



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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September 20, 2022

MICHELLE WATSON, CFA, CAIA, CFP  
Executive Vice President, Partner  
50 California Street, Suite 3650  
San Francisco, CA 94111

Re: Your Request for Advice  
**Our File No. A-22-088**

Dear Ms. Watson:

This letter responds to your request for advice on behalf of City of Beverly Hills Planning Commissioner Jeff Wolfe regarding the statement of economic interest reporting provisions of the Political Reform Act (the “Act”).<sup>1</sup>

Please note that we are only providing advice under the statement of economic interest reporting provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also 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.

### QUESTION

Must Planning Commissioner Wolfe disclose his investment interest in individual stocks and securities held in an “index-tracking, tax-loss harvesting strategy” account?

### CONCLUSION

Yes. An “index-tracking, tax-loss harvesting strategy” account is not a mutual fund nor is it a bona fide investment fund that pools money from more than 100 investors. (Section 82034 and Regulation 18237.) Therefore, as an appointed official, his individual stocks and securities that otherwise meet the definition of an “investment” in Section 82034 will be disclosable under Sections 87200-87205 on his statement of economic interest report.

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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 18104 through 18998 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 AS PRESENTED BY REQUESTER

Jeff Wolfe is a newly appointed member of the Planning Commission in the City of Beverly Hills, having begun his term on July 1, 2022, and as a result is required to disclose his financial interests under the Act. His question regards one of his financial interests and whether it is the type that must be disclosed.

Commissioner Wolfe holds an account with Evergreen Gavenkal, an independent registered investment advisor (“RIA”). This account is described as a “tax-loss harvesting strategy,” that is not a “fund.” Tax-loss harvesting strategies use technology to build investment strategies with individual securities to mimic an index – like the S&P 500. This is done to provide tax-lots of individual securities so that in a systemized way, tax-losses can be harvested throughout the year. This is technology driven, not driven by an individual client. The investment manager/advisor has discretion, not the end client, and it is a passive strategy to mimic an index.

Through a series of emails, you have provided additional explanations, clarifying that this is a diversified strategy that has over 500 holdings in it, and largely reflects the stocks available through the SP 500. It is passive to an index like an index MF [mutual fund] or ETF [exchange traded fund], as it just has individual securities for tax-loss harvesting purposes. The strategy holds securities of more than 15 issuers and does not have a stated policy of concentrating its holding in the same industry or business. You state that in this manner, the tax-loss harvesting strategy is similar to funds that are not required to be disclosed, although you note that this is not a fund and is not a pooled investment vehicle. By telephone, you clarified that while other investors participate in this index-driven strategy, each account is individually owned, for tax loss purposes. And, that while an investor could have a situation where they held some stocks in a “concentrated position (long-term holding)” that would be separate from the tax-loss harvesting strategy, Commissioner Wolfe does not have any holdings of this nature.

## ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using their official position to influence a governmental decision in which the official has a financial interest. The purpose of the Act’s conflict-of-interest provisions is to ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).)

In furtherance of this goal, the Act requires that assets and income of public officials which may be materially affected by their official actions should be fully disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided. (Section 81002(c).) Sections 87200-87205 specifically sets forth the duties of elected and appointed officials, such as planning commissioners, in disclosing their financial interests. A planning commissioner must within 30 days of assuming office file a statement disclosing their investments, interest in real property and income received during the 12 months prior to assuming office. (Section 87202(a).)

At issue here is the disclosure of Commissioner Wolfe’s investments, and whether the stocks and securities in the “strategy” account meets the definition of the term, “investment.” Relevant to this matter, Section 82034 provides the following definition, in pertinent part:

“Investment” means any financial interest in or security issued by a business entity, including, but not limited to, common stock, preferred stock, rights, warrants, options, debt instruments, and any partnership or other ownership interest owned directly, indirectly, or beneficially by the public official, or other filer, or that person’s immediate family, if the business entity or any parent, subsidiary, or otherwise related business entity has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. An asset shall not be deemed an investment unless its fair market value equals or exceeds two thousand dollars (\$2,000).

Section 82034 excludes the following types of interests, including as relevant here, certain “diversified mutual funds,” from the definition:

[A] time or demand deposit in a financial institution, shares in a credit union, any insurance policy, interest in a diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940 or in a common trust fund created pursuant to Section 1564 of the Financial Code, interest in a government defined-benefit pension plan, or any bond or other debt instrument issued by any government or government agency.

In adopting Regulation 18237. “Definition of Investments” in 2011 to interpret and clarify the “mutual fund exception” in Section 82034, the Commission recognized there are types of funds that share key characteristics with mutual funds and may also fall under the exception. Regulation 18237 states:

(a) For purposes of Section 82034, the term “investment” does not include a fund, including an exchange traded fund (ETF), closed-end fund or fund held in a plan qualified under Sections 401(k), 403(b), 457 or similar provision of the Internal Revenue Code (qualified plan), that is substantially similar to a “diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940” if all the following are met:

(1) The fund is a bona fide investment fund that pools money from more than 100 investors and invests the money in stocks, bonds, or other securities.

(2) The fund holds securities of more than 15 issuers.

(3) The public official did not influence or control the decision to purchase or sell the specific fund on behalf of the official’s agency during the applicable reporting period.

(4) The public official does not influence or control the selection of any specific investment purchased and sold on behalf of the fund.

(5) The fund does not have a stated policy of concentrating its holdings in the same industry or business.

As you note in your request, the interests in the “strategy” account do not meet the requirements of this regulation in that the account is not a “bona fide investment fund that pools money from more than 100 investors.” While the “strategy” account may track an index, it is individually held by Commissioner Wolfe. Because the interests in the “strategy” account do not meet the exceptions to the definition of an “investment,” relating to mutual funds in either the above Section 82034 or Regulation 18237, Commissioner Wolfe must disclose in his statement of economic interest, including his assuming office statement as well as annual statements, any financial interest in or security issued by a business entity, including any stock in a business entity, that has a fair market value that equals or exceeds two thousand dollars (\$2,000) and is held in the “strategy” account.<sup>2</sup> In addition, he must recuse himself from decisionmaking that relates to these financial investment interests in accordance with the Act’s conflict of interest provisions.

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

Sincerely,

Dave Bainbridge  
General Counsel

**L. Karen Harrison**

By: L. Karen Harrison  
Senior Counsel, Legal Division

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<sup>2</sup> It is your understanding that each security held in the account will meet the “doing business in the jurisdiction” limitation.