

San Diego  
ASSOCIATION OF GOVERNMENTS  
**MEMO**

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March 18, 2010

1500200

TO: Independent Taxpayer Oversight Committee

FROM: Julie Wiley, General Counsel

SUBJECT: Conflicts of Interest Issues Related to Selection of New Members

Current ITOC members have expressed concern about SANDAG's ability to fill the vacant seats on the ITOC due to conflict of interest issues that can arise for persons selected to serve on the ITOC. The Statement of Understanding attached to the 2004 *TransNet* Ordinance states the following with regard to the ITOC and conflict of interest:

The ITOC shall be subject to SANDAG's conflict of interest policies. ITOC members shall have no legal action pending against SANDAG and are prohibited from acting in any commercial activity directly or indirectly involving SANDAG, such as being a consultant to SANDAG or to any party with pending legal actions against SANDAG during their tenure on the ITOC. ITOC members shall not have direct commercial interest or employment with any public or private entity, which receives *TransNet* sales tax funds authorized by this Ordinance.

This provision could be interpreted to be more restrictive than California law. Therefore, to clarify the matter, the SANDAG Board of Directors added language to Rule# 17 of Board Policy No. 031: *TransNet* Ordinance and Expenditure Plan Rules. Board Policy No. 031 concerns interpretation and implementation procedures for the *TransNet* Ordinance. Rule #17 states in relevant part:

The Board intends to make every effort to ensure the representatives selected to serve on the Independent Taxpayers Oversight Committee (ITOC) are free from any bias that would interfere with objective decision making by the ITOC. The Conflict of Interest section of the "Statement of Understanding Regarding the Implementation of the Independent Taxpayer Oversight Committee for the *TransNet* Program," which is part of the *TransNet* Extension Ordinance, states in part: "ITOC members shall not have direct commercial interest or employment with any public or private entity, which receives *TransNet* sales tax funds authorized by this Ordinance." The Board interprets this language **to impose the same level of restrictions on the ITOC representatives as those that apply to SANDAG Board members pursuant to California state law found at Government Code sections 87100 et seq. and 1090 et seq.** [Boldface added for emphasis.]

This means that current and potential ITOC members are held to the same statutory requirements as any other official serving on the SANDAG Board.

The laws that apply to ITOC members are confusing and located in several locations of the California statutes and regulations. A lengthy memo regarding conflict of interest analysis for potential ITOC members was prepared in 2005 and can be made available to ITOC members if requested. I also prepared a one page memo for current ITOC members concerning conflict "red flags" in February 2008 that I have attached to this memo. Currently, I have been asked to prepare a short memo regarding the most likely scenarios of conflict of interest that would be of concern for applicants for the vacant ITOC seats. This memo is intended to accomplish that end.

The most likely candidates that would be qualified for and have an interest in serving on ITOC are people who serve or have served as consultants in the private sector or employees of public entities. Of these, the most likely persons to have a conflict are consultants actively employed in the private sector whose firms are hired by public entities to carry out projects funded by *TransNet* or who will apply directly to SANDAG to work on a *TransNet* funded project. This is because retirees do not receive an income anymore to cause them a conflict and the employment income of active public employees is considered a non-interest for conflict laws purposes as long as the employee is not working for the

same department that would be applying for the *TransNet* funds. Private sector employees working for a company that hopes to receive *TransNet* funding by contracting with either SANDAG or one of its member agencies or grantees are the most likely applicants to have a prohibited conflict of interest.

The possibility of a conflict, however, does not automatically require disqualification of an applicant. There are two statutory schemes that apply to conflicts for ITOC members. The first is Government Code section 1090, which applies to conflicts that arise in “making a contract.” With respect to the making of a contract, the courts have defined the making of the contract to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. The courts have made it clear that the prohibition contained in section 1090 also applies to persons in advisory positions to contracting agencies. This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. Since the ITOC reviews the evaluation criteria and funding allocations involving *TransNet* funds, the ITOC members are part of the process of making a contract with the eventual recipients of the *TransNet* funds. However, because of its advisory status, the ITOC does not actually enter into most of the contracts resulting from the procurement or grant processes it reviews, so even ITOC members with a financial interest could usually avoid a conflict by merely disqualifying themselves from any participation in connection with the making of the contract.

The other statutory sections concerning conflict of interest applicable to ITOC are located in the Political Reform Act. The Political Reform Act prohibits public officials such as ITOC members from participating in a decision if it is sufficiently likely that the outcome of the decision will have a material impact on the public official’s economic interests, and if the impact on the economic interest is not also felt by a significant segment of the public. Generally, a material impact means the ITOC member has received \$500 in income in the last 12 months from a source that would be seeking *TransNet* funds. Even if there is a material impact causing a conflict of interest for a private sector employee serving on ITOC, the member can state his/her conflict on the record and abstain from any involvement in the decision making process involving his/her employer.

Based on the analysis above, when selecting new members for the ITOC that currently work for a private company that will seek *TransNet* funds, the selection panel should take the following scenarios into account to determine how often the member with a conflict may have to abstain from voting:

SITUATION	RESPONSE
ITOC member works for a firm that does or will perform work for a city or the County on a <i>TransNet</i> -funded project	Member must abstain from any votes regarding evaluation criteria or funding allocations to a city or County that could be passed through to the firm
ITOC member works for a firm that does or will perform work for a city or the County, but no <i>TransNet</i> funds are used on the project	Member will not need to abstain from any votes on ITOC on this basis
ITOC member works for a firm that does or will perform work as a prime or subcontractor on a <i>TransNet</i> -funded project	Member must abstain from any votes on <i>TransNet</i> budget items that include projects on which the firm might want to submit a bid or proposal
ITOC member works for a firm that is or will try to be a grantee receiving <i>TransNet</i> funds under a particular <i>TransNet</i> competitive grant program	Member must abstain from any votes regarding evaluation criteria or funding allocations to a grantee that could pass through the <i>TransNet</i> funds to the member’s firm