



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 15, 2020

Brian Hebert
Executive Director
California Law Revision Commission
C/O UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Your Request for Advice
Our File No. A-20-028

Dear Mr. Hebert:

This is in response to your February 13, 2020 request for advice¹ on behalf of the following gubernatorially appointed members of the newly formed Committee on Revision of the Penal Code (“Committee”): John Burton, Peter Espinoza, Carlos Moreno, L. Song Richardson and Michael Romano regarding the conflict of interest code provisions of the Political Reform Act (“the Act”).²

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.

QUESTIONS

1. Are the five gubernatorially appointed Committee members (“Members”) unsalaried members of a body which serves a solely advisory function, and thus excluded from the definition of “designated employees?”

¹ Procedural note: We previously notified you on February 13, 2020 that this request was not appropriate for a Commission opinion. (Regulation 18320(f)(1).) We notified you by email on February 25, 2020 that we were, initially, treating this matter as a request for an exemption under Regulation 18751 and that the time limits for members to file statements of economic interests, and for the agency to submit a proposed conflict of interest code are tolled while a request for exemption is under consideration. (Regulation 18751(h).) Upon gathering further information from you, and in consideration of your agency’s concurrent request to amend its conflict of interest code to include the Committee and its members, we have determined that this matter is more appropriately a request for advice on behalf of the Committee Members as to their duties under the Act.

² 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. Must the Committee Members be incorporated into the CLRC's conflict of interest code and file Statements of Economic Interest ("SEIs")?

CONCLUSIONS

1. Yes. The Committee Members are unsalaried members of a solely advisory body at this time. The Committee was created to research and make recommendations on revisions to the Penal Code to the Legislature and the Governor, the Committee has no authority to make final decisions, compel or deny decisions and, as a newly formed advisory body, has no history of its recommendations being accepted without substantial modification. We caution that this status may change if Committee recommendations are regularly approved without substantial modifications.

2. No. These positions need not be included in amendments to the CLRC's conflict of interest code, and the Committee Members need not file SEIs, interim or otherwise, so long as the Committee's status has not changed.

FACTS AS PRESENTED BY REQUESTER

The California Law Revision Commission ("CLRC") is a small state agency. It assists the Legislature and the Governor by studying topics assigned by resolution or statute and recommending statutory reforms to improve the law. (Sections 8280-8298.) The Committee was created on January 1, 2020 within the CLRC by Senate Bill 94, c. 25 of 2019, under the provisions of Sections 8280-8296. Pursuant to Section 8281.5(a), the Committee is responsible for studying and making recommendations on the revision of the Penal Code to achieve the following objectives:

- (1) Simplify and rationalize the substance of criminal law.
- (2) Simplify and rationalize criminal procedures.
- (3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders.
- (4) Improve the system of parole and probation.

The Committee consists of two legislative members and five members appointed by the Governor. The gubernatorial appointments do not require Senate Confirmation. (Section 8281.5.) Committee members cannot also be members of the CLRC. (Section 8281.5(d).) The Committee members serve without compensation, except each gubernatorial appointee is entitled to a \$100 per diem for each day's attendance at a Committee meeting and Committee members are entitled to reimbursement of actual expenses incurred in the discharge of their duties, including travel expenses. (Section 8282.)

The Committee is contained within the CLRC, with funds of \$60,000 for the Committee's operating budget. The CLRC made its request for a determination of the "designated employee" status for the Committee Members and separately proposed amendments to its conflict of interest

code to address the changes in circumstances related to the Committee's creation. The budget that created the Committee included funding and position authority to hire two CLRC attorneys to be exclusively tasked to Committee work. Two CLRC managers will be shared by the Committee and the CLRC: the chief deputy and the executive director. In their managerial role, each will handle administrative issues for the agency including facilities, procurement, and accounting issues. The CLRC is also providing administrative staff for the ministerial process of preparing and distributing the Committee's reports.

The Committee will submit its reports to the Governor and the Legislature in its own name, on its own letterhead, and without any attribution or reference to CLRC. The jurisdiction of the two bodies is also nonoverlapping and the law expressly provides that the CLRC has no authority over the Committee's recommendations. (Sections 8289 and 8290.5.) The CLRC as a multi-member body will have no involvement whatsoever in the reports made by the Committee.

You provided that the Committee has not been vested with any final decisionmaking power. Any reforms the Committee recommends must go through the legislative process like any other legislative proposal. It is only permitted to study topics within the scope of its authority and make recommendations to the Governor and the Legislature. The Committee has no fixed time schedule for submitting reports; however, it is the CLRC's understanding that the Committee's recommendations will be included in an annual report, at the beginning of each year. There is no sunset date on the Committee's operation, and it will continue as long as the Governor and Legislature decide to continue to authorize and fund it. The Committee will not be acquiring real property. The first meeting of the Committee was held on January 24, 2020.

ANALYSIS

An express purpose of the Act, as set forth in Section 81002(c), is that the assets and income of public officials which may be materially affected by their official actions, should be disclosed, and, in appropriate circumstances, the public officials should be disqualified from acting in order to avoid conflicts of interest. To that end, the Act requires specified public officials to disclose their economic interests as provided in Sections 87200-87210, and a broader group of public officials to disclose their economic interests as provided in the conflict-of-interest code of the agency that employs them. (Sections 87300-87302.6.) The Committee Members are not in positions listed under Section 87200. At issue is whether the Committee Members meet the definition of "designated employees" who should be covered in an agency's conflict of interest code.³

Every agency is required to adopt and promulgate a conflict of interest code under the Act applicable to its "designated employees." (Sections 87300, 87302, 82019.) Persons holding "designated employee" positions specified in a conflict of interest code must file SEIs. (Section

³ An initial consideration by the Commission was whether the Committee is a separate authority, such that it should file, or be exempted from filing, its own code, or if the Committee's creation should be addressed through amendments to the CLRC's code. (Sections 82011, 87301, and 87306.) Where there is a continuing, substantial functional relationship between two entities, and one entity is a subdivision of another, the entities should be covered under a single conflict of interest code. (See *Okwuosa* Advice Letter No. A-03-034 and *Lillie* Advice Letter, No. A-98-052.) The facts indicate that while the two have separate jurisdictional authority, the CLRC is seeking to amend its code to incorporate the Committee's existence. We agree that the Committee should be addressed within the CLRC's code rather than be treated as a separate authority.

87302.) Specifically, the CLRC seeks a determination that the Committee Members do not fall under the definition of “designated employees” and thus would not be included in the CLRC’s code amendments for changed circumstances. And, the CLRC seeks a determination as to whether the Members are required to file SEIs, in the interim pursuant to Section 87302.6, or under Section 87302.⁴

Relevant to these facts, “designated employee” means any officer, employee, member, or consultant of any agency whose position with the agency entails the making or participation in the making of decisions which may foreseeably have a financial effect on any financial interest. (Section 82019(a)(3).) Excluded from the definition of a “designated employee” are unsalaried members of a committee which serves a solely advisory function. (Section 82019(b)(1).) Members of solely advisory bodies also do not meet the definition of a “public official” and are not subject to the Act’s conflict of interest prohibitions. (Regulation 18700(c)(1).) Thus, under the Act, an agency need not amend its conflict of interest code to incorporate unsalaried members of a body that lacks decisionmaking authority.

Regulation 18700(c)(2)(A) states that a body has decisionmaking authority when:

- (i) It may make a final governmental decision;
- (ii) It may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or;
- (iii) It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.

Based upon the facts provided, the Committee is composed of unsalaried members of a body that serves, to date, in a solely advisory function. The facts indicate that it may neither make, compel, nor deny a final government decision. The Committee will present its recommendations on revising the Penal Code to the Legislature and the Governor for further legislative action. As to item (iii), the Committee is a newly created body, with no history of actions. The Committee will submit its reports to the Governor and the Legislature in its own name, on its own letterhead, under its own terms and without any attribution or reference to CLRC, so the history of CLRC’s recommendations are not relevant. We have advised newly advisory bodies that they are in fact

⁴ Section 87302.6 requires members of a newly created agency to file SEIs as Section 87200 filers until the members are included in a conflict of interest code. Section 87200 filers must file at the fullest level of disclosure and within 30 days of assuming office.

“solely advisory” until a history of recommendations is established.⁵ (See for example, *Hassel-Shearer* Advice Letter, No. I-18-071.)

Therefore, the Committee members are excluded from the definition of “designated employees” as unsalaried members of a body serving a solely advisory function. As such, the positions need not be included in amendments to the CLRC’s conflict of interest code, nor must the five Members of the Committee file SEIs on an interim⁶ or permanent basis, so long as the Committee maintains its status as a body that does not possess decisionmaking authority under the above standards.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *L. Karen Harrison*
L. Karen Harrison
Senior Counsel, Legal Division

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⁵ We caution that the Committee could become a decisionmaking body if it begins making substantive recommendations that are regularly approved without significant amendment or modification through the legislative process. If this should occur, please contact the Commission for further advice.

⁶ Regulation 18754 requires newly created body members to file interim SEIs at the fullest disclosure level until the member is included in an approved conflict of interest code. However, this requirement does not apply where the body does not possess decisionmaking authority as defined in under the language currently found in Regulation 18700(c)(2) [former Regulation 18701(a)].