



FPPC Update

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This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

LEAGUE OF CALIFORNIA CITIES CITY ATTORNEY CONFERENCE

FPPC UPDATE SPRING 2018

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POLITICAL REFORM ACT REVISION PROJECT

The past two years, the FPPC has focused on its overhaul of the Political Reform Act. The overarching goal of the Project as stated by FPPC Chair Remke was to streamline and simplify the language of the Act without weakening disclosure or sacrificing accountability. In early 2017, after much work and outreach, the draft of the revised Act was submitted to the Legislative Counsel for review. In September comments were provided to the FPPC by the Counsel which, according to FPPC staff were substantial. At that time FPPC staff was to review the comments and decide whether to take those comments under submission and re-work the draft and re-start the comment process or determine not to take the Project further. After reaching out to FPPC legal staff in March, they stated that while elements of the Project may be pursued in the future to further the goal of streamlining the Act without weakening disclosure or sacrificing accountability, a comprehensive statutory restructuring is not imminent.

It is the feeling of the League's FPPC Committee that this was a preferable course given that the proposed draft changed and reordered every existing section of the Act and did not appear to create significant clarity to warrant the revisions.

RECENT CHANGES TO FPPC REGULATIONS

Over the past several months, the League's FPPC Committee has monitored any proposed regulatory changes which would have a substantive impact on the conflict of interest rules, and to date, there have not been any proposed regulation changes of significance that the Committee has seen a need to comment on.

A regulation worth mentioning though is one that was repealed, Regulation 18901, Mass Mailings Sent at Public Expense. The reason for this repeal is that the mass mailing provisions are now incorporated fully into Government Code Section 89002 as a result of the recent

enactment of Senate Bill 45 (“SB 45”). SB 45 codified the FPPC’s mass mailing restrictions into Government Code Sections 89002 and 89003 and added a prohibition on certain mass mailings by or on behalf of a candidate whose name is on the ballot within 60 days of the election. SB 45 further restricts prior permissible mass mailings for officials who will appear on a ballot as it relates to letterhead, certain public meetings related to the candidate, and business cards as more specifically described in Subsection 89002(b)(1), (9) and (11). Government Sections 89002 and 89003 are provided below.

89002.

(a) Except as provided in subdivision (b), a mailing is prohibited by Section 89001 if all of the following criteria are met:

(1) An item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. The item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.

(2) The item sent either:

(A) Features an elected officer affiliated with the agency that produces or sends the mailing.

(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency that produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

(3) Any of the costs of distribution are paid for with public money or the costs of design, production, and printing exceeding fifty dollars (\$50) are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this section.

(4) More than 200 substantially similar items are sent in a single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).

(b) Notwithstanding subdivision (a), a mass mailing of the following items is not prohibited by Section 89001:

(1) An item in which the elected officer’s name appears only in the letterhead or logotype of the stationery, forms, including “For Your Information” or “Compliments of” cards or stamps, and envelopes of the agency sending the mailing, or of a committee of the agency, or of the elected officer, or in a roster listing containing the names of all elected officers of the agency. For purposes of this section, the return address portion of a self-mailer is considered the envelope. In any such item, the names of all elected officers must appear in the same type size, typeface, type color, and location. The item shall not include the elected officer’s photograph, signature, or any other reference to the elected officer, except as specifically permitted by this section. The item may, however, include the elected officer’s office or district number and the elected officer’s name or district number in his or her Internet Web site address or electronic mail address.

(2) A press release sent to members of the media.

(3) An item sent in the normal course of business from one governmental entity or officer to another governmental entity or officer, including all local, state, and federal officers or entities.

(4) An intra-agency communication sent in the normal course of business to employees, officers, deputies, and other staff.

(5) An item sent in connection with the payment or collection of funds by the agency sending the mailing, including tax bills, checks, and similar documents, in any instance in which use of the elected officer's name, office, title, or signature is necessary to the payment or collection of the funds. The item shall not include the elected officer's photograph, signature, or any other reference to the elected officer, except as specifically permitted by this section.

(6) Any item sent by an agency responsible for administering a government program, to persons subject to that program, in any instance in which the mailing of the item is essential to the functioning of the program, the item does not include the elected officer's photograph, and use of the elected officer's name, office, title, or signature is necessary to the functioning of the program.

(7) Any legal notice or other item sent as required by law, court order, or order adopted by an administrative agency pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2), and in which use of the elected officer's name, office, title, or signature is necessary in the notice or other mailing. For purposes of this paragraph, inclusion of an elected officer's name on a ballot as a candidate for elective office, and inclusion of an elected officer's name and signature on a ballot argument, shall be considered necessary to that notice or other item.

(8) A telephone directory, organization chart, or similar listing or roster which includes the names of elected officers as well as other individuals in the agency sending the mailing, in which the name of each elected officer and individual listed appears in the same type size, typeface, and type color. The item shall not include an elected officer's photograph, name, signature, or any other reference to an elected officer, except as specifically permitted by this section.

(9)

(A) An announcement of any meeting or event of either of the following:

(i) An announcement sent to an elected officer's constituents concerning a public meeting that is directly related to the elected officer's incumbent governmental duties, is to be held by the elected officer, and that the elected officer intends to attend.

(ii) An announcement of any official agency event or events for which the agency is providing the use of its facilities or staff or other financial support.

(B) Any announcement provided for in this paragraph shall not include the elected officer's photograph or signature and may include only a single mention of the elected officer's name except as permitted elsewhere in this section.

(10) An agenda or other writing that is required to be made available pursuant to Sections 11125.1 and 54957.5, or a bill, file, history, journal, committee analysis, floor analysis, agenda of an interim or special hearing of a committee of the Legislature, or index of legislation, published by the Legislature.

(11) A business card that does not contain the elected officer's photograph or more than one mention of the elected officer's name.

(c) For purposes of this section, the following terms have the following meanings:

(1) "Elected officer affiliated with the agency" means an elected officer who is a member, officer, or employee of the agency, or of a subunit thereof such as a committee, or who has supervisory control over the agency or appoints one or more members of the agency.

(2) "Features an elected officer" means that the item mailed includes the elected officer's photograph or signature or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color.

(3) "Substantially similar" is defined as follows:

(A) Two items are "substantially similar" if any of the following applies:

(i) The items are identical, except for changes necessary to identify the recipient and his or her address.

(ii) The items are intended to honor, commend, congratulate, or recognize an individual or group, or individuals or groups, for the same event or occasion, are intended to celebrate or recognize the same holiday, or are intended to congratulate an individual or group, or individuals or groups, on the same type of event, such as birthdays or anniversaries.

(iii) Both of the following apply to the items mailed:

(I) Most of the bills, legislation, governmental action, activities, events, or issues of public concern mentioned in one item are mentioned in the other.

(II) Most of the information contained in one item is contained in the other.

(B) Enclosure of the same informational materials in two items mailed, such as copies of the same bill, public document, or report, shall not, by itself, mean that the two items are “substantially similar.” The informational materials shall not include the elected officer’s name, photograph, signature, or any other reference to the elected officer except as permitted elsewhere in this section.

(C) An item is only considered substantially similar to other items sent by the same official, not to items sent by other officials in the same agency.

(4) “Unsolicited request” is defined as follows:

(A) A written or oral communication, including a petition, that specifically requests a response and is not requested or induced by the recipient elected officer or by any third person acting at his or her behest. However, an unsolicited oral or written communication, including a petition, that does not contain a specific request for a response shall be deemed to constitute an unsolicited request for a single written response.

(B) An unsolicited request for continuing information on a subject shall be deemed an unsolicited request for multiple responses directly related to that subject for a period of time not to exceed 24 months. An unsolicited request to receive a regularly published agency newsletter shall be deemed an unsolicited request for each issue of that newsletter.

(C) A previously unsolicited request to receive an agency newsletter or mass mailing on an ongoing basis shall not be deemed to have become solicited by the sole fact that the requestor responds to an agency notice indicating that, in the absence of a response, his or her name will be purged from the mailing list for that newsletter or mass mailing. A notice in the following language shall be deemed to meet this standard:

“The law does not permit this office to use public funds to keep you updated on items of interest unless you specifically request that it do so.”

Inclusion of a similar notice in other items does not constitute a solicitation under this section.

(D) A communication sent in response to an elected officer’s participation at a public forum or press conference, or to his or her issuance of a press release, shall be deemed an unsolicited request.

(E) A person who subscribes to newspapers or other periodicals published by persons other than elected officers shall be deemed to have made unsolicited requests for materials published in those subscription publications.

(Added by Stats. 2017, Ch. 827, Sec. 1. (SB 45) Effective January 1, 2018.)

89003.

Notwithstanding subdivision (b) of Section 89002, a mass mailing, as defined in Section 82041.5, that meets the criteria of subdivision (a) of Section 89002 shall not be sent within the 60 days preceding an election by or on behalf of a candidate whose name will appear on the ballot at that election, except as provided in paragraphs (2) to (8), inclusive, and paragraph (10) of subdivision (b) of Section 89002.

(Added by Stats. 2017, Ch. 827, Sec. 2. (SB 45) Effective January 1, 2018.)

In March, the FPPC Executive Staff Report to the Commission stated that there may be possible amendments to conflict of interest rules including (1) rules for small shareholders and related business entities and (2) bright line materiality standards, including clarification of the 500-foot property rule. No date was given as to when those potential changes would be forthcoming.

PRIORITIES OF THE FPPC FOR 2018

FPPC Chair Remke's 2018 priorities state that the Commission's focus will be on assisting candidates, committees and filing officers in their duties for the 2018 election year. It has been mentioned in many Commission meetings that election years are very busy years, and staff will mainly be focused on compliance and responding to complaints as it relates to election matters. They will also continue to work to improve transparency in government ethics by launching an enforcement database public portal.

The Commission is looking to review its enforcement priorities and procedures. Based on watching the Commission meetings on this topic, some Commissioners want to examine the process followed by staff undertaking its enforcement activities. There appears to be a split on the Commission on how involved the Commission should be when it comes to enforcement activities and what information they are entitled to know in approving enforcement actions.

The Commission is also reviewing its governing practices. Again it appears there is a split on the Commission as it relates to the Commission's role and whether there should be committees established to be more involved in staff activities and oversight and developing procedures to provide more information to the Commission as well as streamlining processes of the FPPC.

If you would like to get a feel for the current dynamic on the Commission, it is worth watching one of their meetings. It is clear there is a split on many matters that staff brings forward for Commission action.

SELECT RECENT FPPC ADVICE LETTERS

Lucan Advice Letter No. A-18-002

This opinion applied FPPC regulation 18702.1(b), Materiality Standard for Financial Interests in Business Entities that are not otherwise listed in subsection (a) which is not a commonly seen analysis.

In *Lucan*, the FPPC looked at whether the construction of an extended hotel stay in an official's jurisdiction, where there currently was no similar rental option, will have a reasonably foreseeable material financial effect on the official's interest in multiple residential rental properties. One of the elements in Regulation 18702.1(b) which can create a disqualifying financial impact is if the decision would "increase or decrease the amount of competition in the field in which the business entity is engaged." The FPPC found that because the proposed hotel would have the option of extended stays that the development would serve as competition for potential future tenants for the Councilmember's rental properties. It was also noted that one of the rental properties was within 1,800 feet from the Project. As a result, it was found to be reasonably foreseeable that the Project would contribute to a change in the value of the official's rental business. The Advice Letter noted that when examining whether a decision would increase competition for purposes of materiality, the FPPC has previously considered (1) the current level of competition in the field, (2) the proximity of the competitors to the official's business entity, and (3) whether the entity and its competitor share a similar target market.

The FPPC concluded that because extended stays were not available in the City and that at least one of the rental properties was near the Project that, even though their target market is not identical, the new hotel units would serve as competition.

The FPPC then went on to look at the public generally exemption and found the official may take part in the decisions under the public generally exception because residential rental units make up more than 25 percent of the residential real property in the jurisdiction rendering that a significant segment of the public and there was no indication that the Project would affect the official's rental properties differently than other rental properties.

Relevant portions of the regulations referenced:

§ 18702.1. Materiality Standard: Financial Interests in Business Entities.

(b) For a governmental decision not identified in subdivision (a), the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity. Examples of decisions that may be applicable include those that:

- (1) Authorize, prohibit, regulate or otherwise establish conditions for an activity in which the business entity is engaged;
- (2) *Increase or decrease the amount of competition in the field in which the business entity is engaged;*
- (3) Increase or decrease the need for the products or services that the business entity supplies;
- (4) Make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives;
- (5) Decide the location of a major development, entertainment facility, or other project that would increase or decrease the amount of business the entity draws from the location of the project; or
- (6) Increase or decrease the tax burden, debt, or financial or legal liability of the business entity.

§ 18703. Public Generally.

(a) General Rule. A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.

(b) A significant segment of the public is at least 25 percent of:

- (1) All businesses or non-profit entities within the official's jurisdiction;
- (2) *All real property, commercial real property, or residential real property within the official's jurisdiction; or*
- (3) All individuals within the official's jurisdiction.

(c) A unique effect on a public official's financial interest includes a disproportionate effect on:

(1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.

(2) An official's business entity or real property resulting from the proximity of a project that is the subject of a decision.

(3) An official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest.

(4) An official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage.

(5) A person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.

(6) An official's personal finances or those of his or her immediate family

Gee Advice Letter No. A-17-249

This Advice Letter is interesting in that it analyzed interests in private membership organizations, and although the decision at issue did not find there was a conflict, the country club membership was found to be both a real property and a business investment interest. This Advice Letter is of note as certain club memberships should be listed on SEI Forms and such memberships could also create a conflict of interest, a fact that many electeds may not realize.

The FPPC analyzed the membership structure of the Country Club and determined the value of the membership exceeded \$2,000. In addition, if the Club dissolves the value of the Club assets and real estate, after debts and liabilities were paid, would be divided among the members. The FPPC stated that consistent with prior advice: “when the resale value of a club membership is determined at least in part by the value of the club’s real estate, the members have a least a beneficial interest in that real estate.” It further concluded that since the members would be entitled to a proportionate share of the value of the assets if the Club were dissolved, their memberships constitute interests in real property.

Next, the FPPC stated that consistent with prior Commission determinations, club memberships can be an investment in a business entity where the membership was at least \$2,000 in value and can be resold for profit or loss.

However, the FPPC determined that the councilmembers could take part in the decision regarding the creation of the downtown parking program because the decision will not have a reasonably foreseeable material effect on their interests.

Schneider Advice Letter A-17-280

In this Advice Letter, the FPPC applies Regulation 18234, Interests in Trusts a regulation not commonly looked at.

The FPPC advised that a councilperson, who resides in a home held in a family trust, does not have an economic interest in the property because her parents, the trustees of the trust, may revoke the trust at their discretion, and she is not receiving any income from the trust. As a result, the councilperson does not have a disqualifying conflict of interest in decisions involving actions related to improvements to be made at park property located within 500 feet of her home.

The FPPC noted that the councilperson does not own the property or pay rent. She does currently stand to inherit the property valued at \$1.5 million under the parents' revocable trust. Nonetheless, the parents could modify the trust, she cannot, nor was she a trustee or co-trustee nor did she receive any income from the trust. The only interest she had in the trust was as a beneficiary who will inherit the property when her parents are deceased.

The FPPC looked to Regulation 18234 which defines when an official has an interest in a trust, it requires that the person be a beneficiary and either receive income or have an irrevocable future right to receive income. As a result, the councilperson could participate in decisions related to improvements at the park.

§ 18234. Interests in Trusts.

(a) An official has an economic interest in the pro rata share of the interests in real property, sources of income, and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater.

(b) For purposes of this section, the interests of the official include those of the official, spouse, and dependent children regarding interests in real property and investments and those of the official and spouse regarding sources of income.

(c) *For purposes of determining whether an official has an economic interest in interests in real property, sources of income, and investments of a trust, the official has a direct, indirect, or beneficial interest in a trust if the official is:*

(1) A trustor and:

(A) Can revoke or terminate the trust;

(B) Has retained or reserved any rights to the income or principal of the trust, or retained any reversionary or remainder interest; or

(C) Has retained or reserved any power of appointment, including but not limited to the power to change the trustee, or the power to amend, alter or designate, either alone or in conjunction with anyone else, the person or persons who shall possess or enjoy the trust property or income.

(2) A beneficiary and:

(A) *Presently receives income; or*

(B) *Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable, unless one of the following applies:*

(i) *Powers exist to consume, invade, or appoint the principal for the benefit of beneficiaries other than the official and such powers are not limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiaries; or*

(ii) *Under the terms of the trust, someone other than the official can designate the persons who shall possess or enjoy the trust property or income.*

(d) For the purposes of this section, an official does not have a direct, indirect, or beneficial interest in a trust solely because the official is a trustee or co-trustee. However, income received for the performance of trustee services is income as defined in Government Code Section 82030.