Agenda Item # 12

Conflict of Interest

Association of Bay Area Governments

PLAN CORPORATION

Pooled Liability Assurance Network

Association of Bay Area Governments

Date: June 19, 2013

To: ABAG PLAN Board of Directors

From: Robert J. Lanzone, Legal Counsel

Subject: **Conflict of Interest Code**

Recommended Action

Approve a Resolution which adopts a PLAN Conflict of Interest Code.

Background

The California Political Reform Act requires each California local agency adopt a Conflict of Interest Code. Until recently, the PLAN met the state law requirement by having Board members include the SBWMA as an "additional jurisdiction" on the FPPC Form 700 forms filed by them with their own jurisdictions.

We believe it would be a better practice to have The Board members, and alternates prepare and file Form 700s with the Secretary of the PLAN. This would also apply to the key ABAG employees who do work for the PLAN including the Executive Director, the Chief Financial Officer and the Risk Manager.

The attached Code is aimed at compliance with the FPPC regulations and is additional to the Code of Conduct the Board adopted to apply to the RFP process.

The form of the Code of Conduct should be familiar to Board members as it is virtually identical to the Codes each of the member agencies have enacted.

Robert J. Lanzone

Association of Bay Area Governments

PLAN CORPORATION

Pooled Liability Assurance Network

Association of Bay Area Governments

POOLED LIABILITY ASSURANCE NETWORK (PLAN)

NOTICE OF INTENTION TO ADOPT A CONFLICT-OF-INTEREST CODE

NOTICE IS HEREBY GIVEN that the Pooled Liability Assurance Network (PLAN) intends to adopt a conflict-of-interest code pursuant to Government Code Section 87300 and 87306. Pursuant to Government Code Section 87302, the code will designate employees who must disclose certain investments, income, interests in real property and business positions, and who must disqualify themselves from making or participating in the making of governmental decisions affecting those interests.

A forty-five (45) day written comment period has been established commencing on June 30, 2013 and terminating on August 15, 2013. Any interested person may present written comments concerning the proposed Code no later than August 15, 2013 to the PLAN , c/o ABAG, 101 8th Street, Oakland, CA 94607 or by telephone at 510.464.7913. No public hearing on this matter will be held unless any interested person or his or her representative requests, no later than fifteen (15) days prior to the close of the written comment period, a public hearing by so notifying Fred Castro, Clerk of the Board at the address or phone number written above.

The PLAN has prepared a written explanation of the reasons for the designated positions and the disclosure responsibilities and has available all of the information upon which its proposed Code is based for review, if desired, on request of the PLAN, at c/o ABAG, 101 8th Street, Oakland, CA 94607.

Copies of the PLAN's proposed Code are available to interested persons by contacting Fred Castro in writing at ABAG PLAN, at the address and telephone number written above. All written comments concerning the proposed Code should be submitted directly to Fred Castro at ABAG PLAN on or before August 15, 2013.

NOTE: This notice should be filed with the Fair Political Practices Commission and served individually on agency employees and officers affected by this code forty-five (45) days prior to agency action.

Association of Bay Area Governments

PLAN CORPORATION

Pooled Liability Assurance Network

Association of Bay Area Governments

Resolution authorizing the Notice of Intention to Adopt a Conflict of Interest Code by the Pooled Liability Assurance Network

Whereas, the Pooled Liability Assurance Network (PLAN) was established by the Association of Bay Area governments as a non profit corporation to provide a pooled risk program to manage risk, purchase insurance, provide claims administration and safety/loss control services

Whereas, pursuant to Government Code Section 87300, et seq., members of PLAN's Governing Board (Board) are subject to California's Political Reform Act of 1974, Government Code Section 81000, *et seq.*, and are required to adopt a Conflict of Interest Code (Code); and

Whereas, pursuant to Section18750.1(c)(3), every agency which proposes to adopt a conflict of interest code shall prepare a Notice of Intention to Adopt a Conflict of Interest Code opening a 45-day comment period to review the proposed Conflict of Interest Code which is attached hereto as Exhibit A.

Now, Therefore, Be It Resolved that the Governing Board of the PLAN Corporation hereby authorizes the Notice of Intention to Adopt the Conflict of Interest opening the 45-day comment period to review the proposed Code.

Passed and adopted this 19th day of June, 2013.

_____

Heather McLaughlin
Chair

Attest:

_____

James Hill
Corporate Secretary

ROBERT J. LANZONE
JEAN B. SAVAREE
GREGORY J. RUBENS
LINDA J. NOESKE*
*Certified Specialist, Family Law
The State Bar of California
Board of Legal Specialization

KATE KOSTRZEWA
KAI RUESS
CAMAS J. STEINMETZ

LAW OFFICES
AARONSON, DICKERSON, COHN & LANZONE
A PROFESSIONAL CORPORATION
939 LAUREL STREET, SUITE D
SAN CARLOS, CALIFORNIA 94070
PHONE: 650-593-3117
FAX: 650-637-1401
www.adcl.com

MICHAEL AARONSON
(1910-1998)

KENNETH M. DICKERSON
(1926-2008)

MELVIN E. COHN
(Superior Court Judge/Retired)
OF COUNSEL

February 21, 2013

To: ABAG PLAN Board of Directors

From: Robert J. Lanzone
Kai Ruess

Re: Political Reform Act's applicability to ABAG PLAN

In an October 31, 2012 memo to the Board of Directors, we indicated that we were seeking guidance from the Fair Political Practices Commission (FPPC) regarding the applicability of the California Political Reform Act (the Act) to ABAG PLAN (PLAN). We now have an official opinion letter from the FPPC which establishes that PLAN is a "local public agency" under the Act and therefore must adopt a conflict of interest code.

As stated in our previous memo to the Board, whether an entity is defined as a "local public agency" is based on a four-factor test articulated in *In re Siegel* (1977) 3 FPPC Ops. 62. The factors include:

(1) whether the impetus for formation of the entity originated with a government agency;

(2) whether the entity is substantially funded by, or is its primary source of funds, a government agency;

(3) whether one of the principal purposes for which the entity was formed to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and

(4) whether the entity is treated as a public entity by other statutory provision.

The FPPC found in its letter, which is attached to this memo, that PLAN satisfied each of these four factors and therefore is a "local public agency." The Act therefore requires that it adopt a Conflict of Interest Code. (Section 87300 and Section 82041). PLAN's board members must also disclose financial interests on an annual basis through Form 700 and recuse themselves from decisions which affect those interests.

RECOMMENDATION

This issue was originally raised in June 2012 when the Board first considered adopting a Conflict of Interest Code to comply with FPPC regulations. The staff memo and proposed Code that was presented to the Board are attached to this memo. Now that it appears certain that PLAN must adopt such a code, we recommend that the Board consider adoption of the proposed Conflict of Interest Code.

If you have any questions, please feel free to contact me.

Very truly yours,

ROBERT J. LANZONE

FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

December 19, 2012

Kai Ruess, Associate
AARONSON, DICKERSON, COHN & LANZONE
A Professional Corp
939 Laurel Street, Suite D
San Carlos, CA 94070

Re: Your Request for Advice
Our File No. A-12-163

Dear Mr. Ruess:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").[1] This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

Is PLAN, a non-profit entity, a "local public agency" under the Act? And if so, must it create a conflict-of-interest code?

CONCLUSIONS

Yes. Based on the facts you provided, PLAN is a local government agency, subject to the conflict-of-interest provisions of the Act.

FACTS

Your firm represents the Association of Bay Area Governments Pooled Liability Assurance Network Corporation ("PLAN"), which was established in 1992 by the Association of Bay Area Governments ("ABAG") to provide self-insurance and risk management programs to member agencies.

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[1] 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.

In 1986, ABAG entered into a risk coverage agreement with its member agencies. The agreement charged ABAG with the duty to provide liability insurance, claims coverage and risk management services to the subscribing member agencies. In 1992, the members created PLAN, a non-profit, public benefit corporation to handle the administration of the insurance plan and provide risk management services. PLAN collects the members' premiums and sets policy regarding risk management and implementation of and coverage offered by the plan. PLAN's bylaws state that it will adhere to the Brown Act in conducting its meetings, including special meetings.

PLAN's Board of Directors is comprised of one appointed director from each member agency. PLAN has no full-time staff, and instead compensates ABAG for use of its staff.

ANALYSIS

The Act prohibits a public official from making or participating in making a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.) The conflict-of-interest provisions of the Act apply only to "public officials." A public official is defined as every member, officer, employee or consultant of a state or local government agency. (Section 82048.) In addition, Section 87300 of the Act states that "[e]very agency shall adopt and promulgate a Conflict of Interest Code" applicable to its "designated employees." For the purposes of the Act, "agency" is interpreted to mean any state agency or local government agency. (Section 82003; *Maas* Advice Letter, No. A-98-261.) A "local government agency" is defined in the Act as "a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing." (Section 82041.)

You ask whether PLAN board members are public officials subject to the disclosure requirements of the Act. The answer turns on whether PLAN is considered a local government agency, and therefore required to adopt a conflict-of-interest code for its employees and board members under Section 87300 or be included within an existing city code.

The Commission established criteria for determining whether an entity is governmental in character in its opinion *In re Siegel* (1977) 3 FPPC Ops. 62. The *Siegel* factors determine whether local entities are public or private in character. Those factors are:

> (1) Whether the impetus for formation of the entity originated with a government agency;
>
> (2) Whether the entity is substantially funded by, or its primary source of funds is, a government agency;
>
> (3) Whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and

(4) Whether the entity is treated as a public entity by other laws.

The Commission's subsequent advice letters and an opinion state that it is not necessary that all four of the Siegel factors be satisfied for an entity to be considered a local government agency. (*In re Vonk* (1981) 6 FPPC Ops. 1; *O'Shea* Advice Letter, No. A-91-570.) It is only necessary that the entity satisfy enough of the four factors for its overall character to correspond to that of a local government agency. (*Rasiah* Advice Letter, No. A-01-020.) Therefore, the *Siegel* factors are not intended to be a definitive litmus test for determining whether an entity is public for purposes of the Act. Ultimately, the test must still be a factual analysis on a case-by-case basis. (*In re Vonk, supra.*)

(1) Did the impetus for formation of the entity originate with a government agency?

PLAN started in 1992 when the joint powers authority, ABAG, decided to create a non-profit entity to handle liability insurance and other services for its members. Based on your facts, and as you stated in your request, the first prong of the *Siegel* test is satisfied.

(2) Is the entity is substantially funded by, or does it have as its primary source of funds a government agency?

You have suggested that the only income to PLAN is premium payments by members that would then be used to pay for liability insurance. Based on your facts, PLAN must collect beyond the premium to provide meaningful services, reimburse ABAG for use of employees, and reimburse board members for expenses (per PLAN's bylaws). These funds come from member agencies, which are all local government agencies, thus making government agencies the primary source of funds. Accordingly, the second *Siegel* factor is met.

(3) Is one of the principal purposes for which the entity was formed to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed?

In the *Siegel* opinion, this third criterion is a two-part inquiry that examines whether an entity performs a public function and whether the service provided is one that is traditionally performed by public agencies. (*Stark* Advice Letter, No. A-03-015.)

Public Function:

We first look at factors considered by the *Siegel* opinion to be relevant to determining whether an entity performs a public function. One such factor is the degree to which government actors control or are involved in its operations. In the *Siegel* opinion, the Commission noted that "further evidence that the Corporation is fulfilling a public function under this plan is that the water system is to be operated solely by city employees." In addition, the opinion looked at whether city council members were members of the board of the nonprofit Corporation and

considered the fact that the city council had a right to disapprove the name of anyone submitted to serve on the board. (*In re Siegel, supra.*)

PLAN was formed to "handle the administration of the [ABAG] insurance plan and provide risk management services." Before 1992, when ABAG members formed PLAN, ABAG itself entered into a risk coverage agreement with its member agencies. The agreement charged ABAG with the duty to provide liability insurance, claims coverage, and risk management services to the members. When the member agencies decided to remove that duty from ABAG's responsibilities, they created PLAN.

PLAN's Board is comprised of public officials from local member agencies and funds come from local agencies' dues. Additionally, PLAN does not have employees, but reimburses ABAG for employee time. Your facts do not reach whether obtaining liability insurance and providing risk management services are traditionally a public activity. That PLAN is intertwined with and inextricable from the member public agencies, however, which weighs in favor of it serving a public function, consistent with the conclusion in the *Siegel* opinion.

Service Traditionally Performed by Public Agencies:

Secondly, we look at factors the *Siegel* opinion considered relevant in determining whether an entity performs a function that has traditionally been performed by public agencies. According to information provided in your letter, PLAN was created to take over a function that had previously been performed by ABAG, a joint powers authority. Currently, the non-profit performs the function, and the non-profit is 100 percent funded and overseen by member agencies.

Therefore, based on your facts, PLAN performs the same function that was historically provided by ABAG for its member agencies. As noted, we do not have information regarding the traditional role of public agencies in contracting for these services, but based on your facts, PLAN simply took over control of a function that had previously been in the hands of a public entity. While we assume the actual insurance may come from a private source, the service provided is overseen by government entities, in a traditional governmental role, which satisfies this factor.

Accordingly, we conclude that the third *Siegel* factor has been met.

(4) Is the entity treated as a public entity by other laws?

The final factor to consider in evaluating an entity's status under the Act is whether the entity is treated as a public entity by other provisions of law. PLAN's bylaws state that PLAN will conduct its meetings according to the Ralph M. Brown Act. You state that this is a voluntary compliance. Consistent with prior advice, the voluntary self-regulating to follow the open meeting laws weighs in favor of the fourth criterion of the *Siegel* analysis. (*See, e.g., Roscoe* Advice Letter, No. A-11-058; *Kranitz* Advice Letter, No. A-03-204; *Stark, supra.*) Therefore, this factor is also met.

Based on the facts you provided and under the *Siegel* analysis, PLAN is an agency under the Act. Accordingly, PLAN must adopt a conflict-of-interest code pursuant to Sections 87300 and 87302. Members of the board must file statements of economic interest as required and must also comply with the Act's conflict-interest provisions.

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

Sincerely,

Zackery P. Morazzini
General Counsel

Heather M Rowan

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl

ROBERT J. LANZONE
JEAN B. SAVAREE
GREGORY J. RUBENS
[illegible]A J. NOESKE*
*Certified Specialist, Family Law
The State Bar of California
Board of Legal Specialization

KATE KOSTRZEWA
KAI RUESS
CAMAS J. STEINMETZ

LAW OFFICES
AARONSON, DICKERSON, COHN & LANZONE
A PROFESSIONAL CORPORATION
939 LAUREL STREET, SUITE D
SAN CARLOS, CALIFORNIA 94070
PHONE: 650-593-3117
FAX: 650-637-1401
www.adcl.com

MICHAEL AARONSON
(1910-1998)

KENNETH M. DICKERSON
(1926-2008)

MELVIN E. COHN
(Superior Court Judge/Retired)
OF COUNSEL

October 31, 2012

To: ABAG PLAN Board of Directors

From: Robert J. Lanzone
Kai Ruess

Re: Political Reform Act's applicability to ABAG PLAN

BACKGROUND

In 1986, the Association of Bay Area Governments (ABAG) entered into a risk coverage agreement with its member agencies. This agreement charged ABAG with the duty to provide liability insurance, claims coverage and risk management services to the subscribing member agencies. In 1992, ABAG and the member agencies revised this agreement and formed the ABAG PLAN Corporation (PLAN), a California non-profit public benefit corporation, to handle the administration of the insurance plan. Specifically, PLAN collects all premiums and sets policy regarding risk management and implementation of and coverage offered by the plan.

The PLAN Board of Directors is composed of one appointed director from each member agency. PLAN has no full-time staff, and instead compensates ABAG for use of its staff.

The question posed to our office is whether or not PLAN must have its own conflict of interest code and whether its Board of Directors are subject to the reporting/disclosure provisions of the Political Reform Act (PRA) and applicable Fair Political Practices Commission (FPPC) regulations as it relates to their position on the PLAN Board.

ANALYSIS

The Political Reform Act requires that "every agency shall adopt and promulgate a Conflict of Interest Code..." (Section 87300). An "agency" has been interpreted to include a "local government agency" which is a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing (Section 82041). Thus, PLAN must have a conflict of interest code and its board

members must disclose financial interests and recuse themselves from decisions which affect those interests if PLAN is a "governmental agency."

What constitutes a governmental agency is a factual determination. The FPPC has taken up this issue in a number of opinion papers and employs a 4-prong analysis to determine whether an entity is a local government agency under Section 82041. The 4-prong analysis was originally articulated in In re Siegel (1977) 3 FPPC Ops. 62 and reads as follows:

> (1) Was the impetus for formation of the entity originated with a government agency?
>
> (2) Is the entity substantially funded by, or is its primary source of funds, a government agency?
>
> (3) Is one of the principal purposes for which the entity was formed to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed?
>
> (4) Is the entity treated as a public entity by other statutory provision?

It appears point one, above, would be indicate that PLAN is a local government agency, but the remaining three points are less clear. PLAN is funded by premium collection rather direct subsidy from ABAG and its principal purpose (to administer insurance services) is not a function that is traditionally performed by a single public agency. These characteristics seem to dictate that PLAN is not a government agency, but it is not clear.

We called the FPPC advice line to ask them for guidance on this issue. We were referred to another person at FPPC via email who responded that he believes PLAN is a government agency and therefore subject to the PRA. However, he suggested that we submit a formal request letter to the FPPC Board for an opinion letter because determining whether an entity is a local government agency is a fact-driven analysis which may be subject to different interpretations. We plan to submit this letter and anticipate that the FPPC will respond within a month.

We will request that the FPPC also provide guidance on what is necessary to comply with the PRA if it determines that PLAN is subject to its provisions. Specifically, we will ask them to determine whether PLAN Board member can simply add PLAN to their existing Form 700s which they file with their primary agencies or if a separate form is needed each year. We will also ask whether Board members must recuse themselves from discussions that specifically affect their primary agencies.

RECOMMENDATION

Once we have a firm decision from the FPPC, we will update the Board on this issue. If the FPPC determines that PLAN must have a conflict of interest code, our

office can assist in drafting it in time for next year's reporting deadline, which is April 1, 2013.

If you have any questions, please feel free to contact me. .

Very truly yours,

ROBERT J. LANZONE

CONFLICT OF INTEREST CODE

ABAG PLAN CORPORATION

Section 1. Purpose. Pursuant to the provisions of Government Code Sections 87300, et seq., ABAG PLAN Corporation, Inc. a nonprofit corporation(the PLAN) hereby adopts the following Conflict of Interest Code. Nothing contained herein is intended to modify or abridge the provisions of the Political Reform Act of 1974 (Government Code Section 81000). The provisions of this Code are additional to Government Code Section 87100 and other laws pertaining to conflicts of interest. Except as otherwise indicated, the definitions of said Act and regulations adopted pursuant thereto are incorporated herein and this Code shall be interpreted in a manner consistent therewith.

Section 2. Designated Positions. The positions listed on **Exhibit A**, attached hereto and by this reference incorporated herein, are Designated Positions. Each officer and employee holding a position listed on Exhibit A is a Designated Employee, and is required to file a disclosure statement (as prescribed hereinafter) on any decision which the said officer or employee may make or in which said officer or employee may participate, that may foreseeably have a material effect on a financial interest. The Executive Committee, may determine in writing on a case by case basis that a particular consultant, although a designated position, is hired to perform a range of duties that is limited in scope and thus does not require compliance, or full compliance with disclosure requirements. Any such written determination shall include a description of the consultant's duties and a statement as to the extent of disclosure requirements. The Executive Committee may determine whether a contract consultant constitutes a "consultant" as defined in the Political Reform Act. The Executive Committee's determination is a public record and shall be retained for public inspection in the same manner and location as this Conflict of Interest Code.

Section 3. Disclosure Statement. Designated Positions shall be assigned to one or more of the disclosure categories as contained in the Fair Political Practices Commission (FPPC) Form 700, as set forth on Exhibit A. Each Designated Employee shall file an annual statement disclosing that employee's interest in investments, real property, and income, designated in **Exhibit B**, attached hereto and by this reference incorporated herein, as reportable under the category to which the employee's position is assigned on Exhibit A.

Section 4. Time and Place of Filing.

(a) All designated officers and employees required to submit a statement of financial interests shall file the original with the Secretary of the Board of Directors of PLAN.

(b) A designated officer or employee* required to submit a statement of financial

interest Form 700 shall submit an initial statement on or before April 1, 2013.

(c) Employees appointed, promoted or transferred to designated positions shall file initial statements within 30 days after date of employment.

(d) Annual statements shall be filed no later than April 1st of each year by all designated officers and employees. Such statements shall cover the period of the preceding calendar year.

(e) A designated officer or employee who leaves an office shall file, within 30 days of leaving office, a leaving office statement.

Section 5. Contents of Disclosure Statements. Statements of economic interests shall be made on forms prescribed by the Fair Political Practices Commission and supplied by the Secretary of the Board of Directors of PLAN.

Section 6. Disqualifications. Designated officers or employees must disqualify themselves from making or participating in the making of any decisions in which they have a reportable financial interest, when it is reasonably foreseeable that such interest may be materially affected by the decision. No designated officer or employee shall be required to disqualify himself with respect to any matter which could not be legally acted upon or decided without his participation.

EXHIBIT A

DESIGNATED POSITIONS

Designated Positions	Disclosure Categories
Members of the Board of Directors	1
Alternates for Members of the Board of Directors	1
Executive Director/President	1
Chief Financial Officer	1
Risk Manager	1
Legal Counsel to the Corporation	1

EXHIBIT B

Category 1. Persons in this category must disclose all investments in business positions in business entities, doing business in, and sources of income and interests in real property, within the jurisdictional area of the PLAN.

Category 2. Persons in this category must disclose all investments and business positions in business entities in or doing business within the jurisdictional area of the PLAN. .

Category 3. Persons in this category must disclose all investments and business positions in business entities and sources of income which provide, manufacture or supply services, supplies, materials, machinery or equipment of the type utilized by or subject to review or approval of the member entities of the PLAN..