

MARY JO LANZAFAME  
ASSISTANT CITY ATTORNEY  
CATHERINE M. BRADLEY  
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

Jan I. Goldsmith  
CITY ATTORNEY

**MEMORANDUM OF LAW**

**DATE:** August 31, 2010  
**TO:** Gail Granewich, City Treasurer  
**FROM:** City Attorney  
**SUBJECT:** Financial Disclosure Requirements for Members of the City Treasurer's Investment Advisory Committee

**INTRODUCTION**

On May 10, 2010, the Audit Committee discussed a report from the City Auditor titled "Performance Audit of the City Treasurer's Investments Division." The report included a discussion of the roles and responsibilities of the City Treasurer's Investment Advisory Committee (IAC). During the meeting, a member of the public suggested that IAC members should file financial disclosures. In response, the Audit Committee requested that the City Attorney advise whether members of the IAC are "public officials" under regulations of the California Fair Political Practices Commission (FPPC) and required to file financial disclosure forms (Statements of Economic Interests).

**QUESTION PRESENTED**

Are members of the IAC subject to the financial disclosure requirements of the FPPC?

**SHORT ANSWER**

Based on the information available to us, it does not appear that the IAC members meet the applicable requirements of the FPPC regulations that would mandate disclosure of their financial interests. The IAC appears to be solely advisory and does not make governmental decisions or manage public investments as defined by FPPC regulations.

**BACKGROUND**

San Diego Charter section 45 provides that the Treasurer shall perform duties imposed upon City Treasurers by general law, the City Charter, or ordinances of the Council. Pursuant to California Government Code section 53607, the Council annually delegates to the Treasurer the authority to invest or reinvest City funds, or to sell or exchange securities so purchased.

*See, Cal. Gov't Code § 53600 et. seq.* Each year, the Council also publicly considers the City's Investment Policy as prepared by the City Treasurer. *See, Cal. Gov't Code § 53646.*

In 1990, a former City Treasurer created the IAC to provide a secondary review of the City's investment process in order to strengthen the credibility and oversight of the City Treasurer's Investment Program. Currently, the IAC is an informal working group that meets twice a year to provide input regarding the City's Investment Policy and the City's Pooled Investment Fund. Ideas and suggestions on investment policies are discussed among the members of the IAC, the Treasurer, and her staff. The Treasurer considers the suggestions and has sole authority to accept or disregard IAC recommendations.

The IAC consists of five members. Two are City employees and three are members of the public with experience in managing money. There are no term lengths for the positions. Instead, members are selected by and serve at the pleasure of the City Treasurer. Currently, the City staff members are the Chief Financial Officer and the Director of Debt Management. The public members are Kay Chandler and Deborah Higgins, financial experts specializing in institutional investing. The third public member position is vacant.

## ANALYSIS

### A. PURPOSE OF THE POLITICAL REFORM ACT

The purpose of the conflict of interest provisions of the California Political Reform Act is to ensure public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their financial interests or those of persons who have supported them. In particular, the laws are intended "to promote and accomplish several state policies including: (1) assuring the independence, impartiality and honesty of public officials; (2) informing citizens regarding those economic interests of officials which might present a conflict of interest; (3) preventing improper personal gain by persons holding public office; (4) assuring that governmental decisions are properly arrived at; and (5) preventing special interests from unduly influencing governmental decisions." *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 667 (1974), citing legislative findings in then-Government Code section 3601. *See, Cal. Gov't Code § 81001(b).* By disclosing relevant financial interests, public officials can determine whether a conflict of interest exists and avoid participating in a matter. The Act also makes this financial information available to the public to help ensure government decisions are free from undue influence or improper financial motives.

### B. PUBLIC OFFICIALS WHO MANAGE PUBLIC INVESTMENTS MUST FILE STATEMENTS OF ECONOMIC INTERESTS

California Government Code section 87200 lists the types of public officials who are required to file Statements of Economic Interests. The list includes elected officers and other high-ranking public employees, city managers, city attorneys, city treasurers, chief administrative officers, members of city councils, and "other public officials who manage public investments."

California regulations further define those who manage public investments to include “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.” Cal. Code Regs. title 2, § 18701(b)(1)(A). “Public investments” means the investment of public moneys in real estate, securities, or other economic interests of the production of revenue or other financial return. Cal. Code Regs. title 2, § 18701(b)(2).

The management of public investments is defined as being more than ministerial functions. It includes: “directing the investment of public moneys; formulating or approving investment policies; approving or establishing guidelines for asset allocations; or approving investment transactions.” Cal. Code Regs. title 2, § 18701(b)(4). If the IAC manages public investments, the members would be considered “statutory filers” and must file Statements of Economic Interests.<sup>1</sup>

### C. RESPONSIBILITIES OF THE IAC

Whether a member of a board or commission manages public investments is a factual question to be determined on a case-by-case basis. The IAC does not have a formalized charter or similar document to identify its roles and responsibilities. However, the City Treasurer’s website materials regarding its “Investment Policy” states that:

Per Government Code § 53646, the City of San Diego’s Investment Policy is annually reviewed and approved by the City Council. Prior to Council approval, the City Treasurer’s Investment Advisory Committee (IAC) reviews the policy changes and makes additional recommendations. The Investment Policy is a formal statement of objectives and constraints for the City’s investment approach.

The City Treasurer recently prepared a draft “Statement of Purpose” for the IAC. The Statement of Purpose describes the IAC as an independent investment advisory group to the City Treasurer. The IAC provides input to the City Treasurer regarding “the prudent management and safeguarding of the City’s Pooled Investment Fund (the “Pool”) and on best practices.” The IAC “reviews the appropriateness of the investment benchmarks used to measure portfolio performance and provides feedback on proposed changes to the City Treasurer’s Investment Policy.” The IAC provides the City Treasurer “with an independent perspective on the management of the Pool” but does not recommend or select specific investments, funds or brokers, or advise on any aspect of the daily transactions of the Investment Pool.

There are very few FPPC informal advice letters considering whether someone is a public official who manages public investments. In *Condrashoff Advice Letter*, No. I-09-111, the FPPC

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<sup>1</sup> The Treasurer’s conflict of interest code, adopted by the City Council, indicates that the Treasurer, Chief Investment Officer, and Investment Officer are statutory filers.

concluded that Amador County Water District directors manage public investments because they approve the adoption of the general agency policy relating to the investment of public funds. The FPPC noted that managing public investments includes "more than the actual hands-on management of funds, such as determining what to buy and sell and when." *Id.* at 3. Citing earlier advice, the FPPC noted that school district board members who direct the investments of funds, formulate or approve policies for the investments of the funds, will be considered officials who manage public investments. *See, Hanna Advice Letter*, No. A-96-314.

We note that the above advice letters dealt with boards that actually approved the adoption of policies regarding the investment of public funds. In this case, the Council annually considers the City Treasurer's Investment Policy for the City's Pooled Investment Fund as recommended by the Treasurer. The Treasurer formulates the policy with the assistance of her staff. The proposed policy is then reviewed by the IAC to provide a further discussion and review of the policy. The Treasurer retains responsibility for the policies and has discretion to accept or reject any recommendations by the IAC.

Based on the above facts, it appears that the IAC does not have authority to actually formulate or approve the investment policies, establish asset allocations, or otherwise manage the City's funds. Because the FPPC advice letters seem to rely on whether an individual is authorized to direct the investment of funds or has the authority to approve investment policies, neither of which the IAC is authorized to do, we conclude that the IAC would not be required to file Statements of Economic Interests.

**D. BOARDS OR COMMISSIONS THAT ARE SOLELY ADVISORY ARE NOT REQUIRED TO FILE STATEMENTS OF ECONOMIC INTERESTS**

Boards or commissions that are solely advisory do not have financial disclosure requirements. Cal. Code Regs. title 2 § 18701(a)(1). On the other hand, the City Council is required to adopt a conflict of interest code for salaried or unsalaried members of committees, boards or commissions that have decision making authority. A committee, board or commission possesses decision making authority whenever:

- (i) It may make a final governmental decision;<sup>2</sup>
- (ii) It may compel a governmental decision; or it may 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

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<sup>2</sup> A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position: (1) votes on a matter; (2) appoints a person; (3) obligates or commits his or her agency to any course of action; (4) enters into any contractual agreement on behalf of his or her agency; or (5) determines not to act, within the meaning of subdivisions (a)(1), (a)(2), (a)(3), or (a)(4), above, unless such determination is made because of his or her financial interest. Cal. Code Reg. title 2 § 18702.1(a).

- (iii) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Cal. Code Regs. title 2, § 18701(a)(1).

In *Nielson Advice Letter*, No. A-02-147, the FPPC reviewed a “Treasury Oversight Committee” (TOC) created by the Board of Supervisors of Ventura County pursuant to Government Code section 27130 et. seq. Because the Government Code contemplated the delegation of audit responsibilities to the TOC, the FPPC concluded that the TOC was not solely advisory. The *Nielson* letter states:

The FPPC does not interpret bodies of law outside the Political Reform Act, and it does not do so here. However, we cannot overlook the existence of a statute whose plain meaning signals an apparently unqualified delegation of audit responsibilities to the TOC. The statute does not simply call for advice or recommendations concerning an audit, and it seems clear that the statutory scheme creating the TOC anticipates some level of genuine oversight, beyond mere advice that the board of supervisor’s investment decision be audited as and how the *board* sees fit.

The FPPC in *Nielson* also noted that the TOC does not manage public investments, but instead acts to oversee and audit such actions by the board of supervisors. *Id.* at 5.

Even if the IAC does not manage public investments, the members still may be required to file Statements of Economic Interests if the IAC has decision making authority. Based on the facts we have gathered, it does not appear that the IAC makes final governmental decisions, or can compel or prevent a governmental decision, the first two prongs of section 18701(a)(1). As noted in the draft Statement of Purpose, the IAC is an advisory group to the Treasurer that meets twice a year to provide feedback and recommendations on the City Treasurer’s Investment Policy. The Treasurer makes the decision whether to accept or reject any suggested changes to the policy. It does not appear that the City has delegated any decision making authority to the IAC.

The third factor in section 18701(a)(1) is whether a committee makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency. We have insufficient facts to determine whether the IAC provides substantive recommendations that are regularly approved without significant amendment or modification by another public official or governmental agency. Unless a determination is made that the IAC’s recommendations are regularly approved without modification, the City Council would not be required to adopt a conflict of interest code for the IAC.

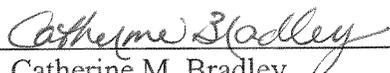
### CONCLUSION

State law requires public officials who manage public funds to disclose their financial interests by filing a Statement of Economic Interests. State law also requires that the City Council adopt a conflict of interest code for boards or commissions that have decision making authority and require the members to file Statement of Economic Interests disclosing financial interests described in the conflict code.

The facts we have gathered indicate that the IAC is an advisory committee tasked with providing a secondary review and feedback to the Treasurer on the City's Treasurer's Investment Policy for the City's Pooled Investment Fund. As an advisory committee, the IAC has no decision making authority or authority to manage public investments. Accordingly, its members would not have to file Statements of Economic Interests unless their recommendations are regularly approved, over an extended period of time, without significant modification by another public official or governmental agency.<sup>3</sup>

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By   
Catherine M. Bradley  
Chief Deputy City Attorney

CMB:sc  
ML-2010-14  
cc: Audit Committee

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<sup>3</sup> The advice contained in this memorandum is not binding on any other governmental or law enforcement agency. Members of the IAC may seek an opinion from the FPPC with respect to their duties under the Political Reform Act.