under the Act.

Accordingly, Mr. Barnhart does not have a potential conflict based solely on his interests in, or future payments from, Kaiser's pension plan, which is a defined benefit plan under I.R.S. Code Section 401(a). His wife's public employee's pension would also fall under this exception, if it is also a defined benefit plan under I.R.S. Code Section 401(a).

*Social Security Payments*

Section 82030(b) also states that "income" does not include:

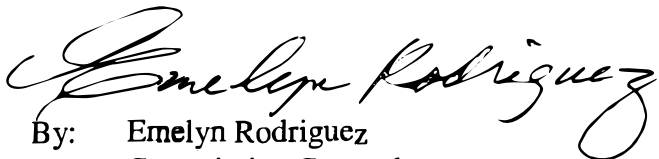
"(2) Salary and reimbursement for expenses or per diem, and *social security*, disability, or other similar benefit payments received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code." (Emphasis added.)

Accordingly, payments received by Mr. Barnhart from social security are not reportable, nor would they be the source of a potential conflict for him.

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

Sincerely,

Zackery P. Morazzini  
General Counsel



By: Emelyn Rodriguez  
Commission Counsel