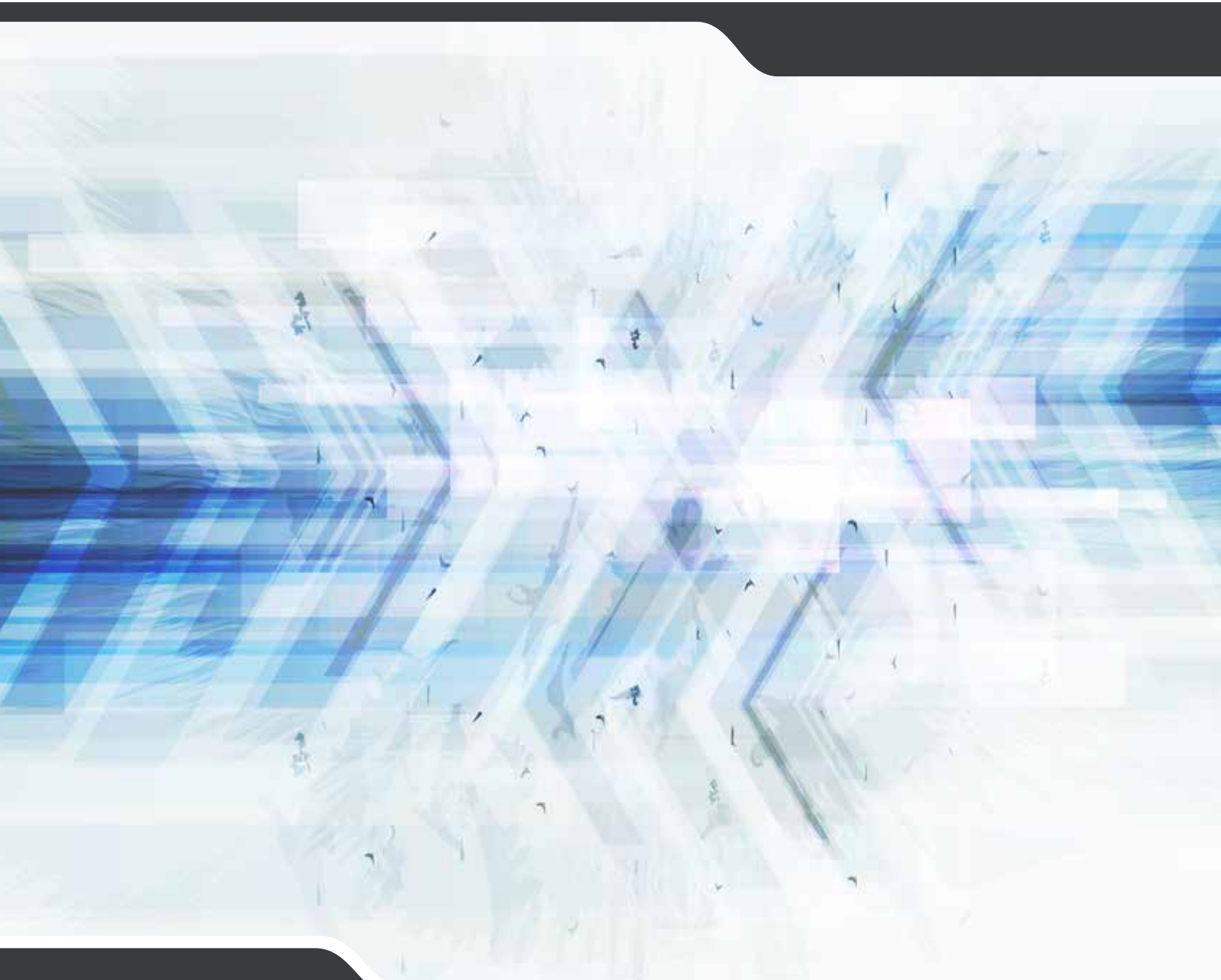


A GUIDE FOR LOCAL AGENCY COUNSEL:

# Providing Conflict of Interest Advice



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## Introduction

### 1.1 Welcome

The City Attorney's Department of the League of California Cities® is pleased to present this new edition of *A Guide for Local Agency Counsel: Providing Conflict of Interest Advice (2016)*. This edition includes seven years of legal updates since the Guide was first published in 2008, and aims to provide local agency counsel with efficient and practical guidance on analyzing conflict of interest issues. The Guide is an important part of the League's continuing efforts to educate its members on California's public ethics laws. It should be a key resource aiding local agency counsel in navigating clients through challenging conflict of interest issues.

### 1.2 Local Agencies & Public Servants: A Few Notes on Terminology

Most of the public ethics laws summarized in this Guide apply equally to local governmental entities regardless of their form (e.g., city, county or special district). Given the broad application of California's public ethics laws, the use of narrow terms like "city" and "city attorney" has been set aside in favor of more inclusive terms better reflecting the range of practitioners likely to access this Guide. Even though California public ethics laws have wide effect, they do not have universal application in all instances and different laws may impact local government agencies in diverse or unique ways. Therefore, local agency counsel must closely review the applicable law(s) to determine what and if an obligation applies to the particular agency, officer, or employee that the practitioner is advising.

California law is replete with varying definitions of the numerous public entities that provide governmental and quasi-governmental functions. This is also the case with definitions seeking to encompass the officials, officers and employees who lead and work for those entities. Even the conflict of interest laws summarized in this Guide offer different definitions of the people and entities falling within their purview. For ease of reference, this Guide therefore uses three terms to refer to the entities, persons, and attorneys involved in conflict of interest issues.

### 1.2.1 Common References

The Guide refers to several laws and state bodies who administer those laws. The following shorthand descriptions are used throughout the Guide.

- “Political Reform Act” or “Act” means the Political Reform Act of 1976, codified at Government Code section 87100, et seq.
- “FPPC” or the “Commission” means the California Fair Political Practices Commission.
- “Regulation X” means the regulations promulgated by the FPPC under California Code of Regulations, title 2, division 6, section 18109, et seq.
- “Section 1090” or “1090” means Government Code section 1090, and also generally references the anti-self-dealing statutes codified at Government Code sections 1090 through 1099.

### 1.2.2 Local Agency Counsel

Instead of determining in which instance(s) the terms city attorney, general counsel or special counsel apply, the Guide uses the generic term “local agency counsel.”

### 1.2.3 Local Agency

There are over a dozen descriptors used for public entities in the Government Code alone, with “local agency” being the most common.<sup>1</sup> Most definitions of local agency include a similar list of core entities, i.e., county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state. For purposes of inclusiveness, this definition will suffice for the Guide.<sup>2</sup> The Guide does not use the Political Reform Act’s term “local government agency” because that term is longer than the term “local agency” while at the same time is less inclusive and specialized for that statute.

1 The descriptors used to define public entities in the Government Code range from simple (e.g. county and city) to complex (e.g., the Brown Act’s definition of local agency) and vary in their reference to city, county, district, public district, special district, public entity, local public entity, authority, local government, local governmental agency, public agency, and local public entity. [See Government Code sections 811.2 (Public entity); 900.4 (Local public entity); 1090 (District); 6252(a) (Local agency); 6252(d) (Public agency); 6252(f) (State Agency); 34101 (chartered cities); 34102 (general law cities); 50001 (Local agency); 53200(a) (Local agency); 53215 (Local agency); 53227.2 (Local agency); 53234(b) (Local agency); 53260 (Local agency employer); 53263 (local agency); 53290(a) (local agency); 53926(a) (local agency); 53317 (defining Local agency but using the term Public agency); 53760.1(f) (Local public entity); 54951 (local agency); 56036(a) (District); 54980(b) (Local agency); 54964(b)(4) (Local agency); 54964.5(b)(5) (Local agency); 82003 (Agency); 82008 (City)]. Often the differences turn on whether certain government instrumentalities or agencies are included (e.g., the Regents of the University of California, or Community College Districts). Frequently, the same descriptor (e.g., “District” or “Local Agency”) is defined differently in each of the specific laws utilizing the term (e.g. “District” under Government Code 1090 versus under Government Code section 56036 of the Cortese-Knox-Hertzberg Local Government Reorganization Act). For example, see the definition of “Local Agency” in Government Code section 50001, which includes only county, city, and city and county, as compared to Section 6252(a) which provides a more extensive list of core entities. The term “city” is typically defined as inclusive of general law and charter cities, towns, and municipal corporations. [See e.g., Government Code section 56023; see also Government Code sections 6252(a); 34101, 34102, 53200, 53224, 54951 and 82008]. Government Code section 1090 uses a broad formulation of the term “District” to capture other non-municipal entities: “...any agency of the state formed pursuant to general law or special act, for the local performance or proprietary functions within limited boundaries.” [Government Code section 1090(c)]. Other definitions seek to include the various legislative bodies, boards, commission, and committee of those entities. [See e.g., Government Code sections 6252(a), 34000 and 82041].

2 The intent is to be inclusive without being oppressively detailed as all of the following elements could have been included: Local agency means any county or city (whether general law or chartered), district of any kind, including school and community college districts, public entity, public authority, public agency, municipal or public corporation, any other local or regional political subdivision, any public entity created pursuant to the Joint Exercise of Power Act by one or more of the foregoing, any instrumentality of one or more such entities, or such entity as provides or has authority to provide local or regional public services or functions, and any department, division, bureau, office, legislative body, commission, committee or other organizational subpart of the foregoing entities.

## 1.2.4 Public Servant

As noted above, there are numerous California statutes replete with their own definitions of the people who lead, manage and do the work of local agencies.<sup>3</sup> Our purpose will be served by a term that is positive in its reference to government work, while at the same time broad enough to encompass elective and appointed officials, officers, and employees. Since it is common for the public servant and public employee alike to think of themselves, and to be thought of by the citizens they serve, as “public servants,” this term best fits the Guide’s needs. Other terms do not have the same wide application and positive inference. The term “bureaucrat” connotes more administrative functions than elective representation and in the modern lexicon many would say it has become a pejorative. “Officer” may cover some elected officials and employees, but not all. Some statutes offer multiple or even confusing definitions. For example, Government Code section 1090 uses the phrase “city officers or employees” in one place and then “public officer or member of any public board” in another.<sup>4</sup> While the Guide will utilize the term “public servant,” all local agency counsel should review each law for application to their unique circumstances.<sup>5</sup>

## 1.3 How To Use The Guide

Local agency counsel are routinely called upon to provide advice on the obligations of public servants to disclose and report financial interests, or to disqualify themselves from participating in a local agency action based on a conflict of interest. Or counsel may be asked to provide more general counseling and training on conflict of interest laws. Recognizing these roles, this Guide is primarily concerned with assisting local agency counsel in identifying, assessing and advising clients on conflict of interest questions under California’s multifaceted public ethics laws, as well as how to apply these laws in practice. The Act,<sup>6</sup> the related FPPC regulations,<sup>7</sup> and the contractual self-dealing prohibitions of Government Code section 1090 constitute the core of California’s public ethics laws and are treated accordingly in this Guide. Local agency counsel will also need a working understanding of AB 1234 (which includes mandatory training for conflicts of interest),<sup>8</sup> common law conflicts, local conflict ordinances, and the various “specialty” conflict laws — each of which is dealt with in turn.

A detailed, topical table of contents is provided to assist local agency counsel in quickly narrowing inquiries to relevant topics. Chapter topics are as follows:

- 1.0 Introduction
- 2.0 Assessing a Conflict of Interest Question
- 3.0 AB 1234 Requirements
- 4.0 Disclosure, Identification and Reporting Forms
- 5.0 Common Problems & Issues
- 6.0 1090: Prohibited Interests in Contracts In Depth
- 7.0 Disqualifying Conflicts Under the Political Reform Act
- 8.0 Local Conflict of Interest Codes

3 See Government Code sections 810.2 (Employee); 811.4 (Public employee); 1090 (a) (city officers or employees); 1091.1 (public officer or member of any public board); 1099 (Public officer); 36501 (officers and employees); 53200(e) (Employees); 53227(a) (employee of local agency); 53234 (Local agency official); 53243 (b) (local public officer); 53296(e) (Employee); 56025 (city officer); 82019 (Designated employee); 82020 (Elected officer); and 82041 (Local government agency).

4 Government Code sections 1090(a), 1091(b)(1), and 1091.1.

5 For example, Government Code section 1099(a) defines “public officer” to include “an appointed or elected member of a governmental board, committee or other body . . . .” Occasionally, statutes use a term that is left undefined. [See e.g., Government Code section 34004 (municipal officer)]. Inclusion of all employees may in some instances be too broad, as only such employees that are designated by the entity to receive ethics training or to report financial interests may be subject to public ethics laws. [See Government Code section 53234, which is part of AB 1234]. The same may be said of officers; for example, the Abuse of Office statutes (Government Code section 53243 to 53244) require the “officer” to have “exercised discretionary, executive authority” in his or her employment to be covered. Government Code section 53244(b).

6 California Government Code, title 9, chapter 7 (Government Code sections 87100 — 87505).

7 California Code of Regulations, title 2, division 6, chapter 7, sections 18700, *et seq.*

8 California Government Code sections 53232 — 53235.4.

- 9.0 Common Law Conflicts of Interest
- 10.0 Specialty Conflict Laws
- 11.0 Enforcement of Conflict Violations

A useful starting point for new local agency counsel is the discussion in Chapter 1.0 of the role and obligations of the local agency counsel in providing conflict of interest advice. Chapter 2.0 provides a framework to identify and analyze conflict of interest questions. Chapters 3.0 and 4.0 concern continuing ethics requirements for public servants and the manner in which financial interests must be reported. Common problems experienced by local agency counsel are grouped together in Chapter 5.0. Chapters 6.0 through 11.0 focus on specific conflict laws in depth.

The Guide does not provide guidance related to political campaigns, campaign finance and disclosure, or the regulation of lobbyists. Although fundamental to California's public ethics laws, those topics are generally outside the domain of local agency counsel and so are not covered here.<sup>9</sup>

Similarly, legal ethics and the professional obligations of attorneys, whether under the Business and Professions Code or the State Bar Rules of Professional Conduct, are not addressed in any detail. While Section 1.5 of this Guide provides an overview of issues to consider when identifying the local agency counsel's client for the purpose of rendering conflict advice to the client's representatives, legal ethics as a whole is a topic beyond the scope of this Guide. The practitioner is encouraged to review *Practicing Ethics: A Handbook for Municipal Lawyers*, 2nd Ed, (2014, California League of Cities®) on the topic of legal ethics.<sup>10</sup>

## 1.4 Striving for Ethical Conduct

It is worth repeating a concept that is frequently and appropriately identified in publications by the League of California Cities® and the Institute for Local Government<sup>11</sup> when discussing public ethics. Namely, conflict of interest laws are only the minimum standards to which public servants are required to comply. On the other hand, public ethics are a set of core values that are not defined or enforced by law. They are expectations imposed by members of the public that public servants will go above and beyond the requirements of the law and act in a manner that is in the best interests of the local agency, and not in the service of narrow personal interests.

It is an accepted tenet of our democratic tradition that while public servants wield the power of local government, they must only do so as stewards of public resources and holders of the public trust. For this reason, public servants are held to high standards of ethical conduct. The Institute for Local Government has identified some of these “**universal ethical values**” as including trustworthiness, responsibility, respect, loyalty, compassion, and fairness. The Institute has also pointed out the particular importance of ethics in public service, since “[t]he public's trust and confidence in its leaders and institutions is vital to success in public service.”<sup>12</sup> While this Guide includes some references to these core ethical values, the focus of the Guide is to provide a summary of the conflict of interest laws that establish the minimum standards for public servants. Local agency counsel may

9 Local agency counsel may be asked to provide legal advice to a city clerk or agency secretary, acting in the course and scope of his or her employment as the “filing officer” for campaign contribution and expenditure reports (e.g., Cal. Gov. Code section 81010 and California Code of Regulations, title 2, division 6, section 18110). (See *The California Municipal Law Handbook* (2015), sections 3.188 — 3.209, regarding disclosure requirements under the Political Reform Act; and see the “Candidate Toolkit” available from the Fair Political Practices Commission website at <www.fppc.ca.gov>.)

10 *Practicing Ethics* is available on the League's website at: [http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Practicing-Ethics\\_-A-Handbook-for-Municipal-Lawyer.aspx](http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Practicing-Ethics_-A-Handbook-for-Municipal-Lawyer.aspx)

11 The Institute for Local Government is the research and education affiliate of the California State Association of Counties, the League of California Cities, and the California Special Districts Association.

12 *Understanding the Basics of Public Service Ethics*, ((2009) The Institute for Local Government).

refer their clients to the Institute for Local Government website for additional materials, texts, and detailed discussions on public ethics and going beyond the minimum ethical standards.<sup>13</sup>

When enacting public ethics laws, the Legislature considers universal ethical values such as trustworthiness, responsibility, respect, loyalty, compassion, and fairness. These laws are then interpreted, refined, and applied in court cases, FPPC regulations and opinions, Attorney General Opinions, and various forms integral to the application of those laws. As a practical matter, these establish a minimum floor for the conduct of public servants and the primary focus of this Guide.

In California, we can trace our earliest attempts at regulating ethical (or anti-corrupt) activity to the 1850's regarding public servants' self-dealing in public contracts<sup>14</sup> and efforts to control the influence of the railroad barons.<sup>15</sup> Throughout the 19th and 20th centuries, California continued to wrestle with the progressive notion that ethical principles should apply to government. Beginning with the adoption of the Purity of Elections Law in 1893 and continuing through the 1950s, these formative years saw numerous laws refining election procedures, adding the powers of initiative-referendum-recall to the state constitution, requiring campaign finance disclosure, regulation of lobbyists, and mandating openness and transparency in the meetings of local public agencies.

In the 1970's, this populist movement for more transparency in government became a statewide ballot measure through Proposition 9, which gave California the Political Reform Act of 1974,<sup>16</sup> the most comprehensive public ethics law in the United States at the time. The Act embraced rigorous campaign disclosure requirements. It also created an expansive set of financial conflict of interest laws to be administered by the Fair Political Practices Commission, an independent body authorized to promulgate regulations under the Act and to enforce them. However, the Act was not the end of the journey. In 2006, in the wake of widely reported local political scandals, the Legislature adopted AB 1234. The newer statute requires mandatory ethics training for public servants. Additionally, as of the publication of this Guide, the FPPC continues to finalize its multi-year comprehensive review and amendment of the financial conflict of interest regulations.

This body of public ethics law rests on two basic principles, articulated in the Act, that (1) government officials serve all citizens equally without regard to status or wealth, and (2) those officials should perform their duties without bias or personal gain.

The continued evolution of public ethics law awaits the demands of a voting population that is growing ever more entranced with the social transparency and immediacy brought by social media. What changes will come are unknown, but they are certain to bring challenges to local agency counsel and public servants. Lawmakers strive for bright line tests, but ethical principles are conceptual and subject to individual interpretation. Often clients seek only the technical answer — the minimum legal requirement — and not a dialogue on how the higher and more aspirational aspects of public ethics should apply to their decisions. Although this Guide is designed to give practical advice on the minimum ethical requirements, it is also published with the hope that local agency counsel will consider a moral responsibility to advise clients on what is right and not just what is technically lawful.

## 1.5 The Local Agency is the Client

When providing conflict-of-interest advice to public servants, it is critical to (1) identify the client for whom the work is undertaken, and (2) determine whether the relevant law imposes the duty on the public servant or upon the local agency or both. For example, the conflict of interest requirements of the Act fall largely on the public servant with only subsidiary record-keeping

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13 The Institute for Local Government website is found at: [www.ca-ilg.org](http://www.ca-ilg.org); see *Ethics and Transparency*, Institute for Local Government, [www.ca-ilg.org/ethics-transparency](http://www.ca-ilg.org/ethics-transparency) (as of Aug. 24, 2015); and *Practicing Ethics: A Handbook for Municipal Lawyers*, 2nd Ed. (2014 League of California Cities). For texts on the subject of public ethics, see Bowie, N. E., and Freeman, R. E. (eds.), *Ethics and Agency Theory*, (1992 Oxford University Press); Cooper, Terry L., *The Responsible Administrator; An Approach to Ethics for the Administrative Role*, 5th Ed., (2006 Wiley & Sons); Rohr, J. A. *Public Service, Ethics, and Constitutional Practice*, (1998 University Press of Kansas).

14 California Government Code section 1090, *et seq.*

15 California Constitution article XII section 7.

16 California Government Code, title 9, sections 81000, *et seq.*



duties falling upon the local agency. In most cases, it will be the public servant who seeks out local agency counsel for advice on a conflict of interest question. However, the remedy for a violation of a conflict of interest law may have an adverse impact on both the public servant and the local agency.

This leads to the important question of what or who is the local agency counsel's client? Is the client the local agency organization, the governing board, individual board members, the chair of the governing board, the chief executive of the local agency, individual department heads, or some or all? This question has been vigorously debated over the years. It is not the purpose of this Guide to offer an exhaustive treatment of the question. Rather, enough discussion is provided to encourage local agency counsel to be cognizant of the issue, and to conduct additional analysis as dictated by the particular facts presented. An in depth treatment of the subject can be found in the League's publication *Practicing Ethics: A Handbook for Municipal Lawyers*, 2nd Ed., (2014 League of California Cities).<sup>17</sup>

For local agency counsel, California State Bar Formal Opinion 2001-156 appears to have finally decided this issue, at least for California State Bar purposes.<sup>18</sup> The opinion held, among other things, that California Rule of Professional Conduct 3-600 applies to city attorneys. Essentially, it held that the city, as an entity, is the city attorney's client.

Rule 3-600(A) provides as follows:

In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement. California Rules of Professional Responsibility 3-600(A).

In applying Rule 3-600 rule to city attorneys, Opinion 2001-156 states as follows:

Although this rule does not explicitly indicate that a governmental entity is an organization within the scope of the rule, the Committee believes that the rule applies to a municipal corporation and is best viewed as applicable to all governmental entities. In general, the scope of rule 3-600(A) has been broadly construed in case law involving non-governmental settings. In particular, the drafters' intent for the rule to apply to attorneys for governmental entities may be inferred from the citations found in the discussion after the rule, which include a reference to *People ex rel. Deukmejian v. Brown*, ..., a case involving representation of governmental entities. *Id.* (footnotes and citations omitted.)

Following Rule 3-600(A) and the commentary, the more difficult question is: who is the local agency's "highest authorized officer, employee, body, or constituent overseeing a particular engagement?" With the exception of the few California charter cities with a "strong mayor" form of government, most local agencies exercise their authority through a city council or governing board, except to the extent that authority is delegated to a chief executive or other department heads (through a voter approved charter provision or council action). Thus, it is essential for local agency counsel to closely review applicable local law in identifying who is authorized to act on behalf of the agency for any particular engagement. Since local agency counsel is hired directly by the governing board,<sup>19</sup> the governing board will often be the highest authorized body to oversee the local agency counsel's engagement. However, there are instances in which a chief executive or department head may be the highest authorized officer or employee overseeing the engagement.

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<sup>17</sup> *Practicing Ethics* is available on the League of California Cities' website at: [www.cacities.org/practicingethics](http://www.cacities.org/practicingethics)

<sup>18</sup> CA.Eth.Op. 2001-156, 2001 WL 34029610 [hereinafter CA.Eth.Op. 2001-156].

<sup>19</sup> For cities, see Government Code sections 34856, 36505, 41801, 41803, and 41804.



But State Bar Formal Opinion 2001-156 is not binding on the courts. The California courts have reached potentially conflicting results on this issue. In *Ward v. Superior Court of Los Angeles County, et. al*, (1970) 70 Cal.App.3d 23, the Court of Appeal held, similar to the State Bar, that the county counsel represents the county as an entity, and an individual county employee did not have a separate “client” status with county counsel merely because the county employee obtained confidential legal advice from county counsel (in the employee’s capacity as a representative of the client county). However, the California Supreme Court, in *People et. rel. Deukmejian v. Brown* (1981), 29 Cal. 3d 150, held that, at least for situations involving the state government, the client can be an individual board member or an employee of the government agency, particularly when the attorney first provides legal advice to the State employee and then files a lawsuit on behalf of the State entity challenging that employee’s action on the same subject matter. These differing decisions demonstrate the range of possible results reached under Rule 3-600(A).

As noted above, there may be particular local laws that will guide or determine the question of who is the city attorney’s client. For example, the California Attorney General, in a discussion of the duties and responsibilities of a city attorney in a particular charter city, opined that a city attorney may provide confidential legal advice to an individual council member regarding the application of the Political Reform Act but that the city attorney would then be disqualified from prosecuting any violation. The Attorney General reasoned that where a city charter imposes a duty on the city attorney to advise city officers in such matters, the officers become “clients” of the city attorney.<sup>20</sup> Considering that this opinion preceded the effective date of Rule 3-600, it is possible the Attorney General might reach a different conclusion today.<sup>21</sup>

## 1.6 Confidentiality

Having established that, generally, the local agency counsel’s client will be the local agency, as manifested through action of the governing board (or the highest authorized officer or employee acting on behalf of the local agency), how does the local agency counsel deal with the individual city official who has asked the conflict of interest question? Rule 3-600(D) requires attorneys representing entities to “explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization’s interests are or may become adverse to those” of the officer or employee.<sup>22</sup>

Following this rule, local agency counsel should inform public servants that the local agency, as an entity, is the local agency counsel’s client. Local agency counsel should further explain that confidential information that is shared with the local agency counsel, and that is necessary to properly analyze a conflict issue, may not be kept confidential or privileged from the governing board, other officers, or employees of the organization who are necessary to address or analyze a particular question (including the chief executive and department heads such as the city clerk, finance director, or planning director).

Tension exists between a local agency counsel’s representation of the local agency as an entity, and a public servant’s probable expectation of confidentiality when the local agency counsel advises the public servant on a conflict of interest issue. Some local agency counsel have sought to resolve these competing interests by hiring separate outside counsel to advise public servants on conflict of interest questions. This attorney, while paid by the local agency, it is argued would represent only the interests of the particular public servant to whom he or she is giving advice. They posit that the public servant, rather than the governing board, would be the client and would hold the privilege. This method is not universally accepted as resolving the client conflict issue because payment of outside legal counsel by the local agency may create the same duty to represent the local agency as is borne by local agency counsel.

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20 71 Ops.Cal.Atty.Gen. 255 (1988).

21 The Attorney General posed the question as to the identity of the client of a government attorney in 84 Ops.Atty.Gen. 71 (2001). The Attorney General then failed to answer the question, merely asking a series of other questions. The Attorney General discussed Rule 3-600 in the opinion as follows:

“Rule 3-600 suggests that the client is the ‘organization itself, acting through its highest authorized officer, employee...’ but offers no further guidance specifically with respect to governmental agencies.”

Thus, it is unclear who the Attorney General thinks is the client of a local agency attorney.

22 State Bar Rules of Professional Conduct rule 3-600(D).

However, in situations where local agency counsel provides conflict advice to both the entity and the public servant, many local agency counsels explicitly advise their governing boards and staff in writing about the attorney/client relationship. For example, the following admonition has been used by a number of city attorneys:

**NO PERSONAL ATTORNEY-CLIENT RELATIONSHIP**

Any council member who consults with the city attorney, his or her staff and/or attorney(s) contracted to work on behalf of the city, cannot enjoy or establish an attorney-client relationship with said attorney(s) by consulting with or speaking to same. Any attorney-client relationship established belongs to the city, acting through the city council and as may be allowed in law for purposes of defending the city, the city council or an official acting in his or her official capacity during the course of litigation and/or administrative procedures, etc.

It is clear under Rule 3-600 that the advice a local agency counsel gives a public servant regarding his or her potential conflict of interest is not protected from disclosure to other officers in the organization. It is important that public servants know that the information they describe to the local agency counsel will not be confidential, at least within the organization, as the local agency counsel's written opinion to a public servant on a conflict of interest matter might form the basis of a disciplinary action against the public servant, especially if the public servant fails to follow the local agency counsel's advice.

Under Rule 3-600, the holder of the privilege (typically the governing board or the chief executive) could instruct the local agency counsel not to release — to the FPPC or the general public — conflict advice given to a public servant. However, it is important to note that some prosecutors believe that, since the local agency is the client, the privilege even extends to the governing board as-a-whole. Therefore, a dispute could arise in the unlikely event that local agency counsel is directed not to provide a copy of a conflict of interest opinion to a prosecutor.

Under existing authority, it is unclear what the local agency counsel should do if faced with such a situation. Some attorneys attempt to avoid this potential problem by obtaining authorization in advance to release all conflict of interest opinions to the public. In the absence of such advance approval, the safest approach is to treat conflict of interest information as privileged and refuse to provide the protected information to the FPPC or the district attorney unless the governing board waives the privilege.

Given the uncertainty in the law, local agency counsel should make it clear to public servants that conflict of interest advice may not be protected by the attorney/client privilege and, to the extent it is protected, the privilege is held by the full governing board rather than by the individual public servant to whom the local agency counsel provides the advice. As long as such an admonition is given before providing advice under the Act, it seems unlikely that a city attorney could be disciplined or criticized for following Rule 3-600 even if a court determines that the Rule does not apply (i.e., that each public servant is the local agency counsel's client and that an attorney-client privilege exists with each public servant).<sup>23</sup>

## 1.7 Duties, Responsibilities & Liability

### 1.7.1 Duty to Provide Conflict Advice — Special Rule for City Attorneys

Some attorneys have concluded that local agency counsel has no duty to advise individual public servants of their responsibilities under the Political Reform Act because only the city, as an entity, is the city attorney's client. It is certainly true that the Political Reform Act imposes no express obligation on local agency counsel to advise public servants. However, Government Code section 41801 may impose such a duty for city attorneys in general law cities. This section provides as follows:

The city attorney shall advise the city officials in all legal matters pertaining to city business. (Government Code section 41801.)

<sup>23</sup> In this regard, the Attorney General has opined that information provided to the city attorney by a city official in order to determine the validity of a contract under Section 1090 should be kept confidential because otherwise the official would not be candid in his or her discussions with the city attorney. 71 Ops.Cal.Atty.Gen. 255, note 1 (1988).

Since an individual public servant's conflict of interest may interfere with, and have a bearing on an action planned by the city, it follows that the effect of an individual conflict of interest falls within the phrase "all legal matters pertaining to city business" in Government Code section 41801. Also, Government Code section 91003 provides courts with authority in some cases to void city actions where a public servant was financially interested in the result, a possibility that has potentially serious consequences for the city as an entity. In this context, the city itself has an interest in its public servants obtaining guidance from the city attorney on conflict of interest questions. This likely gives rise to a duty on the part of the city attorney to advise on conflict of interest matters. Therefore, it appears that conflict of interest questions constitute "legal matters of city business" for purposes of Government Code section 41801 and similar charter provisions, and that city attorneys can properly advise an official of their duties and responsibilities under the Act.

### **1.7.2 Duties to Obtain the Facts & Research the Law**

None of the conflict of interest laws impose an express duty on the local agency counsel to do any factual investigation or research in response to a conflict question. However, the absence of such a statutory duty does not mean that the local agency counsel is free from an ethical obligation to discover the necessary facts and research the applicable law. In conflict of interest issues, as in all matters, attorneys have a professional responsibility to perform their legal services in a competent manner. See, e.g., California Rule of Professional Conduct 3-110(A), providing that a "...member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently". In addition to professional responsibilities, attorneys must be mindful of their general liabilities for malpractice in the negligent performance of duties undertaken. Hopefully this Guide will assist the practitioner in fulfilling those obligations.

### **1.7.3 Good Faith Reliance & Improper Advice as Defenses**

In *People v. Chacon* (2007) 40 Cal.4th 558, the defendant city council member sought and obtained appointment as city manager. Her conduct in securing that position resulted in her being with violating Government Code section 1090. The defendant asserted the defense of entrapment by estoppel, claiming that she acted in reliance on the advice of the city attorney. The trial court ruled in limine that the defendant could assert the defense. As a result, the prosecution announced they could not proceed and the trial court dismissed the case pursuant to Penal Code section 1385.

After the Court of Appeal reversed the dismissal, the California Supreme Court unanimously affirmed the judgment of the Court of Appeal, concluding that the defense of entrapment by estoppel was not available to the defendant. The court was reluctant to extend the defense to public servants who seek to oppose conflict of interest accusations by claiming reliance on the advice of local agency counsel. The court found the defense was particularly inappropriate in this case because the city attorney was subordinate to the city council, and was appointed by and serving at its direction. The defendant could not escape liability for conflict of interest violations by claiming to have been misinformed by an employee serving at her pleasure. The court considered the fact that the average citizen cannot rely on a private lawyer's erroneous advice as a defense to a general intent crime. The defendant also could not evade this rule by asserting that the attorney who mistakenly advised her happened to hold a government position.

### **1.7.4 Responsibility and Liability of Local Agency Counsel**

Government Code section 83116.5 provides that:

Any person "... who purposely or negligently causes any other person to violate" or "aids and abets any other person" to violate the Political Reform Act is liable for a violation of the Act."

In 1991, the FPPC shocked city attorneys by filing an enforcement action against a city attorney who had issued allegedly incorrect advice, causing a council member to violate the Act.

Following many discussions between the League City Attorneys Department and the FPPC, the FPPC ultimately resolved this situation by enacting Regulation 18316.5. The Regulation provides in relevant part as follows:

18316.5. Application of Government Code Section 83116.5

- (a) The Commission will not apply Government Code Section 83116.5 to find a violation of this title by a person who provides incorrect advice interpreting any provision of this title which causes the advisee to violate this title under any of the following circumstances:
  - (1) Government Employee or Contractors. If the person is an employee of or under contract to a state or local government agency and is giving advice interpreting the provisions of this title as part of the person's government contract or employment.
- (a) This regulation is not applicable where a person renders advice which is intended to result in a violation of this title. Furthermore, nothing in this regulation shall be construed to exempt a person from liability for a violation of any other provision of this title.

Under this Regulation, the FPPC will not commence an enforcement action against a local agency counsel for rendering negligent advice unless the advice was "intended to result in a violation of" the Political Reform Act. Therefore, local agency counsel can currently render Political Reform Act advice to public servants without fear of FPPC action if his or her advice proves wrong.

This regulation does not bind district attorneys who have concurrent authority to enforce the Political Reform Act, and a district attorney could conceivably still prosecute a local agency counsel under Section 83116.5 for rendering negligent advice under the Act. The existing regulation, however, should provide persuasive evidence that Section 83116.5 is not intended to cover local agency counsel negligence.

There appears to be no cases or ethical opinions in which a local agency counsel has been disciplined by the State Bar or held liable for rendering incorrect advice under the Act. Government Code sections 825 through 825.6 and sections 995 through 996.8 probably require a local agency to indemnify and defend local agency counsel in an action brought against the local agency or local agency counsel for the counsel's alleged negligent advice under the Act. After determining that a city was not covered under a city attorney's errors and omissions policy, the Court of Appeal in *Fireman's Fund Insurance Co. v. City of Turlock*, 170 Cal. App. 3d 988 (1985), provided strong dicta indicating that a city must indemnify a city attorney for the city attorney's negligence. As the court stated:

Furthermore, even assuming there was coverage under the terms of the Cal. Union policy, that policy cannot benefit either City or its own carriers because neither City nor its insurers should be allowed to benefit from its employee's insurance. Government Code Section 825 provides that a public entity is required to indemnify its employee and provide him a defense and not the other way around. *Id.* at 1004.

Government Code section 995.2(c) provides that a local agency may refuse to provide for the defense of a local agency counsel in an action or proceeding brought against the local agency if the local agency determines that the "defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee." This section might apply in the unlikely event another public servant brings an action against a local agency counsel. *Turlock* involved an action brought by a former employee against the city and the city attorney, but the court never discussed Section 995.2, as the city assumed the defense of the city attorney.

Government Code section 995.6 provides that a local agency may, but is not required to, provide for the defense of a public servant in an administrative proceeding. This section would probably apply to California State Bar disciplinary proceedings.

At a minimum, the risk of a malpractice action alone makes it all the more imperative that each local agency counsel inform public servants that an opinion from local agency counsel does not offer the public servant any immunity under the Act.

## Assessing a Conflict of Interest Question

### 2.1 The Big Picture Approach to Conflict Questions

Given the complexity of California's public ethics laws, accompanying regulations, Attorney General Opinions, FPPC advice letters, court cases and specialty ethics laws, conflict of interest questions may be daunting at first — especially considering the short time frame within which local agency counsel may be asked to provide an answer. Certainly most local agency counsel has experienced a public servant requesting conflict advice shortly before a board meeting. While the best course might be to encourage the public servant to recuse himself or herself from the matter until a thorough analysis can be done, there is not always that luxury. This chapter offers suggestions for a systematic assessment of conflict questions to ensure that all conflict laws are considered for relevancy and then analyzed.

Public servants often bring great enthusiasm or passion for certain projects or points of view. These emotions do not present a financial conflict of interest, but they may obscure the objectivity of the public servant and in the strongest cases may constitute bias which under both statutory and common law may lead to a conflict.

When assessing conflict questions, it is helpful to determine whether the conflict arises due to the public servant's position (as with most financial conflicts) or is based on his or her opinions or beliefs. While both can interfere with decision-making and require recusal, this Guide is primarily concerned with financial conflicts of interest. However, the practitioner may find some aid with the bias issue in Chapter 9.0 — Common Law Conflicts of Interest.

### 2.2 Assessment Flow Charts

The first step in breaking down a conflict of interest question is to decide whether to approach the problem by the type of interest at issue (e.g., is the interest at issue a contract or a type of financial interest), or by type of activity (e.g., is it the public servant's position or activity that is giving rise to the conflict), or by what the official is receiving (e.g., tickets or a gift). The following illustrations provide a depiction of the types of interest involved.

### BY TYPE



**Contract**  
(Chapters 5 & 6)



**Activity**  
(Chapters 4, 5, 7, 8 & 10)



**Gifts**  
(Chapters 5 & 7)



**Tickets / Events**  
(Chapters 5 & 7)



**Financial Interests**  
(Chapters 5 & 7)



**Travel**  
(Chapters 5, 7 & 10)



**Position(s)**  
(Chapters 4, 5, 7, 8 & 10)



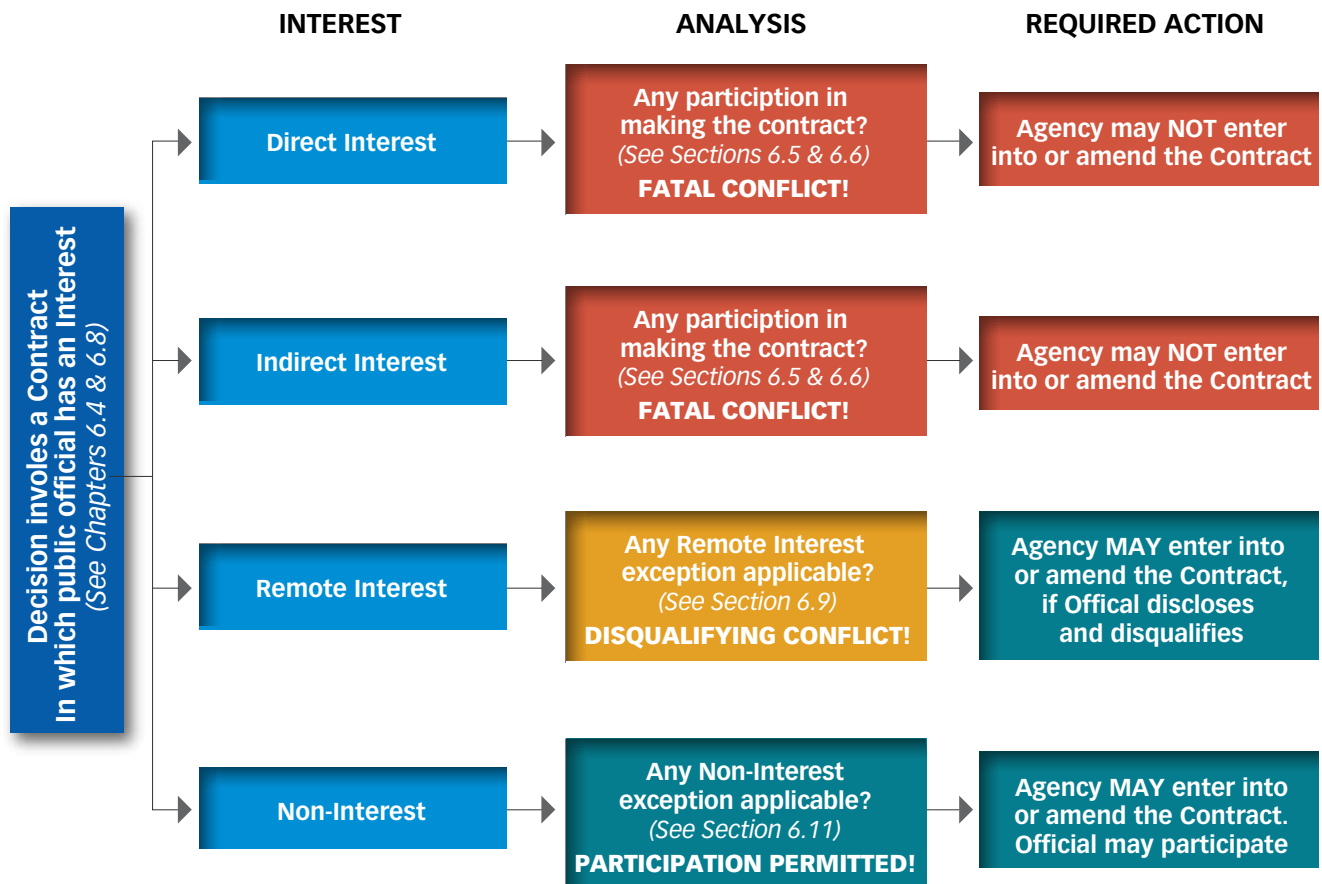
**Speaking / Presentation**  
(Chapters 5 & 7)

Another way to assess the issue is to review each statute in turn to determine whether it applies or is not relevant.

BY STATUTE	GUIDE
<b>AB 1234</b>	<i>Chapter 3</i>
<b>Gov. Code 1090</b>	<i>Chapters 5 &amp; 6</i>
<b>Political Reform Act</b>	<i>Chapters 4, 5 &amp; 7</i>
<b>Local Conflict Code</b>	<i>Chapter 8</i>
<b>Common Law</b>	<i>Chapter 9</i>
<b>Specialty Laws</b>	<i>Chapter 10</i>

If the conflict question involves a decision on or participation related to a contract, whether making a contract or amending a contract, then the practitioner should start with Government Code section 1090 and its related statutes. Particular care should be taken in assessing Section 1090 conflicts as the mere possibility of an interested public servant's influence on the decision triggers a conflict that may result in serious consequences for the official and agency, and abstention is not adequate to address the conflict. Common problems arising under these sections are discussed in Chapter 5 and in more detail in Chapter 6. Below is a basic flow chart on how to assess the issues.

## FINANCIAL INTEREST IN A CONTRACT



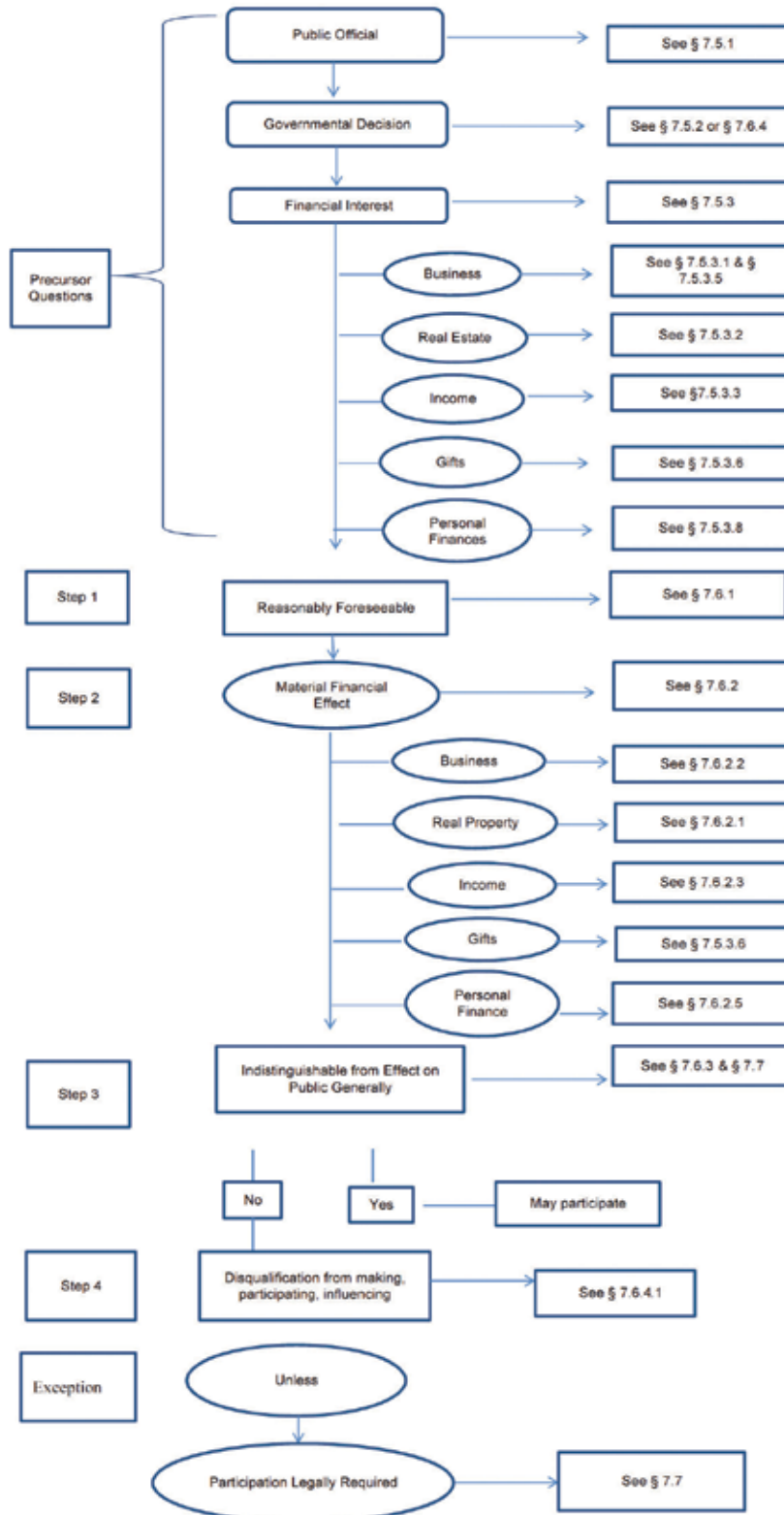
### ► PRACTICE TIP: Contracts

Financial interests in a contract can also trigger issues under the Political Reform Act. Because the Political Reform Act and section 1090 operate differently, both must be analyzed for any conflict involving a contract. Failure to address both can lead to giving the public servant incorrect advice.

For most conflict issues not covered by Government Code section 1090, local agency counsel should consult the Political Reform Act and the FPPC Regulations. The Act covers all types of financial interests as well as specific items such as tickets, honoraria and mass mailings. Below is a basic flow chart for assessing conflicts under the Act. A number of common problems arising under the Act are addressed in Chapter 5, and an analysis of the FPPC's Four Step Process and discussion of each type of qualifying economic interest are addressed in Chapter 7. Biennial ethics training is discussed in Chapter 3 and reporting and disclosure requirements are covered in Chapter 4.



The four part process to assess a conflict of interest under the Act is discussed in detail in Chapter 7.0. The elements of the process are broken down below:

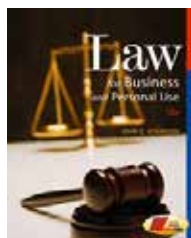




After assessing a conflict under Government Code section 1090 and the Political Reform Act, or ruling them out, the local agency counsel should next assess whether any of the following are applicable:



**Local Conflict of Interest Codes** (Chapter 8)



**Common Law Conflicts of Interest** (Chapter 9)



**Specialty Conflict Laws** (Chapter 10)

Local conflict of interest codes are addressed in Chapter 8.0. Conflicts arising under the common law are discussed in Chapter 9.0. An explanation of Specialty Conflict Laws is found in Chapter 10.

## 2.3 Providing Conflict Advice

One of the most important admonitions that local agency counsel should give to a public servant when providing conflict advice is that counsel's advice cannot provide the person being advised with any immunities from criminal or civil prosecutions. Local agency counsel should inform the public servant that only good faith reliance upon written advice from the FPPC on the particular situation at hand can protect the official.<sup>24</sup>

Since the local agency counsel's opinion does not confer immunity on a public servant and the counsel probably has a responsibility to disclose communications, at least internally, many local agency counsel have undertaken a practice of routinely inserting admonitions to this effect in written opinions to their clients so that misunderstandings do not occur. As previously discussed, it is important to stress when providing advice to public servants that such advice might not be privileged and that public disclosure may ultimately occur. Illustrative is the following admonition used in Political Reform Act advice letters issued by one city attorney:

You may not rely upon any assistance provided by this office to provide immunity from FPPC enforcement or prosecution. Further, you enjoy no privilege of attorney/client confidentiality in reviewing these matters with the City Attorney. In the event that facts come to our attention which lead us to believe that you should disqualify yourself from participation in a decision, we will advise the City Council of our belief that you should disqualify yourself. Finally, if, after receiving the assistance provided by this letter, you wish to participate in the decision-making process with immunity from prosecution or enforcement, this office will assist you in making direct contact with the FPPC for informal or formal advice upon which you can rely.

<sup>24</sup> This only applies to conflicts which arise under the Political Reform Act and then only when the advice is based on accurate facts and assumptions. Government Code section 83114 (regarding issuance and effect of written opinions and advice of FPPC); see also *Okun vs. Superior Court* (1981) 29 Cal.3d 442, 456 (stating that "[o]ne of the commission's functions is to issue advisory rulings that concern possible conflict of interest involving state or local public servants. Good faith compliance with a ruling is generally a defense against enforcement of civil or criminal sanctions"). FPPC advice on Government Code section 1090 is evidence of good faith conduct in an administrative or criminal proceeding against the requestor. Gov. Code § 1097.1(c) (5).

### 2.4 Obtaining Advice from the FPPC

As part of its directive to assist persons in complying with the Political Reform Act, the FPPC will provide advice to public servants who request it.<sup>25</sup> Advice is provided in either informal or formal modes. The FPPC website provides a comprehensive review of how to seek advice for either mode ([www.fppc.ca.gov](http://www.fppc.ca.gov)).<sup>26</sup> The website has helpful guides on topics including Conflict of Interest, Gifts and Honoraria, and Rules for Leaving Government Service. Past advice letters by the FPPC may be found by searching the FPPC's website or in Westlaw and Nexis databases.

The informal and formal modes of advice are briefly summarized below. Bear in mind that the FPPC will not provide assistance for past conduct, except to the extent that the information relates to the possible amendment of disclosure forms. Anonymous formal advice will never be given and anonymous informal assistance will rarely be given.

#### 2.4.1 Informal Advice

The FPPC will provide informal assistance and advice by either telephone or email.

**Email:** [advice@fppc.ca.gov](mailto:advice@fppc.ca.gov)

**Telephone:** (866) ASK-FPPC or 1-916-322-5660.

Informal assistance does not provide the requestor with immunity<sup>27</sup> and is not intended for third party or hypothetical questions or enforcement matters. The FPPC states that email and telephonic advice is best when the question is straightforward and the requestor has clear facts. They are not the proper forums for complex questions or questions for which the requestor does not have complete or clear facts. Advice may be required by any person whose duties under the Act are in question or by the person's authorized representative<sup>28</sup> (e.g., the city attorney or general counsel of a local agency). Informal answers may be provided in up to two to three business days. See the FPPC website for information that will be requested. Anticipate conservative responses, reference to relevant sections of the Act and Regulations and other reference material on the FPPC website. Remember that the advice will only be provided on the facts conveyed. Failure to provide complete or accurate facts will degrade the advice or may result in no advice being given. The FPPC will not confirm in writing any telephonic advice given. Emails to the FPPC and written responses are all matters of public record.

#### 2.4.2 Formal Advice

The FPPC's written response to a request for formal advice, if followed by the requestor, provides immunity to the requestor under the specific facts referenced.<sup>29</sup> Such advice letters do not provide immunity to any other parties and are not accorded the same standing as a written opinion of the FPPC.<sup>30</sup>

Any local agency, public servant subject to the Act, or their authorized representative may request formal advice.<sup>31</sup> The request must be in writing and sent to:

Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814

The request may also be faxed to (916) 322-0886.

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25 Government Code section 83114(b); California Code of Regulations, title 2, section 18329.

26 California Fair Political Practices Commission <[www.fppc.ca.gov](http://www.fppc.ca.gov)> (as of Aug. 24, 2015).

27 California Code of Regulations, title 2, section 18329(c)(3).

28 California Code of Regulations, title 2, section 18329(c)(1).

29 Government Code section 83114(b); California Code of Regulations, title 2, section 18329(b)(7).

30 Government Code section 83114(b); California Code of Regulations, title 2, section 18329(b)(7).

31 California Code of Regulations, title 2, section 18329(b)(1).

Requests for formal advice must meet all of the requirements of FPPC Regulation 18329(b)(2). These requirements include “all facts material to the consideration of the question or questions presented ... in a clear and concise manner.” A complying request will be acknowledged by the FPPC in writing with a formal written response given within 21 working days after the request for advice was deemed complete. In some instances, the FPPC may utilize additional time to provide a final response. The FPPC may, but is not obligated to, respond to a non-complying formal request for advice with general guidance, but such a response will not confer any immunity upon the subject of the request.

### **2.4.3 FPPC Opinions**

Requests for assistance or advice, even formal advice, must be distinguished from a request for an “opinion” concerning duties under the Act. Any public servant, local agency or their authorized representative may request an opinion from the Commission in writing.<sup>32</sup> The Commission’s Executive Director must accept or reject the request within 14 working days and it generally takes several months for the Commission to issue its opinion.<sup>33</sup> Requests for assistance and advice generally relate to the application of known facts to applicable law and regulations. Requests for an opinion, on the other hand, raise substantial questions of interpretation and evoke matters of policy.<sup>34</sup> Before it issues an opinion, the Commission must consider staff’s memorandum and recommendations as well as the arguments of any interested persons. The Commission will issue a draft opinion and then hold a public hearing on the opinion request.<sup>35</sup>

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32 California Code of Regulations, title 2, section 18320(a).

33 California Code of Regulations, title 2, section 18320(e).

34 Government Code section 83114(a); California Code of Regulations, title 2, section 18320(f)(2).

35 California Code of Regulations, title 2, section 18322.



## AB 1234 Requirements (Government Code section 53234 et seq.)

Assembly Bill 1234 was enacted in 2005. The first part of AB 1234 requires a local agency to adopt formal compensation and expense reimbursement policies for members of its legislative body and then to follow those policies.<sup>36</sup> The second part of AB 1234 requires biennial ethics training of all “local agency officials” if the local agency “provides any type of compensation, salary, or stipend to, or reimburses the actual and necessary expenses of, a member of its legislative body in the performance of official duties.”<sup>37</sup> This chapter will only address the ethics training requirements of AB 1234.

### 3.1 Application: Local Agencies and Local Agency Officials

#### 3.1.1 Local Agencies

For purposes of AB 1234 Ethics Training requirements, the definition of “local agency” is “a city, county, city and county, charter city, charter county, charter city and county, or special district.”<sup>38</sup> Thus, the training requirements do not apply to other agencies on which local agency officials may serve (e.g., joint powers agencies, transportation agencies, or conservation agencies). AB 1234 Ethics Training requirements also do not apply to school districts.

Although the courts have not yet determined whether charter cities must comply with AB 1234, it is recommended that charter cities comply, at a minimum, with the ethics training requirements of AB 1234.

#### 3.1.2 Local Agency Officials

The specific trigger for AB 1234 Ethics Training requirements is: whether the local agency provides any type of compensation, salary, stipend, or reimbursement of actual and necessary expenses of a member of any of its Brown Act-covered bodies in the performance of official duties.<sup>39</sup> If the local agency does provide such compensation, salary, stipend, or reimbursement, then **all** “local agency officials” of that agency must receive the training.<sup>40</sup>

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36 Government Code sections 53232.1 and 53232.2.

37 Government Code section 53235(a).

38 Government Code section 53234(b).

39 Government Code section 53235(a). The definition of “legislative body,” for purposes of AB 1234, is found in Government Code section 53232(b) which states it has the same meaning as specified in Government Code section 54952.

40 Government Code section 53235(a).

“Local agency official” means any member of a legislative body or elected official of the local agency who receives any type of compensation, salary, stipend, or reimbursement of actual and necessary expenses incurred in the performance of official duties **and** any employee designated by the governing body of the local agency to receive AB 1234 ethics training.<sup>41</sup> Local agency counsel should be familiar with which officials of their local agency are subject to the ethics training requirements of AB 1234.

## **3.2 Basic Requirements**

### **3.2.1 Training**

A local agency is required to provide its local agency officials with information on available training to meet AB 1234 requirements at least once a year.<sup>42</sup> Training can be accomplished by (1) live training sessions, (2) self-study training sessions with testing; or (3) online training sessions.<sup>43</sup> A local agency is not required to provide AB 1234 Ethics Training itself; however, it may do so if it desires.

AB 1234 Ethics Training is provided free-of-charge to local agency officials at the FPPC website.<sup>44</sup> The Institute for Local Government also offers AB 1234 Ethics Training opportunities for both online and self-study instruction.<sup>45</sup>

A local agency, or association of local agencies, may also provide training courses or sets of self-study materials with tests, to meet the ethics training requirements of AB 1234.<sup>46</sup> These courses may be taken at home, in-person, or online.<sup>47</sup> If a local agency develops its own criteria to satisfy the requirements of AB 1234 Ethics Training, then the FPPC and the Attorney General’s Office must be consulted regarding the sufficiency and accuracy of the proposed course content.<sup>48</sup> The local agency may include local ethics policies in the curricula.<sup>49</sup>

All providers of AB 1234 training courses must provide each participant with proof of participation.<sup>50</sup> Local agency officials must then provide copies of these certificates to the agency’s custodian of records.

### **3.2.2 Training Frequency**

AB 1234 requires covered local agency officials to receive a minimum of two (2) hours of approved training every two (2) years.<sup>51</sup> Local agency officials are to receive this mandatory training no later than one year from their first day of service with the local agency and at least once every two years thereafter.<sup>52</sup> Since AB 1234 does not define “year,” it is advisable for local agencies to establish a policy that training be obtained with two calendar years from the date of the public servant’s last training. Any local agency official who serves more than one local agency may satisfy the training requirements once every two years without regard to the number of local agencies with which he or she serves.<sup>53</sup>

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41 Government Code section 53234(c).

42 Government Code section 53235(f).

43 Government Code section 53235(d).

44 *AB 1234 Ethics Training for Local Officer, California Fair Political Practices Commission* <<http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/ethics-training.html>>.

45 *Ethics Education: AB 1234 Training, Institute for Local Government*, <[www.ca-ilg.org](http://www.ca-ilg.org)> and search for Ethics Training (as of Aug. 24, 2015).

46 Government Code section 53235(d).

47 *Id.*

48 Government Code section 53235(c). See California Code of Regulations, title 2, section 18371 for the FPPC’s listing of core concepts to be covered in the training.

49 *Id.*

50 Government Code section 53235(e).

51 Government Code section 53235(b).

52 Government Code section 53235.1(b).

53 Government Code section 53235.1(c).

### 3.2.3 Training Content

AB 1234 Ethics Training must address “general ethics principles” and “ethics laws” relevant to the local agency official’s public service.<sup>54</sup> “Ethics laws”<sup>55</sup> include, but are not limited to, the following:

- Laws relating to personal financial gain by public servants (including, but not limited to, laws prohibiting bribery and conflict-of-interest laws);
- Laws relating to claiming perquisites (perks) of office (including, but not limited to, gift and travel restrictions, prohibitions against the use of public resources for personal or political purposes, prohibitions against gifts of public funds, mass mailing restrictions, and prohibitions against acceptance of free or discounted transportation by transportation companies);
- Laws relating to government transparency (including, but not limited to, financial interest disclosure requirements and open government laws); and
- Laws relating to fair processes (including, but not limited to, common law bias prohibitions, due process requirements, incompatible offices, competitive bidding requirements for public contracts, and disqualification from participating in decisions affecting family members).

The FPPC maintains a list of core topics for AB 1234 Ethics Training in FPPC Regulation 18731.<sup>56</sup> This list contains references to statutes and regulations pertaining to the following topics:

- Conflicts of interest under the Political Reform Act;
- Conflicts of interest and campaign contributions;
- Limitations on the receipt of gifts and honoraria;
- Conflicts of interest when leaving office;
- Mass mailing restrictions; and
- Economic interest disclosure under the Political Reform Act.

Given the breadth of the subjects that need to be included in AB 1234 Ethics Training, the goal of the training cannot be to teach local agency officials the law in each of these areas.

The goals of the training should be to:

- Acquaint local agency officials with the fact that there are laws that govern their behavior in each of these areas;
- Motivate local agency officials to comply with such laws (among other things by explaining the consequences of violation of such laws; and
- Alert local agency officials to seek the advice of qualified legal counsel when issues arise with respect to such laws.

### 3.2.4 Training Compliance and Enforcement

A local agency that requires its local agency officials to complete AB 1234 Ethics Training is required to maintain records indicating the date on which the local agency official completed the training **and** the entity that provided the training.<sup>57</sup> The local agency is required to maintain all such records for not less than five years from the date the local agency official completed the training.<sup>58</sup> All such records maintained by a local agency are subject to disclosure under the California Public Records Act.<sup>59</sup>

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<sup>54</sup> Government Code section 53235(b).

<sup>55</sup> Government Code section 53234(d).

<sup>56</sup> California Code Regulations, title 2, section 18371

<sup>57</sup> Government Code section 53235.2(a).

<sup>58</sup> Government Code section 53235.2(b).

<sup>59</sup> *Id.*

AB 1234 does not provide for any specific penalty for failing to comply with the ethics training requirements. However, the fact that such training records are subject to disclosure under the California Public Records Act makes a local agency official's compliance, or lack thereof, a topic for public discussion and debate.

### 3.3 Resources

A good resource for a local agency in developing its own training course is found on the *Institute for Local Government* website.<sup>60</sup> Sample materials include PowerPoint slides, sign-in sheets, and an instructor evaluation form. There is also a helpful instructional paper entitled *Designing an Effective AB 1234 Course*.

The FPPC website<sup>61</sup> is also a good resource, providing links to the following:

- Regulation 18371, setting forth the core content of AB 1234 ethics training;
- Statutes and Regulations comprising AB 1234 core topics;
- Attorney General's Office AB 1234 criteria; and
- Institute for Local Government resources.

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<sup>60</sup> Ethics Education Resources for Trainers, Institute for Local Government, (<http://www.ca-ilg.org/post/ethics-education-resources-trainers>).

<sup>61</sup> *AB 1234 Ethics Training for Local Officer*, California Fair Political Practices Commission (<http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/ethics-training.html>).



## Disclosure, Identification and Reporting Forms

### 4.1 Introduction

The Political Reform Act and the FPPC Regulations require certain public servants to file statements disclosing their reportable investments, real property interests, business positions, income and its sources, and other financial interests that may give rise to a conflict of interest.<sup>62</sup> The FPPC has developed a series of forms for filers to use to satisfy this requirement, chief among them being Form 700, Statement of Economic Interest (SEI).<sup>63</sup> The Act and the Regulations also require certain public servants to publicly identify the presence of a conflict of interest and to disqualify themselves from participation in the matter. An affected public servant will need to periodically report his or her financial interests on the appropriate FPPC-provided form, verbally announcing conflicts at public meetings, and recusing himself or herself from participation in effected decisions.

For a discussion of the process to determine whether a conflict of interest exists, see Chapter 7.0, Disqualifying Conflicts Under the Political Reform Act. Chapter 4.0 addresses the various public servants subject to the disclosure and identification requirements, and discusses the steps necessary for a covered public servant to properly identify conflicts to disqualify himself or herself from participation in conflicted items. Included at the end of the chapter is an appendix providing information about each of the FPPC disclosure forms.

Local agency counsel is cautioned not to end his or her research into conflict identification and disclosure requirements with the Act and Regulations. Other state laws may impose separate and different conflict disclosure requirements applicable to public servants and local agencies. For example, Government Code section 1090 *et seq.* imposes significantly different identification requirements than under the Act. See Chapter 6, 1090: Prohibited Interest In Contracts In Depth, for a discussion of identification under Government Code section 1090. Additionally, Government Code section 84308(c) requires disclosure of campaign contributions received by local elected officials when they are serving on a board (e.g., a LAFCO or Transportation Commission) to which they have been appointed by their member agency.

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<sup>62</sup> Government Code sections 87203 and 87302. California Code of Regulations, title 5, sections 18722 through 18740.

<sup>63</sup> See the FPPC website at: <http://www.fppc.ca.gov>.

## **4.2 Which Public Servants are Subject to the Requirements?**

### **4.2.1 Disclosure/Reporting**

The public servants required to disclose their financial interests on an SEI (Form 700) fall into two categories, commonly referred to as “Section 87200 Filers” or “Designated Employees.”

Section 87200 Filers are those public servants expressly enumerated in Government Code section 87200 and includes state elected officers, members of various state commissions, judges and commissioners of the judicial branch, and specific local agency positions. The local agency positions are listed below:

- Board of supervisors;
- District attorneys;
- County counsels;
- County treasurers;
- County chief administrative officers;
- Planning commissioners;
- Mayors;
- City council members;
- City managers and chief administrative officers of cities;
- City attorneys;
- City treasurers;
- Public officials who manage public investments; and
- Candidates for any one of these offices at any election.

Candidates for elected office are addressed in Government Code section 87201. Persons elected, appointed, or nominated to office are addressed in Government Code section 87202.

Designated Employees are those public servants, other than Section 87200 Filers, who a local agency has identified in its local conflict of interest code as holding a position within the agency that involves “making of decisions which may foreseeably have a material effect on any financial interest.”<sup>64</sup> Local agencies typically include a list of Designated Employees as an attachment to their local conflict of interest codes and identify the specific reporting requirements. See Section 7.5.3.6, Source of Gift, for further discussion.

### **4.2.2 Identification**

Government Code section 87105 requires all Section 87200 Filers to publicly identify (announce) the financial interest that gives rise to the conflict of interest or potential conflict of interest immediately prior to the consideration of the matter.<sup>65</sup> This section does not expressly apply to Designated Employees, but local agency counsel should review their local conflict of interest rules to determine whether there is an independent basis for identification and announcement.

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<sup>64</sup> Government Code section 87302(a).

<sup>65</sup> Government Code section 87105(a)(1).

## 4.3 Disclosure/Reporting

### 4.3.1 Section 87200 Filers

The Act requires Section 87200 Filers to file an SEI upon assumption of office, annually thereafter, and upon leaving office.<sup>66</sup> The disclosure encompasses those reportable investments, business positions held, real property interests, income and its sources that might cause a financial conflict of interest to arise in the performance of the official's duties for the local agency including, but not limited to, the following:

- Each investment in a business entity with a fair market value equal to or exceeding \$2,000 or more;
- Each interest in real property located within the local agency jurisdiction with a fair market value equal to or exceeding \$2,000 or more (note: interest in real property does not include the filer's residence);
- Each source of gross income of \$500 or more (including loans) that is located in or doing business in the jurisdiction of the city; and
- Any source of a gift or gifts aggregating \$50 or more, whether or not the source is located in or does business in the jurisdiction.

When disclosure of an interest is required, the public servant has a duty to disclose the interest whether or not there is a pending or likely governmental decision involving the disclosed interest. Local agency counsel should keep in mind that while there may be financial interests that the Section 87200 Filer is not compelled to report, (e.g., his or her personal residence), those interests may still give rise to a disqualifying conflict of interest.

### 4.3.2 Designated Employees

Each local agency is required to adopt a local conflict of interest code.<sup>67</sup> The Act mandates that local conflict of interest codes impose disclosure requirements on Designated Employees but permits the local agency to determine the specific types of investments, business positions, interests in real property and sources of income which are reportable, provided the local agency requires disclosure of those interests that may be foreseeably affected materially by any decision made or participated in by the Designated Employee by virtue of his or her position.<sup>68</sup> Designated Employees must be required to file an SEI within thirty days of assuming a position, annually thereafter, and within thirty days of leaving the position.<sup>69</sup>

### 4.3.3 Reporting Forms

The primary form for required disclosure of financial interests is the SEI or Form 700, promulgated by the FPPC. SEIs are public records. During normal business hours, any member of the public is permitted to inspect and copy any SEI on file at the local agency.

Form 700 is available on the FPPC website. There is an interactive version of Form 700 that allows filers to complete the form online before printing and signing. Some jurisdictions utilize the FPPC certified electronic filing program, which allows filers within these jurisdictions to file electronically. (See the FPPC's website at: [www.fppc.ca.gov](http://www.fppc.ca.gov).)

The instructions included with Form 700 and the Reference Pamphlet generally include:

- Cover page where the filer lists his or her name, identifies his or her agency position and jurisdiction and specifies whether the form is intended to be used for assuming office, an annual filing, or leaving office;
- Schedule A-1 Investments in stock, bonds and other interests, including those held in an IRA or 401k, where the

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<sup>66</sup> Government Code sections 87200-87210.

<sup>67</sup> Government Code section 87300.

<sup>68</sup> Government Code section 83700(a).

<sup>69</sup> Government Code section 87302(b).

ownership interest is less than 10 percent;

- **Schedule A-2** Investments in business entities (including certain consulting businesses and independent contracting businesses), sole proprietorships, partnership, LLCs, corporations and trusts, where the ownership interest is more than 10%;
- **Schedule B** Interests in real property, including rental property in the jurisdiction;
- **Schedule C** Income, loans, and business positions, including non-governmental salaries of public servant and spouse/registered domestic partner;
- **Schedule D** Gifts including gifts from businesses (such as tickets to sporting or entertainment events); and
- **Schedule E** Travel payments, including from third parties (not the filer's employer).

The instructions on Form 700 also provide a list of common non-reportable interests associated with each of the above schedules.

There are other FPPC forms that are used less frequently, but are still important for local agency counsel to be familiar with. The appendix at the end of this chapter summarizes the following forms:

- **Form 801** Payment to Agency Report
- **Form 802** Agency Report of: Ceremonial Role Events and Ticket/Pass Distributions
- **Form 803** Behested Payment Report
- **Form 804** Agency Report of: New Positions
- **Form 805** Consultants
- **Form 806** Agency Report of: Public Official Appointments

All forms are available on the FPPC's website.

### 4.4 Public Identification/Announcement (Section 87200 Filers)

Government Code section 87105 requires all Section 87200 Filers (see Section 4.2.1 above) who, under the Act, have a financial interest in a decision, upon identifying the conflict of interest or potential conflict of interest, and to take the steps discussed below, immediately prior to consideration of the matter:<sup>70</sup>

In an effort to clarify how disqualification would work in practice, the FPPC adopted Regulation 18707 (renumbered from Section 18702.5 in 2014), which provides guidance on the manner in which Section 87200 Filers must publicly announce and record their disqualification. The process is described below.

Following the announcement of the agenda item that is to be discussed or voted on, but before either discussion or the vote commences, the Section 87200 filer must:

- Publicly identify each type of financial interest held by the public servant that is involved in the decision (i.e., investment, business position, interest in real property, personal financial effect, or receipt or promise of income or gifts); and
- Include the following details identifying the financial interest(s):
  - i. If an investment, the name of the business entity in which each investment is held;
  - ii. If a business position, a general description of the business activity in which the business entity is engaged as well as the name of the business entity;
  - iii. If real property, the address or another indication of the location of the property, unless the property is the public servant's principal or personal residence, in which case identification that the property is a residence;
  - iv. If income or gifts, the identification of the source; and

<sup>70</sup> Government Code section 87005(a).

- v. If personal financial effect, the identification of the expense, liability, asset or income affected.
- If the governmental decision is to be made during an open session of a public meeting, the public identification shall be made orally and shall be made part of the official public record.
- The Section 87200 Filer must recuse himself or herself and leave the room after the identification is made. (See exception, below). The Section 87200 Filer may not be counted towards achieving a quorum while the item is discussed.

#### **4.4.1 Special Rules for Closed Sessions**

If a governmental decision is made during a closed session, the identification may be made orally during the open session before the body goes into closed session and shall be limited to a declaration that his or her recusal is because of a conflict of interest under Government Code § 87100. That declaration shall be made part of the official record.

The Section 87200 Filer may not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.<sup>71</sup>

Finally, Regulation 18707(c) provides that nothing in the provisions of the Regulation is intended to cause a local agency or official to make any disclosure that would reveal the confidences of a closed session or any other privileged information as contemplated by law, including but not limited to the recognized privileges found in Regulation 18740.

#### **4.4.2 Exception for Consent Calendar**

The requirement that a disqualified official “leave the room”<sup>72</sup> for a matter on the uncontested portion of the agenda does not apply to items on the consent calendar. The public servant nevertheless is required to publicly identify the economic interest orally and make that identification part of the official record.<sup>73</sup>

#### **4.4.3 Exception for Absence**

If the Section 87200 Filer is absent from a meeting, he or she has no public identification requirement with regard to that meeting.<sup>74</sup>

#### **4.4.4 Exception for Speaking As a Member of the Public Regarding An Applicable Personal Interest**

The Section 87200 Filer may remain in the room and listen to public discussion on the matter and speak as a member of the public, provided the filer has (a) complied with the public identification, recusal and leaving the dais to speak in the same area as members of the public, and (b) is qualified to speak on a matter of personal interest under Regulation 18704(d)(2). “Personal interests” include a real property interest wholly owned by the filer or his or her immediate family, a business entity wholly owned by the filer or his or her immediate family, or a business entity over which the official (or official and spouse) exercises sole discretion and control.

#### **4.4.5 Exception for Legally Required Participation**

Under certain circumstances, it may be established that a public servant who has a financial interest in a decision is legally required to make or participate in the making of a governmental decision. Regulation 18705 establishes specific requirements for describing and announcing the nature of the official’s economic interest and the potential financial effects. See the discussion in Section 4.8.6.

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71 California Code of Regulations, title 2.5, section 18707(a)(2).

72 Government Code section 87105(a)(3).

73 California Code of Regulations, title 2, section 18707(a)(3)(A).

74 California Code of Regulations, title 2, section 18707(a)(3)(B).

## 4.5 Permissive Disclosure (Designated Employees)

Regulation 18707(b) provides that for all public servants other than Section 87200 Filers (i.e. Designated Employees) subject to the mandatory disclosure requirements discussed above in Section 4.4, the official's determination not to participate due to the official's financial interest may be accompanied by an oral or written disclosure of the financial interest.<sup>75</sup>

### 4.5.1 Abstention/Quorum

When an official with a disqualifying conflict of interest abstains from making a governmental decision in an open session of the agency and the official remains on the dais or in his or her designated seat during deliberations of the governmental decision in which he or she is disqualified, his or her presence shall not be counted towards achieving a quorum.<sup>75</sup>

### 4.5.2 Closed Session

During a closed session meeting of the local agency, a disqualified public servant shall not be present when the decision is considered or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.<sup>76</sup>

### 4.5.3 Local Rules

The regulation does not prohibit a local agency from adopting a rule or custom requiring a disqualified member to step down from the dais and leave the chambers.<sup>77</sup>

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#### ► PRACTICE TIP: Local Rules or Administrative Policy

Memorializing the rules of permissive disclosure in the local agency's conflict-of-interest code, or by means of an administrative policy, may serve to shelter Designated Employees from being unintentionally brought into a disqualifying matter.

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## 4.6 Campaign Contributions

Campaign contributions are generally not considered gifts or income for the purpose of reporting requirements unless the public servant is appointed to serve on another entity's board, in which case they may be (e.g. planning commissioners, members appointed to LAFCO or the local Council of Governments).<sup>78</sup> See the disclosure requirements of Government Code section 84308, mentioned above in Section 4.1.

## 4.7 Behested Payments

A sometimes overlooked disclosure requirement pertains to "behested" payments for charity or agency projects. Payments made principally for legislative, governmental, or charitable purposes and made at the behest of a candidate for elected office or an elected officer are neither gifts nor political "contributions," but they must be reported (on FPPC Form 803) within 30 days following the date on which the payments equal or exceed five thousand dollars (\$5,000) in the aggregate from the same source in the same calendar year in which they are made.<sup>79</sup> The purpose of the "behested payment" provision is to report payments that are not direct contributions to candidates or elected officers but are payments that the public may want to see reported because of the potential for influence over a public official.<sup>80</sup> The reporting requirement applies even if the elected officer is asking for

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<sup>75</sup> California Code of Regulations, title 2, section 18707(b)(2).

<sup>76</sup> California Code of Regulations, title 2, section 18707(b)(3).

<sup>77</sup> California Code of Regulations, title 2, section 18707(b)(4).

<sup>78</sup> See FPPC Website: <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/conflict-of-interest/pay-to-play-contribution-restrictions.html>

<sup>79</sup> Government Code Section 82015.

<sup>80</sup> Bagneris Advice Letter No. A-15-011 (2015).

donations to a nonprofit charity or his or her agency.<sup>81</sup> See the FPPC's explanation and Form 803 for reporting at <http://www.fppc.ca.gov>. See section 4.8.3 of this chapter for a discussion of Form 803 and the reporting of behested payments.

## 4.8 Appendix: Certain FPPC Forms

### 4.8.1 Form 801 — Payment to Agency Report

Regulation 18944 identifies when a payment that is made to a local agency or any of its departments, units or divisions, and used for official agency business, is not a gift or income to any official of that local agency. Such a payment must meet the following requirements:

1. The payment is used for official local agency business;
2. The local agency head official determines and controls the use of the payment including the selection of the official who will use the payment. The local agency head official cannot select him or herself unless payment is for an item of general use by agency officials and the local agency head official is one of those officials who has access to such use; and
3. The local agency reports the payment on a form prescribed by the FPPC and maintained pursuant to the Regulation, including information describing the payment, the donor, the local agency's use of the payment, and the official that received the payment.

Form 801 is the form prescribed by the FPPC and used to satisfy the above requirements.

Form 801 is used to report:

1. A payment for an official's travel expenses for the purpose of facilitating the public's business in lieu of a payment using local agency funds; and
2. A payment that would otherwise be considered a gift or income to the benefitting official, but is instead accepted on behalf of the local agency.

Payments must be made directly to, or coordinated with, the local agency head official, who must determine which official will use the payment.

#### When and Where to File

A local agency, or any department, unit or division of the agency, accepting a payment must complete Form 801 for each payment received regardless of the amount and file it with the local agency's filing officer within 30 days after the receipt or use of the payment/gift by the official.

The form must be prominently posted on the local agency's website. If the payment is for travel expenses, the form must be posted within 30 days after the end of a calendar quarter when aggregated reported payments total \$2,500 or more. A copy must be forwarded to the FPPC.

If payments are not related to travel, the form must be posted within 30 days after the end of a calendar quarter when aggregated reported payments total \$2,500 or more. The local agency is not required to forward a copy of non-travel Form 801s to the FPPC unless the agency does not have a website.

The local agency may post Form 801 earlier than described. The required time of retention and posting of Form 801 is four years.

The reporting of these payments does not apply to tickets or passes to a facility, event, show or performance for an entertainment, amusement, recreational, or similar purpose provided by an agency to, or at the behest of, an official of the local agency, which distribution is subject to the local agency's written Ticket/Pass Distribution Policy as required under Regulation 18944.1 and reported on Form 802.

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81 (*Id.*)



### 4.8.2 Form 802 — Agency Report of: Ceremonial Role Events and Ticket/Pass Distributions

Local agencies are often provided tickets or passes to be distributed to persons for use in ceremonial roles or other agency-related activities. Regulation 18944.1 provides the circumstances under which an agency's distribution of tickets to entertainment events, sporting events and similar occasions would not result in a gift to individuals that attend the function.

For a local agency to distribute tickets or passes to entertainment, sports or other similar events, the agency must first adopt a ticket distribution policy as provided in Regulation 18944.1, describing the public purposes for the uses of such tickets and passes. Form 802 is to be used by the local agency to identify persons that receive admission tickets and passes from the local agency and detail the public purpose for the distribution.

Regulation 18942 lists exceptions to reportable gifts, including ceremonial events, when listed on Form 802.

Form 802 provides information to the public on how the local agency distributes tickets to events such as fairs, professional athletic games and other entertainment events. Form 802 also informs the public whether admissions were made at the behest of an official and whether behested tickets were provided to an organization or to a specified individual.

Officials often attend functions fulfilling a ceremonial role.

Form 802 must be filed with the local agency filing officer within 30 days after distribution of the ticket/pass, and be maintained as a public document. The filing officer retains the original and must forward a copy of Form 802 to the FPPC for posting on its website. Form 802 must be sent as soon as possible to the FPPC but it should not be sent later than 45 days after the date of distribution. The local agency may also post Form 802 on its website, but it is not required.

The filing officer is to retain and have available for public inspection all Form 802 statements on tickets or passes to events provided to officials, or given to others at the behest of officials, and used pursuant to the written policy.

It is important that all public agencies adopt an appropriate distribution policy. If a filer receives a ticket to an event from a local agency without a distribution policy, the filer would be required to report the ticket on his or her Form 700 if the donor is a reportable source and the value of the ticket is \$50 or more, even though it was used for the legitimate governmental purpose.

The required time of retention of the original Form 802 is seven years.

### 4.8.3 Form 803 — Behested Payment Report (aka Co-Sponsor Payment Report)

A payment made at the behest of an official is a contribution unless the payment is made principally for legislative, governmental, or charitable purposes, in which case it is neither a gift nor a contribution. However, payments of this type that are made at the behest of an elected official must be reported within 30 days following the date on which the payments equal or exceed five thousand dollars (\$5,000) in the aggregate from the same source in the same calendar year in which they are made.

The FPPC created Form 803 for this reporting purpose. An elected city official is required to file a Form 803 with the local agency filing officer within 30 days after the date a payment is made that meets or exceeds \$5,000 from a single source in a calendar year. After a source has made a behested payment of \$5,000 or more, any subsequent payments from that source must be reported.

Generally, a payment is made at the *behest* of an official if it is made under the control or at the direction of, requested, solicited, or suggested by the official, or otherwise made to a person in cooperation, consultation, coordination with, or at the consent of, the official. This includes payments behested by the official or by the official's agent or employee on the official's behalf.

A payment is not "made at the behest of" an elected official and is not subject to behested payment reporting if the payment is made in response to a fundraising solicitation from a charitable organization requesting a payment where the solicitation does not *feature* an elected official.

To *feature* an elected official means to use a photograph or signature or to single out the official through the manner or display of his or her name or office in a document, such as by headlines, captions, type size, typeface, or color.



An elected official is also featured in a solicitation if the roster or letterhead listing the governing body contains a majority of elected officials.

A payment is not “made at the behest” of an elected official and is not subject to reporting if the request for a payment is made to an local, state or federal government agency and the payment will be used in the regular course of official business.

The required time of retention of an original Form 803 is seven years.

#### **4.8.4 Form 804 — Agency Report of: New Positions**

The term *designated employee* includes an employee in a newly created position that makes or participates in the making of decisions and whose specific position is not yet listed in the local agency’s conflict of interest code. (Regulation 18219.) Regulation 18734 provides for immediate disclosure requirements of such employees pending amendment of the local agency’s conflict of interest code. Individuals in newly created positions are required to file under the broadest disclosure category in a local agency’s code unless specifically identified otherwise, in writing, by the local agency’s chief executive officer or designee.

The local agency may use Form 804 to identify new positions that will make or participate in making governmental decisions on behalf of the local agency pending amendment of the local agency’s conflict of interest code. Form 804 identifies the disclosure requirements for individuals serving in these new positions. Disclosure requirements should be assigned based on the duties of each position.

Requirements:

1. Assuming office statements must be filed within 30 days after assuming a newly created position.
2. The filing officer must maintain Form 804 in the same place and manner as the local agency’s conflict of interest code.
3. Form 804 must be available for public inspection and copying during regular business hours. This includes any written documents supporting the designation of the position and limitation of the disclosure category.

Whenever a new position is added, in addition to completing Form 804, the local agency should begin the process of amending its conflict of interest code. (Gov. Code section 87306.)

#### **4.8.5 Form 805 — Consultants**

The term *designated employee* includes a consultant as defined under Regulation 18700.3. (See also Regulation 18219.) Consultants, as defined, make governmental decisions or serve in a staff capacity and participate in the making of governmental decisions. The FPPC adopted Regulation 18734 to provide for immediate disclosure requirements of consultants. Individuals in such consultant positions are required to file under the broadest disclosure category in the local agency’s code unless specifically identified otherwise, in writing, by the local agency’s chief executive officer or designee.

Form 805 is used to:

1. Identify consultants that make or participate in making governmental decisions; and
2. Identify the filers’ disclosure requirements.

Requirements:

1. Assuming office SEIs must be filed within 30 days after assuming office;
2. Disclosure requirements should conform to the range of duties under the contract. Otherwise, the individuals are required to file under full disclosure; and
3. Form 805 is to be maintained in the same place and manner as the local agency’s conflict of interest code and made available to the public during regular business hours.

The individual providing the service under the contract must file the SEI, rather than the firm that was contracted. The individual also must disclose information on personal assets rather than the financial assets of the firm contracted.

However, disclosure requirements should be tailored and assigned based on the scope of services provided under the contract with the firm or individual.

Examples:

- A local agency contracts with a law firm to act as general counsel. An individual will provide legal services and make recommendations. The individual is the consultant and, based on the broad or indefinable duties, the consultant would be assigned full disclosure requirements.
- A local agency hires a firm to provide a person to serve as the local agency building official. This individual not only works with staff but members of the public and will make official ministerial decisions on behalf of the local agency. This individual is “serving in a staff capacity,” and should be required to disclose investments and income, including gifts, loans and travel payments, from sources that are involved in building related projects with the local agency.

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► **PRACTICE TIP: Serving in a staff capacity**

Often consultants are hired to perform necessary functions or to provide necessary information for local agencies. Where these consultants are not fulfilling the role of an officer of the agency or are hired to fill a staff position with the agency it is unclear whether they are “serving in a staff capacity.” Local agency counsel is encouraged to assess under the particular facts of each instance whether such an individual would be required under the rules to comply with the disclosure requirements.

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### 4.8.6 Form 806 — Agency Report of: Public Official Appointments

One of the materiality standards for determining a disqualifying conflict of interest is the economic interest in personal finances. Pursuant to Regulation 18702.5, a reasonably foreseeable financial effect on a public servant or his or her immediate family's personal finances is material *if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision*. However, under Regulation 18702.5(b)(1), a public servant may receive a stipend for attendance at meetings of any group or body created by law or formed by the official's agency for a special purpose so long as the selecting body posts on its website a form provided by the FPPC that includes (a) a list of each appointed position eligible for a stipend, (b) the amount of the stipend for each position, (c) the public official's name who has been appointed to the position, (d) the name of the public official, if any, who has been appointed as an alternate, and (e) the term of the position.

In the spring of 2015, the FPPC amended former Regulation 18705.5 and folded its provisions into Regulation 18702.5. Former Regulation 18705.5 provided that a reasonably foreseeable financial effect on a public servant or his or her immediate family's personal finances is material if the official or the official's family member's personal finances would change by at least \$250 in any 12-month period. Regulation 18702.5 now provides that the effect is material if the official or his or her immediate family member will receive a “measurable financial benefit or loss from the decision.”

The FPPC's Form 806 is used for reporting public appointments made that would have a material personal financial effect. At the time of this writing, the FPPC was in the process of updating Form 806 and the instructions to reflect the regulatory change to Section 18702.5, as the Form 806 instructions continue to refer to former Section 18705.5. Local agency counsel with questions are encouraged to call the FPPC for specific advice on using and updating Form 806.

## Common Problems & Issues

### 5.1 Introduction

This chapter presents a short discussion of common problems that local agency counsel may experience on a routine basis. The common problems are listed below for quick reference and discussed following. More detailed discussion may also be found on the topics elsewhere in this Guide.

Official's Refusal to Disqualify .....	Section 5.2
Common Political Reform Act Conflict Situations .....	Section 5.3
Social Relationships and Gifts .....	Section 5.4
Common 1090 Issues .....	Section 5.5
Mass Mailing .....	Section 5.6

### 5.2 Official's Refusal to Disqualify

Public servants usually will not participate in a decision if the local agency counsel advises that a conflict of interest might exist.

Further, conflict of interest questions ultimately turn on whether the decision will have a "material financial effect" on the public servant's financial interests. Local agency counsel should exercise caution when advising public servants as to whether a material financial effect exists. Many times the local agency counsel's advice to the public servant may not reach a final conclusion, but will merely relate the test to be applied to the particular facts. In such a situation, while the local agency counsel may have his or her own opinion as to whether or not a material financial effect exists, it is ultimately up to the public servant, a real estate professional or a financial expert to determine this issue. In such circumstances, the local agency counsel is not in a position to directly advise the official that it is safe to participate in the decision. If a local agency counsel cannot provide clear guidance that there is no potential for a conflict of interest, then the public servant should be advised not to participate unless the public servant first seeks and receives formal written advice from the FPPC.

► **PRACTICE TIP: Voting on Continuances**

The question often arises whether or not the public servant who wants to seek formal written advice may vote to continue the hearing or governmental decision to permit him or her time to receive the formal advice from the FPPC. The answer is generally yes, unless the decision to continue the matter is substantive in nature, e.g., a time delay effectively ends the project or otherwise substantively affects the status quo.

It is the public servant, however, who decides whether to follow the attorney's advice. This is one of the contexts in which it is important for local agencies to understand who is the "client". The client is the organization itself, acting through its highest body, officer or employee authorized to act on a matter.<sup>82</sup> See Section 1.5 "The Local Agency is the Client" for more detailed discussion on this topic.

What happens if the attorney gives advice and it is not followed by the public servant? Strictly speaking, the current State Bar Rules of Professional Conduct do not require that the attorney take the issue up the chain of command — they merely allow it.<sup>83</sup> Doing so, however, is consistent with an attorney's obligation to keep clients reasonably informed of significant developments related to representation.

► **PRACTICE TIP: Change in State Bar Rules**

At the time of publication, the State Bar was considering rules that would require going up the chain of command, unless the attorney believes it is not necessary to protect the organization's interests.<sup>84</sup>

Attorneys in such situations face unique constraints compared to non-attorneys who work for public agencies. State law requires attorneys to maintain their clients' confidences.<sup>85</sup> The only exception (not typically relevant to the public agency context) is when death or substantial bodily harm can be avoided by disclosure.<sup>86</sup>

Thus, if an attorney has given advice that is not being followed, the attorney has few options other than remaining silent. The less perplexing situation is when the law is not clear and the client's course of action is not demonstrably unlawful. However, if indeed it is clear that the agency is taking an unlawful action and the attorney's efforts to encourage corrective action have failed, the attorney may be forced to resign.<sup>87</sup>

82 State Bar Rules of Professional Conduct Rule 3-600.

83 State Bar Rules of Professional Conduct Rule 3-600(B):

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

- (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
- (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

84 See, Proposed Rule of Professional Conduct Rule 1.13; See, also, ABA Model Rule 1.13.

85 See Business and Professions Code section 6068 (e) (1) ("To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

86 State Bar Rules of Professional Conduct 3-100 (B).

87 State Bar Rules of Professional Conduct Rule 3-700.

What about state law protections for whistle-blowers? The California Attorney General has concluded that the Business and Professions Code sections related to attorney-client confidentiality trump those protections.<sup>88</sup> The comment section to the California Bar's Proposed Rules of Professional Conduct also takes this position.<sup>89</sup>

When the Political Reform Act question involves approval of a contract, Government Code Section 1096 also needs to be reviewed. This statute provides that when an officer "charged with the disbursement of public moneys" is presented with an affidavit that an officer "whose account is about to be settled, audited, or paid by him, has violated" Government Code sections 1090, *et. seq.*, the officer must cause the district attorney to "prosecute" the officer.

Possible criminal statutes might also apply. For example, Government Code section 1222 makes it a misdemeanor for a public servant "to willfully omit to perform any duty enjoined by law."<sup>90</sup> If a local agency counsel has a duty to disclose criminal violations by public servants, then it is conceivably possible it might constitute a misdemeanor not to disclose a violation of the Political Reform Act.

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► **PRACTICE TIP: Disclosure of Conflict of Interest Violations**

Before local agency counsel publicly discloses a conflict of interest violation, counsel should obtain prior authorization from the local agency board. However, many practitioners strongly argue against local agency counsel making such a disclosure because it may create ethical problems under State Bar Rule 3-600 and Business and Professions Code section 6068(e).

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It is important that each local agency counsel know how she or he will resolve such a situation before it arises. The local agency counsel is not likely to make the best decision on this potential career-threatening issue by waiting until a board votes on a matter in which the local agency counsel believes the official has a financial interest. Having an approach in place ahead of time is essential. Further, documenting that one has provided sound advice on what the law requires in a given situation (or situations) can be a wise strategy. Also documenting efforts to bring issues to the attention of those at the highest decision-making level is advised. Sending a confidential memo is one way to do this.<sup>91</sup>

## 5.3 Common Political Reform Act Conflict Situations

### 5.3.1 Public Servants Who Are Realtors, Brokers, or Appraisers

Any source of income aggregating \$500 or more provided to, received by, or promised to a public servant within 12 months before the time a governmental decision is being made is considered an economic interest.<sup>92</sup> For public servants who are paid on commission or through other incentive compensation, such as realtors, brokers, appraisers, or salespersons, special rules apply in determining whether a disqualifying source of income exists. See Regulation 18700.1.

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88 71 Ops.Cal.Atty.Gen. 255 (1988).

89 See also Proposed Rules of Professional Conduct, Rules 1.6 & 1.13: Confidentiality & Organization as Client, specifically comment 15 to Rule 1.13: [15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e) or Rule 1.6, a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

90 For further discussion of Government Code section 1222, see 82 Ops.Cal.Atty.Gen. 246 (1999).

91 See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 (finding attorney memo to governing body is protected by attorney-client privilege; memo is not subject to disclosure under the Public Records Act and does not violate open meetings law).

92 Government Code section 87103(c).

### 5.3.2 Public Servants Who Work For Another Agency

Public servants who are employed by another local agency can be faced with a situation where they must evaluate whether to participate in a decision involving their employing agency. Any source of income to the public servant over \$500 over the previous 12 months will typically disqualify the official from participating in a matter involving that source of income. That is *not* the case, however, with income from another agency because such income is specifically exempted from the definition of “income” under the Act.<sup>93</sup>

### 5.3.3 Public Servants and Nonprofit Entity

Financial interests in nonprofits are not exempt from the Act.<sup>94</sup> Because public servants are often active within the communities they serve, it is not uncommon for them to serve local charitable organizations in various capacities, either as an officer or member of the board of directors or as an employee. Such service, if it is for compensation however, can affect the public servant’s ability to participate in the local agency’s decision affecting the nonprofit.

An official has a conflicting financial interest if it is reasonably foreseeable that the decision will have a material financial effect on a specified interest in any relevant business entity.<sup>95</sup> This is the case where the business entity is a source of income to the public servant by receiving \$500 or more in the previous twelve months.<sup>96</sup> Those specified interests include service as a director, officer, partner, trustee, employee, or any position of management in any “business entity,” including nonprofit entities.<sup>97</sup> To the contrary, a nonprofit is not a “business entity” as defined in Government Code section 82005, which is limited to entities operated for profit. Therefore a public servant, even though a board member, director, officer or holding a position of management with a nonprofit does not have a financial interest in the nonprofit simply by virtue of the position. However, if the public servant receives payments from the nonprofit, such as a salary, stipend or meeting fees, the nonprofit would be a source of income to the public servant, provided he or she received more than \$500 in the previous twelve months.<sup>98</sup> If a public servant is compensated by a nonprofit, a governmental decision will have a reasonably foreseeable financial effect on the public servant’s financial interest in the nonprofit, where the nonprofit will receive a measurable financial benefit or loss as a result of the decision or the public servant knows or has reason to know that the nonprofit has an interest in real property that will be financially affected by the decision.<sup>99</sup> See FPPC Regulations section 16702.2 for the relevant material standard for a financial interest in real property.

### 5.3.4 Public Servants Who Have Business Interests

Any business entity in which the public servant has a direct or indirect investment worth \$2,000 or more is considered a financial interest if the business entity, or its parent or subsidiary, has an interest in real property in the jurisdiction, or does business or expects to do business, or has done business in the jurisdiction during the two years prior to the local agency’s action.<sup>100</sup> An indirect investment includes “any investment or interest owned by the spouse or dependent child of a public servant, by an agent on behalf of a public servant, or by a business entity or trust in which the public servant, the public servant’s agents, spouse, and dependent children own directly, indirectly, or beneficially a ten percent interest or greater.”<sup>101</sup> A business entity that is a parent

93 Government Code section 82030(b).

94 See, e.g., California Code of Regulations, title 2, section 18700.1.

95 Government Code section 87103.

96 California Code of Regulations, title 2, section 18700.01(a)(2).

97 California Code of Regulations, title 2, section 18700.1(a)(2)(B). For nonprofits, the director’s or officer’s compensation is a trigger for the conflicting financial interest.

98 Government Code section 87103.

99 California Code of Regulations, title 2, section 18702.3(a)(3).

100 Government Code sections 87103(a), 82030(a) (imposing 2-year restriction); 82005 (definition of “business entity”); 82034 (definition of “investment”); and 82035 (defining “jurisdiction”).

101 Government Code section 87103. See, also, *Metropolitan Water Dist. v Fair Political Practices Comm’n* (1977) 73 Cal.App.3d 650; *Commission on Cal. State Gov’t Org. & Econ. v Fair Political Practices Comm’n* (1977) 75 Cal.App.3d 716; *Witt v Morrow* (1977) 70 Cal.App.3d 817.



or subsidiary, or is otherwise related to a business entity in which the official has an investment, is also included as an economic interest.<sup>102</sup>

### 5.3.5 Spouses And Dependent Children of Public Servants

Financial interests of a public servant's spouse and dependent children are attributed to the public servant. For example, direct or indirect investments or interests in business entities worth \$2,000 or more constitute economic interests.<sup>103</sup> Indirect investments or interests include those owned by the servant's spouse and dependent children.<sup>104</sup> A public servant also has an economic interest in the servant's personal finances and those of the servant's "immediate family."<sup>105</sup> The term "immediate family" means spouses and dependent children.<sup>106</sup> The term "spouse" includes "registered domestic partners" recognized by state law.<sup>107</sup>

## 5.4 Social Relationships and Gifts

The FPPC regulations concerning social relationships and dating are intended to recognize that public servants receive gifts unrelated to their official service. These regulations provide, with some exceptions, that gifts exchanged in social situations and in dating relationships are neither reportable nor subject to the gift limit. See additional discussion under Section 7.5.3.6 Source of Gift.

### 5.4.1 Family Relations

Payments or gifts from specified familial relations are not gifts or income.<sup>108</sup> The list of family members who may provide gifts to public servants without being required to be reportable or subject to the gift limit has been extended to include additional extended family members and their spouses and former spouses. However, the gift will be reportable and subject to the gift limit if the family member is acting as an agent or intermediary for any person not identified as a family member in the list.<sup>109</sup>

### 5.4.2 Reciprocal Arrangements

Reciprocal arrangements are expressly provided as an exception to the gift limit and reporting obligations.<sup>110</sup> A reciprocal arrangement occurs when friends meet for a meal or similar social engagement, and the parties rotate payments on a continuing basis so that, over time, each person pays for his or her approximate share of the costs.<sup>111</sup> As long as (1) the total value received by the public servant within the calendar year is not substantially disproportionate to the amount paid by the official, and (2) the other person is not a lobbyist registered to lobby the public servant's agency, the official has not received a gift. But no single payment to the official may exceed the gift limit. This means that a public servant and a former colleague may go out to dinner every other month and may take turns buying meals without triggering any reporting obligations, provided that the total cost of the meals is not disproportionate.

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102 Government Code section 82034.

103 Government Code sections 87103(a), 87103(b).

104 Government Code section 87103.

105 California Code of Regulations, title 2, section 18700.1.

106 Government Code section 82029.

107 California Code of Regulations, title 2, section 18229. For definition of "dependent children," *see*, California Code of Regulations, title 2, section 18229.1.

108 California Code of Regulations, title 2, section 18942(a)(3) (5).

109 California Code of Regulations, title 2, section 18942(a)(3).

110 California Code of Regulations, title 2, section 18942(a)(8). This exception does not include registered lobbyists.

111 California Code of Regulations, title 2, section 18942(a)(8)(B).



### 5.4.3 Dating Relationships

The FPPC has consistently advised that a gift received from a “bona fide” dating relationship is similar to a gift received from a family member, meaning that these gifts were not considered “gifts” for reporting or valuation purposes. Regulation 18942(a)(18)(A) codified its long-standing advice and extends this exception to include bona fide dates as well as dating relationships. However, neither the term “bona fide date” nor “dating” have specific definitions. Practically speaking, both parties should generally agree that they went on a bona fide date or are in a bona fide dating relationship. This exception now makes it clear that persons on a single date, rather than in a dating relationship, are not required to report gifts between them. This exception extends to dinners, tickets, jewelry, and trips.

However, if the public servant is on a date with certain individuals, the benefit received is a gift that is not reportable or subject to the gift limit, but the aggregate limit will be subject to the Political Reform Act’s conflict of interest provisions if the value meets the gift limit.<sup>112</sup> Those individuals who may present a conflict of interest for the official include (1) a lobbyist who is registered to lobby the official’s agency, (2) a person who has, or may reasonably foreseeably have, a contract, license, permit, or other entitlement for use pending before the official’s agency, and for 12 months following the date a contract is signed or a final decision is rendered in the proceeding, or (3) a person (or agent) involved in a licensing or enforcement proceeding before a regulatory agency that employs the official and in which the official may reasonably foreseeably participate, or has participated, within 12 months of the time the gift is made.<sup>113</sup>

### 5.4.4 Close Personal Friendships

The FPPC excludes as a gift for reporting and valuation purposes those gifts where the donor is a person who is not a lobbyist registered to lobby the official’s agency and where it is clear that the gift was given due to a long standing close personal friendship that is unrelated to the official’s position. There also must be no evidence at the time the gift is made that the official makes or participates in the type of governmental decisions that may have a reasonably material financial effect on the donor.<sup>114</sup>

### 5.4.5 Acts of Neighborliness and Human Compassion

The FPPC also codified other long-standing advice to exempt acts of neighborliness. Acts of neighborliness include activities such as providing a ride, loaning a tool, or feeding a pet, acts that are “consistent with polite behavior in a civilized society that would not normally be part of an economic transaction.”<sup>115</sup> This regulation is not subject to the limitations above that provide an exception for lobbyists with the agency or others who appear before the agency. Thus, a public servant may have the next door neighbor check the mail and look after the house while he is on vacation without violating the gift requirements, regardless of whether the neighbor will seek a contract or approval from the agency.

Gifts received by public servants who have either suffered through events that require private financial assistance (such as an accident, illness, death, or unexpected catastrophe) or have other humanitarian needs (such as adopting a child) are not subject to the gift limit and are not reportable so long as certain criteria have been met.<sup>116</sup> The donor of the gift must either have a prior social relationship with the official (such as a relative, long-time friend, coworker, or member of the official’s church) or the payment must have been made without regard to the official’s status as a public servant under circumstances in which it would be common to receive community outreach.

112 California Code of Regulations, title 2, section 18942(a)(18)(A).

113 California Code of Regulations, title 2, section 18942(a)(18)(D).

114 California Code of Regulations, title 2, section 18942(a)(19).

115 California Code of Regulations, title 2, section 18942(a)(17).

116 California Code of Regulations, title 2, section 18942(a)(18)(B).

However, payments for acts of human compassion must not have been made by any of the following: (1) a lobbyist registered to lobby the official's agency; (2) a person who has, or may reasonably foreseeably have, a contract, license, permit, or other entitlement for use pending before the official's agency; or (3) a person (or agent) involved in a licensing or enforcement proceeding before a regulatory agency that employs the official and in which the official may reasonably participate, or has participated, within 12 months of the time the gift is made.<sup>117</sup>

#### 5.4.6 Weddings

Wedding gifts are not subject to the gift limit. They are, however, reportable and valued at one half of their total value.<sup>118</sup>

Additionally, public servants who attend a wedding or civil union do not receive a reportable gift subject to the gift limit if they receive a benefit that is substantially the same as the benefits received by the other guests in attendance.<sup>119</sup> Thus, public servants who attend a wedding and receive a wedding favor are not required to report the wedding favor on their Form 700 provided that the other guests in attendance also received that same wedding favor.

#### 5.4.7 Entertainment at Private Residence

A public servant who is entertained at someone else's home generally does not receive a reportable gift subject to the gift limit provided that the individual hosting the official is present. This means that the official and his or her spouse and family may receive food or occasional overnight lodging without triggering gift requirements, provided that the official has a relationship, connection, or association that is unrelated to the official's position, and the hospitality is provided as part of that relationship, connection, or association.<sup>120</sup> This "home hospitality" includes any food provided by other guests at the event (such as food brought by others) and benefits received by the official when the official serves as the host (such as a plant bought as a gift).

The definition of a "home" includes a vacation home owned or rented by the individual for use as his or her residence, which includes a timeshare with deeded ownership or a continual right-to-use ownership benefit. A "home" also includes a motor home or boat owned, rented, or leased by the person for use as his or her residence as well as any facility in which the individual has a right-to-use benefit by his or her home residency, such as a community clubhouse.

A public servant, though, may not apply this exception if any part of the cost of the hospitality provided by the host is paid directly or reimbursed by another person as the host would essentially be serving as an intermediary for the true donor. The official may, however, presume that the home hospitality cost is paid by the host unless the host discloses to the official (or it is clear from the surrounding circumstances) that someone else paid for the hospitality. The exception also does not apply if any part of the hospitality is deducted as a business expense on tax returns. Additionally, there must not be an understanding between the host and another person that any amount of compensation the host receives from that person includes a portion to be used to provide gifts of hospitality in the host's home.<sup>121</sup>

#### 5.4.8 Returning Gifts

Public servants who do not want to report a gift on their Form 700 or who do not want the gift may return the gift to the donor within 30 days of receipt, provided that it has not been used and the official receives nothing in exchange for returning the gift. The official may also donate the gift to a nonprofit 501(c)(3), so long as the official does not claim the gift as a charitable contribution for tax purposes and neither the official nor any member of his or her immediate family holds any position with the 501(c)(3).<sup>122</sup>

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117 California Code of Regulations, title 2, section 18942(a)(18)(D).

118 California Code of Regulations, title 2, section 18942(b)(2), section 18946.3.

119 California Code of Regulations, title 2, section 18942(a)(15).

120 California Code of Regulations, title 2, section 18942.2.

121 California Code of Regulations, title 2, section 18942(a)(7)(A),(B).

122 Government Code section 82028(b); California Code of Regulations, title 2, section 18941(c).

## 5.5 Common 1090 Issues

### 5.5.1 Public Servants Involved With Nonprofits

Where a public servant has a financial interest in a contract with a nonprofit organization, disclosure and abstention will not avoid a violation of Government Code §1090 unless the official's financial interest qualifies as a "remote interest" or "noninterest."<sup>123</sup> Service as an officer or employee of a tax exempt nonprofit entity generally qualifies as a "remote interest" under the Government Code.<sup>124</sup> Such interest must be disclosed and the governing body shall take action on the contract without counting the vote of the official with the remote interest.<sup>125</sup> Note that service as a non-compensated officer of certain nonprofits that "support the functions" of the governing body qualify as a "noninterest" under the Government Code and does not require recusal.<sup>126</sup> See Section 7.5.1.1 for more information on nonprofit organizations in general.

### 5.5.2 Vendors

Except in instances of actual necessity, Government Code section 1090 prohibits a local agency from purchasing products or ordering services from a vendor in which a public servant has an ownership interest, even if the public servant (e.g. board member) disqualifies himself or herself from any influence or participation in the purchasing or ordering decision.<sup>127</sup> This applies to board members even if local agency staff makes purchasing decisions without consultation or direction from the local agency board.<sup>128</sup> The fact that the board member would abstain from participating in purchasing decisions does not remove these contracts from the ambit of Section 1090. Where an officer is a member of a board that has the power to execute a contract, the member is conclusively presumed as a matter of law to be involved in the making of the board's contracts — regardless of whether the member actually participates in making the contract.<sup>129</sup> As for staff members, however, there is a conflict only if that staff member actually participates in making the contract.<sup>130</sup>

An exception exists, based on duration of a business relationship, which provides that an official has only a remote interest in a contract where the official has been a supplier of goods or services to the contracting party for at least five years before his or her most recent election to office.<sup>131</sup> "Contracting party" refers not to the government agency, but to the party doing business with the government agency.<sup>132</sup> Note also that if an official owns less than three percent of a business, and if five percent or less of the official's income derives from that business, the official is considered not to have an interest in a contract made with that business.<sup>133</sup>

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<sup>123</sup> See, generally, Government Code sections 1091-1091.5.

<sup>124</sup> Government Code section 1091(b)(1).

<sup>125</sup> Government Code section 1091(a).

<sup>126</sup> Government Code section 1091.5(a)(8).

<sup>127</sup> See, generally, 97 Ops.Cal.Atty.Gen. 70.

<sup>128</sup> *Id.*

<sup>129</sup> 89 Ops.Cal.Atty.Gen 49.

<sup>130</sup> *Fraser-Yamor Agency v. County of Del Norte* (1977) 68 C.A.3d 201.

<sup>131</sup> Government Code section 1091(b)(8).

<sup>132</sup> *Id.*

<sup>133</sup> Government Code section 1091.5(a)(1).

### 5.5.3 Remote Interests

Statutorily defined “remote” interests in a contract do not create a conflict if an officer publicly discloses his or her financial interest, abstains from influencing or attempting to influence any member of the body in the making of the contract, the interest is noted in the body’s official records, and the legislative body authorizes the contract in good faith by a sufficient vote without counting the vote of the party with the remote interest.<sup>134</sup> The remote interest exceptions apply only to members of multi-member bodies, not to individual decision makers or employees.

## 5.6 Mass Mailings

In general, local agencies are prohibited from using public funds for mass mailings. A mass mailing is more than 200 substantially similar items distributed by mail or other means in a calendar month featuring an elected officer affiliated with the local agency.<sup>135</sup> The Act prohibits the use of public funds to pay for mass mailings. A mass mailing may be a videotape, record, button or a written document.<sup>136</sup> Email blasts or website postings are not prohibited.<sup>137</sup>

Before sending out a mass mailing, Regulation 18901’s provisions should be closely scrutinized. What may appear to be a letter validly paid for with public funds may violate the mass mailing provisions. Letters that innocuously refer to an elected official and are prepared in cooperation with the elected official may result in the official being forced to reimburse the city for the cost of the mailing.

### 5.6.1 Method of Analysis

To determine whether a mailing falls within Regulation 18901(a) prohibitions, the following questions should be asked:

1. Is this mailing a mass mailing, i.e., are 200 substantially similar pieces of mail being sent out in a single calendar month?
  - » Was the mailing pursuant to an “unsolicited request?”
2. Will these items be delivered to the recipient at his or her:
  - » Home;
  - » Place of employment; or
  - » Post office box?
3. Do these items either:
  - » Feature an elected officer affiliated with the local agency; or
  - » Include the name, office, photograph, or other reference to the elected officer affiliated with the local agency; and
    - Did the local agency produce or send the mailing; and
    - Were these items prepared or sent with the elected officer’s consent?
4. Was the cost of distribution paid for with public funds; or
  - » Did more than \$50 of public funds go into the design or production of the item and were these costs paid with the intent of the item being sent with public funds?

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<sup>134</sup> See, Government Code section 1091; *see, also*, Government Code sections 1091.1-1091.4, 1091.5(a). These sections contain a long list of remote financial interests that have developed in response to court decisions and the Attorney General’s opinions.

<sup>135</sup> See Government Code section 82041.5.

<sup>136</sup> See California Code of Regulations, title 2, section 18901(a)(1).

<sup>137</sup> Goulet Advice Letter, No. 1-12-152 (2012).

5. Do any of the Regulation 18901(b) or Regulation 18901(c) exceptions apply to this mailing?
  - » Is the mailing a response to an unsolicited request?
  - » Is the elected official's name only contained in a letterhead/roster listing on the mailing?
  - » Is the elected official's name contained in a press release?
  - » Is the mailing part of inter/intra-agency communications?
  - » Is the mailing an attempt to obtain payment or collection of funds?
  - » Is the mailing essential to the functioning of a program?
  - » Is the mailing a legal notice?
  - » Is the mailing a general agency directory?
  - » Is the mailing a meeting notice?
  - » Is the mailing an agenda or similarly required writing?

After answering these questions, the following decision rules should be applied:

1. If the answer is no to any of questions 1-4, the mailing can be paid for with public funds.
2. If the answer to questions 1-4 is yes and the answer to question 5 is no, the mailing cannot be paid for with public funds.
3. If the answer to questions 1-4 is yes and the answer to question 5 is also yes, the mailing can be paid for with public funds.

### 5.6.2 Regulation 18901

Government Code section 89001 provides, "No newsletter or other mass mailing shall be sent at public expense." A literal reading of Section 89001 suggests that all mass mailings involving public funds, irrespective of content or purpose, are prohibited. In response to a variety of questions concerning the distribution of tax notices, tax refund checks, community college schedules, sample ballots, and other mass mailings customarily sent by government agencies, the FPPC adopted Regulation 18901 to clarify which mailings may be paid for with public funds and which may not.

Regulation 18901 is divided into three sections. Section (a) specifies the mass mailings prohibited by the Political Reform Act while section (b) specifies exemptions to the prohibition, and section (c) contains definitions.

#### ■ Four Part Test

Regulation 18901(a) provides that a mailing is prohibited only if it meets the following four requirements:

- i. The item is delivered to the recipient by any means;
- ii. The item either:
  - features an elected officer affiliated with the local agency which produces or sends the mailing, or
  - includes the name, office, photograph, or other reference to the elected officer affiliated with the local agency which produces or sends the mailing and the mailing is prepared or sent in cooperation, consultation, coordination or concert with the elected officer's consent;
- iii. The cost of distribution is paid for with public funds or more than \$50 in public funds are used to pay for design, production or printing costs with the intent of the item being sent with public funds; and
- iv. More than 200 substantially similar items were sent in a single calendar month, excluding any item sent in response to an unsolicited request and excluding any items excepted from the prohibition.

#### ■ Delivery

Regulation 18901(a) only restricts items that are mailed or delivered, by any means, to a person's home, place of employment or business or post office box. This means that none of the rules apply to anything on the Internet. Emails and website postings are not considered to be mailed or delivered because they are not tangible objects.<sup>138</sup> The local agency website may "feature" elected officials, unsolicited electronic newsletters that "feature" elected officials can be sent to more than 200 people, etc. See FPPC Advice Letters: Lacy A-06-017 and Rabenaldt A-08-131.

#### ■ Features

An item features an elected officer if it either 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. The layout of the document features the elected officer's name if it is emphasized through headlines, captions, type size, typeface, or type color. Under the regulation, if an item features an<sup>139</sup> elected officer and more than 200 of these items are delivered to a person's home, office, or post office box, it cannot be paid for with public funds.

#### ■ Affiliated With

An elected officer is affiliated with the local agency if he or she:

- » is a member, officer, or employee of the local agency, or of a subunit of the agency, like a committee;
- » has supervisory control over the local agency; or
- » appoints one or more members of the local agency.<sup>140</sup>

#### ■ Cooperation/Consultation

In addition, a mailing that is sent with the name, photograph, or signature of an elected officer affiliated with the local agency cannot be paid for with public funds if the mailing was prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.<sup>141</sup> If the mailing has not been prepared or sent in cooperation, consultation, coordination, or concert with the elected officer, use of his or her name is permitted provided the officer is not featured in the mailing. However, use of his/her signature is still prohibited.<sup>142</sup>

Thus, if the mailing is prepared by agency staff, completely independent of the elected officer affiliated with the local agency, the elected officer's name may appear in the mailing. However, his name may not be (featured) singled out for attention by the manner of display.

A mailing that does not include any reference to an elected officer who is "affiliated" with the agency that produces or distributes it is not subject to the restrictions of the regulation.<sup>143</sup>

#### ■ Use of Public Funds

As stated above, Government Code section 89001 prohibits the use of public funds for mass mailings or newsletters. Regulation 18901(a)(3) specifies that a mass mailing is sent at public expense within the meaning of Section 89001 if either 1) the cost or distribution of the mailing is paid for with public moneys, or 2) more than \$50 of public moneys are used to pay for the costs of design or production of the item, and 3) the design or production was done with the intent of mailing the item. Thus, items designed, produced and distributed at private expense are not subject to the restrictions of Regulation 18901.

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138 Goulet Advice Letter, No. 1-12-152 (2012).

139 California Code of Regulations, title 2, section 18901(c)(2).

140 California Code of Regulations, title 2, section 18901(c)(1).

141 California Code of Regulations, title 2, section 18901(a)(2)(B).

142 California Code of Regulations, title 2, section 18901(a)(2)(A).

143 California Code of Regulations, title 2, section 18901(a)(2).

### ■ Definition of “Substantially Similar”

Two items are substantially similar if any of the following applies:

- » The items are identical, except for changes necessary to identify the recipient and his or her address; or
- » 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; or
- » Both of the following apply to the items mailed:
  - Most of the bills, legislation, governmental action, activities, events or issues of public concern mentioned in one item are mentioned in the other; and
  - Most of the information contained in one item is contained in the other.<sup>144</sup>

Under the regulation, enclosure of the same informational materials in two items mailed does not, by itself, mean that two items are substantially similar. Informational materials include bills, public documents, or reports.<sup>145</sup>

### 5.6.3 Exceptions to Regulation 18901(a)

Regulation 18901(b) sets forth exceptions to Regulation 18901(a)’s prohibition on mass mailings. Regulation 18901(b) creates exceptions for mailings where an elected officer’s name is incidentally included in the item sent. Regulation 18901(c) defines mailings that are sent in response to unsolicited requests.

### 5.6.4 Regulation 18901(b) Exceptions

Following is a general description of the types of exceptions provided for in Regulation 18901(b).

#### ■ Letterhead/Roster Listing

The inclusion of the elected officer’s name or office in stationery letterhead, business cards or in a roster listing all of the elected officers in the agency is not prohibited. The use of an elected officer’s name and address in the envelope portion of a proposed mailing and on a detachable postcard falls within this exception. This exception does not permit the inclusion of an elected officer’s photograph or signature.

#### ■ Press Releases

Press releases disseminated to the press by the agency are not within the prohibition on mass mailings.

#### ■ Inter/Intra-Agency Communications

The prohibition does not apply to communications sent in the ordinary course of business between agencies or within an agency to employees, officers, deputies and other staff. However, the prohibition does apply to communications sent to former employees, officers, deputies, and other staff of the agency.

#### ■ Payment/Collection of Funds

Items sent in connection with the payment or collection of funds, such as tax bills, refund checks, and similar documents, may include the elected officer’s name, title, or signature if necessary to the payment or collection of funds.

#### ■ Essential Program Mailings

Items sent to program recipients, where the mailing is essential, may include the elected officer’s name, title, or signature if necessary to the functioning of the program.

<sup>144</sup> California Code of Regulations, title 2, section 18901(c)(3)(A)(1)-(3).

<sup>145</sup> California Code of Regulations, title 2, section 18901(c)(3)(B).



- **Legal Notices**

Items required to be sent by law, such as sample ballots, may include the elected officer's name, title or signature if necessary to the notice.

- **Directories**

General agency directories listing all the individuals in the agency may include an elected officer's name and title in the same type size, typeface, and type color as all other individuals listed.

- **Meeting Notices**

A single mention of an elected officer's name may be included in an agency's announcement of an officer agency event. The event must be one for which the agency is providing facilities, staff, or other financial support. A single mention is also permitted in a notice sent to an elected officer's constituents concerning a public meeting. The elected officer must plan the event, including making the financial arrangements; he or she must also attend and conduct the meeting; and the meeting must relate to the elected officer's officer duties.

- **Agendas and Other Required Writings**

The elected officer's name and title may appear in agendas and other writings required to be made available by specified statutory provisions.

### 5.6.5 Unsolicited Request Exceptions

Under Regulation 18901(c)(4), unsolicited requests do not fall within the prohibition on mass mailings. Such requests include:

- A written or oral communication (including a petition) which specifically requests a response and which is not requested or induced by the recipient elected officer or by any third person acting at his or her behest.
- An unsolicited request for continuing information. For purposes of the regulation, the continuing information request is considered unsolicited for a period 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.
- A communication sent by a newsletter or mass mailing recipient in response to an agency notice indicating that in the absence of a response, his or her name will be purged from the mailing list for the newsletter or mass mailing. The agency notice will not be deemed to be a solicitation if it is written in the following language: "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."
- 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.
- Requests for materials published in newspapers or other periodicals that are not published by elected officers.<sup>146</sup>

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<sup>146</sup> See, Proposed Rules of Professional Conduct Rule 1.13; See, also, ABA Model Rule 1.13.



## 1090: Prohibited Interest In Contracts In Depth

### 6.1 Application of Section 1090

Government Code section 1090 restricts local agency officers and employees from making a contract in which they are financially interested. The purpose of this “prohibition is to prevent a situation where a public servant would stand to gain or lose something with respect to the making of a contract over which in his or her official capacity he could exercise some influence.”<sup>147</sup> The basic prohibition of Section 1090 states as follows:

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

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#### ► **PRACTICE TIP: Terminology: Officers and Employers**

Government Code section 1090 et seq., uses the terms “officers” and “employees” to refer to the types of public servants that are subject to the disqualifying conflicts summarized in the chapters. Therefore, to the extent this chapter uses the term “public servant” (to be consistent with terminology use in the remainder of the Guide), it is important to remember that the “public servant must be an “officer” or “employee” to be subject to the requirements of Government Code 1090.

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Be cautious with the above-referenced Attorney General opinion and similar authority. While an employee may not be involved in “making” the contract, he or she could control how much of a product the agency uses and thus indirectly affect the contract by directly affecting the amount of the product purchased. In such circumstances, the answer could be different, depending on the facts presented.

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<sup>147</sup> *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867-868 n.5

Section 1090 is difficult to apply in many circumstances. The Legislature did not provide a definition of “financial interest” in the statute. That phrase is defined more by exceptions to Section 1090, rather than by a detailed elucidation of what is covered by Section 1090. These exceptions do not disclose any obvious theme or relationship, one to the other.

Cases interpreting the philosophy of Section 1090 offer the best guidance. To the judiciary, the purpose of Section 1090 is to make certain that:

The truism that a person cannot serve two masters simultaneously finds expression in California’s statutory doctrine that no public servant shall be financially interested in any contract made by that person or by any body or board of which he or she is a member.<sup>148</sup>

... the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all of this in his own favor.<sup>149</sup>

... every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public servants with a strong incentive to avoid conflict of interest situations scrupulously.<sup>150</sup>

In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of validity.<sup>151</sup>

Furthermore, “the statute not only strikes at situations that do involve actual fraud and dishonesty, but also at those in which the possibility exists for personal influence of an interested (officer) to be brought to bear, either directly or indirectly, on an official decision.”<sup>152</sup> Therefore, the public policy behind Section 1090 is to prevent actual self-dealing, negligent or inadvertent self-dealing, and even the appearance of self-dealing. As such, where application of a particular exception would appear to allow an official to be influenced by his or her personal interests as it relates to a contract, it is important to consider whether application of the exception offends the public policy behind Section 1090.

Another court has noted that Section 1090 should be construed broadly, to further the Legislature’s intent:

To construe [Section 1090] narrowly would permit certain categories of schemes and improprieties to go unchecked, a result which would undermine the public’s confidence not only in the government, but in the court system ruling on such cases. An important, prophylactic statute such as Section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled.<sup>153</sup>

In reviewing the following material relative to Section 1090 conflicts, it is important to keep in mind several important factors:

- The prohibition applies to employees who are involved in making a contract, even if they are not employees required to file statements of economic interests under the Political Reform Act.
- Section 1090 only applies to entering into or amending contracts or participating in their making. It likely does not apply to payments under existing contracts, but the Political Reform Act will usually apply to such payments.
- Section 1090 does not have a “reach-back” period. Thus, before a contract is entered into, an official can likely avoid a Section 1090 violation by divesting himself or herself from a financial interest. However, an official may not resign from

<sup>148</sup> *Thomson v. Call* (1985) 38 Cal.3d 633, 637 (citations omitted).

<sup>149</sup> *Id.* at p. 648; *see also Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 542.

<sup>150</sup> *Thomson v. Call* (1985) 38 Cal.3d 633, 649.

<sup>151</sup> *Id.* at 649.

<sup>152</sup> 66 Ops.Cal.Atty.Gen. 156, 160 n.3 (1983).

<sup>153</sup> *Carson Redev. Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1352.

office to avoid a 1090 problem.<sup>154</sup> Also, the Political Reform Act may still apply.

- The prohibition may apply even though the materiality of the financial effect involved would not trigger a conflict under the Political Reform Act and even where the official will not receive any direct financial benefit from the transaction.
- Employees and members of legislative bodies are treated differently, both in the case law and in the opinions rendered by the California Attorney General's Office. Be careful because it is easy to read the opinions and then use the terms officer, official, board member, and employee interchangeably. The general theme of the prohibition is extremely broad and philosophical while the statutory exceptions are narrowly drawn and more objective. Practice caution and continue the analysis after presumably qualifying for one of the exceptions.
- Government Code section 1090 applies to contracts in which a member of a legislative body has a financial interest differently than to contracts in which an employee has a financial interest. In the former situation, the agency cannot enter into the contract even if the member of the legislative body does not participate (assuming one of the statutory exceptions does not apply.) In the latter case, the entity can enter into the contract so long as the conflicted staff member does not participate.
- Willful violation of section 1090 may be punished as a felony.<sup>155</sup> Conviction could involve a prison sentence, disgorgement of anything received, and a lifetime bar from holding office in the State of California. Where the official enters into a contract that is later found to be in violation of Section 1090, the official has violated Section 1090. This is true even when the official did not intend to secure any personal benefit and when the official did not intend to violate Section 1090.<sup>156</sup>
- Government Code Section 1090 has several penalties. A felony charge may be brought against the public servant. In addition, a contract entered into in violation of Section 1090 is voidable.<sup>157</sup> It is very unlikely that a member of the legislative body who has a financial interest in a contract entered into by the legislative body will be guilty of a criminal act so long as the member does not knowingly and willfully participate in the entering into of the contract in any way.<sup>158</sup> The contract would still be voidable, but the member of the legislative body would not be criminally liable. Disgorgement of profits and disqualification from holding public office in California are also likely results of a 1090 violation. Refraining from any participation is a good practice for those situations in which it is uncertain whether the member has a financial interest.

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154 *Thomson v. Call*, (1985) 38 Cal.3d 633.

155 See Government Code section 1097.

156 See, e.g., *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201 (finding financial interest under section 1090 even where county supervisor, who was also a shareholder of an insurance brokerage firm, had abstained from participation on county insurance contracts, and had divested himself of all financial interest in insurance contracts between the county and various insurers, finding the success of the county contracts "in turn, enhances the value of [his shareholder] interest in the [insurance] agency").

157 Government Code section 1092.

158 *People v. Honig* (1996) 48 Cal.App.4th 289, 333-334.

## 6.2 How Section 1090 Works — An Overview

### 6.2.1 The Contract

- An officer, employee or elected official may not make a contract in his or her official capacity in which he or she is financially interested. Any participation in the process by which the contract is developed, negotiated and/or executed is a violation.
- No body or board may make a contract that is financially beneficial to one of its members even if the “interested” member does not participate and abstains from the decision/vote.
- Transactions not involving written contracts, such as sales, payment authorizations, purchases, or the making or receipt of a grant, can be contracts for purposes of Section 1090.
- If the governmental decision in question does not involve a contract, or if the contract is never executed, Section 1090 is not implicated. However, the Political Reform Act could still apply.

### 6.2.2 Implementation

A contract in which a public servant has a financial interest will be affected in one of the three following ways:

- **Bar to the Transaction.** If a member of the legislative body has a financial interest in the contract, the agency is precluded from entering into the contract, even if the interested member abstains. If a staff member has a financial interest in the contract, the agency can enter into the contract if the staff member does not participate in the entering into of the contract.
- **Remote Interest.** If the board member has a remote interest (as defined in Section 1091), the member does not participate in any manner, and abstains from the vote, the agency is not prevented from making the contract, provided the interest is noted in the official records of the agency. Remote interests do not apply to staff members, as they can always abstain. However, they can serve as a guide in determining what can constitute a financial interest. (See further discussion of remote interests, below).
- **Non-Interest.** If the interest matches one set forth in Section 1091.5, it is a non-interest and the interest will neither prevent the agency from entering into the contract nor prohibit the board member, officer, or employee from participating. Disclosure may be required.

## Remote Interests and Non-Interests, Organized by Topic

INTEREST	REMOTE INTEREST	NON-INTEREST
Officer, employee or member of nonprofit and/or tax-exempt corporations	Section 1091(b)(1) (officer or employee of nonprofit) and 1091(b)(7) (member)	Section 1091.5(a)(7) (unsalaried member); Section 1091.5(a)(8); (noncompensated) (Section 1091.5(a)(12) (historical resources) park/natural preservations)
Officer, employee, or agent of contracting party	Section 1091(b)(2); 1091(b)(3) (employee or agent); 1091(b)(16) officer or employee; (investor owned utility)	not applicable
Stock	Section 1091(b)(14)	Section 1091.5(a)(1) (corporate ownership as income)
Supplier of goods and services	Section 1091(b)(8)	not applicable
Family	Section 1091(b)(4) (parent)	Section 1091.5(a)(6) (spouse)
Attorney, stockbroker, insurance, real estate broker/agent, and director or 10 percent owner of (1) bank; or (2) savings and loan	Section 1091(b)(6) and (b)(10)	Section 1091.5(a)(10) and (a)(11)
Employee of consulting, engineering, architectural, or planning firm	Section 1091(b)(11)	not applicable
Salary, per diem, and reimbursement from a government entity	Section 1091(b)(13) (member of legislative body is employed by the department in second agency with which first agency is contracting)	Section 1091.5(a)(9) (different department of other contracting agency involved)
Reimbursement of expenses in performing official duties	Not applicable	Section 1091.5(a)(2)
Landlord or tenant	Section 1091(b)(5) (with contracting party)	Section 1091.5(a)(4) (with agency)
Subdivision of lands; ownership/interest	Section 1091.1	not applicable
Landowner voting districts	Section 1091.4	not applicable
Party to land conservation contract	Section 1091(b)(9)	not applicable
Elected officer, housing assistance and public housing	Section 1091(b)(12) (contract for housing assistance)	Section 1091.5(a)(5) (public housing tenant)
Settlement of litigation where board member is also a party	Section 1091(b)(15)	not applicable
Recipient of public services	Not applicable	Section 1091.5(a)(3)
Board member or commissioner in special circumstances	Section 1091.2 (local workforce investment board member); Section 1091.3 (county children and family commissioner)	Section 1091.5 (a)(13) (California Housing Finance Agency board member); Section 1091.5(a)(14) (board member/landowner contracts)



### 6.2.3 Effect of Violation

As noted earlier, the greatest difference between a violation of Section 1090 and a violation of the conflict of interest provisions of the Political Reform Act is that a contract made in violation of Section 1090 is void and unenforceable.<sup>159</sup> In addition, the official is subject to (1) criminal and civil penalties, (2) potential disgorgement of any consideration received or any property acquired in the transaction,<sup>160</sup> (3) imprisonment in state prison for a willful violation, and (4) is forever disqualified from holding any public office in California.<sup>161</sup>

Section 1090 requires disgorgement of any public funds paid under the contract, without requiring the public entity to restore the benefits it received under the contract.<sup>162</sup> Disgorgement of funds “is necessary and appropriate to serve the policies underlying Sections 1090 and 1092, including deterring the corruption of public servants and avoiding the appearance of impropriety.”<sup>163</sup>

Prosecution has traditionally been handled by the local district attorney’s office. Starting in 2014, the FPPC has jurisdiction to bring administrative or civil actions for violations of Section 1090, upon written authorization from the district attorney.<sup>164</sup>

In contrast, a violation of the Political Reform Act is punishable as a misdemeanor enforced by the district attorney or the California Attorney General, or by civil or administrative fines imposed by the FPPC, the district attorney or the Attorney General.

## 6.3 Persons Covered

Virtually all board members, officers, and employees and some consultants are “officers and employees” within the meaning of Section 1090. Reported decisions and Attorney General’s opinions have applied Section 1090 to council members<sup>165</sup>; county employees,<sup>166</sup> city employees,<sup>167</sup> contract attorneys,<sup>168</sup> some consultants,<sup>169</sup> school boards<sup>170</sup> and members of advisory bodies<sup>171</sup> (if the official participates in the making of a contract through their advisory function). On the other hand, a University of California faculty member is not covered under Section 1090,<sup>172</sup> nor is an independent contractor, at least for purposes of criminal

159 A similar result may ultimately occur under the Political Reform Act, but it is discretionary for the court. See Government Code section 91003: “If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void.”

160 *Thomson v. Call* (1985) 38 Cal.3d 633, 646-647.

161 Government Code section 1097.

162 *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 583; *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 2015 WL 632149.

163 See *Los Angeles Memorial Coliseum Commission v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 827-828 (agency stated cause of action for disgorgement of profits earned on ticket sales on events under a rental agreement; “it does not matter that the profits to be disgorged came from ticket sales to the public, as opposed to the ‘public funds’ of plaintiffs”).

164 Government Code section 1097.1(b).

165 *Thomson v. Call* (1985) 38 Cal.3d 633, 649.

166 *People v. Vallerger* (1977) 67 Cal.App.3d 847.

167 *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 568.

168 70 Ops.Cal.Atty.Gen. 271 (1987); *California Housing Finance Agency v. Hanover/California Mgmt. and Accounting Center, Inc.* (2007) 1148 Cal.App.4th 682 (outside counsel to state agency); *People v. Gnass* (2002) 101 Cal.App.4th 1271 (contract city attorney); *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533 (contract deputy city attorney); *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278 (special counsel for city).

169 46 Ops.Cal.Atty.Gen. 74 (1965) (financial consultant for bond issuance); *HUB City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114 (waste management consultant for city); but see *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469, 480 n.2 (noting that section 1090’s “application is expressly restricted to the public officials enumerated in that statute”).

170 Educ. Code section 35233.

171 *Millbrae Association for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222.

172 *People v. Lofchie* (2014) 229 Cal.App.4th 240.

prosecution.<sup>173</sup> Additionally, starting in 2015, individuals (whether public servant or private persons) can be held liable for aiding and abetting public servants in entering into unlawful contracts under Section 1090.<sup>174</sup>

## 6.4 Contract Must Be Involved

For Section 1090 to apply, a contract must be involved and since the statute uses the word “made,” a contract must be finalized before a violation of Section 1090 can occur. Any participation by an official in the making of the contract will result in a violation of Section 1090 if he or she had a financial interest within the meaning of the statute. Participation in the final approval or execution of the contract is not required “if it is established that [the public employee] had the opportunity to, and did, influence execution directly or indirectly to promote his personal interest.”<sup>175</sup>

The Attorney General recommends that when determining whether a decision involves a contract, one should refer to general contract principles. Many situations that have been evaluated by the courts and the Attorney General are enlightening when looking for authority in this area:

- A development agreement between the city and developer was a contract.<sup>176</sup>
- A decision by a hospital district to pay expenses for a board member’s spouse to accompany the board member to a conference was a contract.<sup>177</sup>
- A decision to exercise an option, modify, extend or to re-negotiate an existing contract invokes Section 1090.<sup>178</sup>
- A Memorandum of Understanding or collective bargaining agreement setting out the terms and conditions of employment of a class of employees is a contract.<sup>179</sup>

## 6.5 Participation in Making the Contract

### 6.5.1 Employees and Board Members Distinguished

Typically, the courts and the Attorney General’s office have distinguished between employees and members of multi-member boards, councils or commissions in determining whether a contract was approved in violation of Section 1090. The Attorney General’s pamphlet<sup>180</sup> states as follows:

Board members are conclusively presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified himself or herself from any and all participation in the making of the contract. Therefore, if a board member is financially interested in the contract and no exception applies, Section 1090 prohibits the contract from being made.

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173 *People v. Christiansen* (2013) 216 Cal.App.4th 1181 (declining to follow *HUB City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114). The lack of clarity in the applicability of section 1090 to independent contractors and consultants can be appreciated by comparing *Christiansen* to the cases discussed in footnote 169 (discussing whether consultants are covered by Section 1090). See also *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261.

174 Government Code section 1090(b) (superseding *D’Amato v. Superior Court* (2008) 167 Cal.App.4th 861 (finding no aider and abettor liability)). See 98 Ops.Cal.Atty.Gen. 12 (2015), and 99 Ops.Cal.Atty.Gen. 35 (2016).

175 *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.

176 78 Ops.Cal.Atty.Gen. 230 (1995).

177 75 Ops.Cal.Atty.Gen. 20 (1992).

178 *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191.

179 *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 21 Cal.3d 296, 304; *Glendale City Employees Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 334-338.

180 Reference to “The Attorney General’s pamphlet” refers to the pamphlet published by the Office of the Attorney General entitled *Conflicts of Interests* (126 pages, last published in 2010). Please refer to this publication for a complete analysis of section 1090 questions.

The California Supreme Court in *Thomson v. Call* stated that “[m]ere membership on the board or council establishes the presumption” of participation in a decision.<sup>181</sup> To that end, Section 1090 has been viewed as “forbidding city officers from being financially interested in any contract made by them in their official capacity or by the body or board of which they are members...”<sup>182</sup>

By comparison, when an employee (not a council/board member) is financially interested in a contract, the agency will be prohibited from making the contract only if the employee is involved in the contract-making process. So long as an employee plays no role whatsoever in the contracting process, either because it is outside the scope of his or her employment, or because the employee has disqualified himself or herself from participation, the agency is not prohibited from entering into the contract.

For example, the Attorney General has opined that firefighters were permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity.<sup>183</sup>

### ► PRACTICE TIP: Limits of “Official Capacity” Rule

Be cautious with the above-referenced Attorney General opinion and similar authority. While an employee may not be involved in “making” the contract, he or she could control how much of a product the agency uses and thus indirectly affect the contract by directly affecting the amount of the product purchased. In such circumstances, the answer could be different, depending on the facts presented.

Similarly, the Attorney General has concluded that the State Department of Forestry and Fire Protection may award a financial grant to a timber owner for planting, reforestation, and resource management even though the timber owner is a state employee since the employee’s duties did not relate to or affect the awarding of such grants. The employee had no involvement whatsoever “in his official capacity” in the awarding of the grant by the department. His sole involvement was that of a private landowner seeking financial assistance for timber land improvements consistent with the statutory objective.<sup>184</sup>

## 6.6 Virtually Any Involvement Qualifies

The general rule for determining when an official or employee has participated in “making a contract” has been expressed by the Court of Appeal as follows:

The decisional law, therefore, has not interpreted section 1090 in a hyper technical manner but holds that an official (or a public employee) may be convicted of a violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to and did influence execution directly or indirectly to promote his personal interest.<sup>185</sup>

181 *Thomson v. Call*, 38 Cal.3d at 649.

182 *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 215 (emphasis added).

183 80 Ops.Cal.Atty.Gen. 41 (1997). *See also* 63 Ops.Cal.Atty.Gen. 868 (1980) (a real estate tax appraiser employed by the county could purchase property within the county at a tax deed land sale where he/she did not participate in or influence the appraisal); *but see* Pub. Cont. Code section 10410 (prohibiting a contract between state employees and state agencies).

184 88 Ops.Cal.Atty.Gen. 56 (2005).

185 *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052 (emphasis added).

The Attorney General's Office and the California courts have applied Section 1090 to the following situations:

- Engaging in preliminary discussion, negotiations, compromises, reasoning, planning, and drawing of plans and specifications, and solicitation for bids.<sup>186</sup>
- Persons in advisory positions to the contracting agency insofar as these 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.<sup>187</sup>
- A contract for employment with a current board member which begins after the board member retires or resigns would create a conflict under Section 1090 unless no discussions concerning this took place prior to the date of resignation or retirement.<sup>188</sup>
- Resignation from office before the contract is executed.<sup>189</sup>
- Officers, employees and elected officials who participate in a decision to contract out their services who then contract with the agency to perform said services after they leave the agency.<sup>190</sup>
- Employees bidding on surplus real estate or personal property when they participated in their official capacity in setting up the sale process.<sup>191</sup>
- Providing consulting services in connection with revisions to the General Plan after participating in the policy decision to "contract out" much of the revision.<sup>192</sup>
- Hospital District (HD) entering into a lease with a healthcare district director of the HD is required to approve the lease under the terms of a separate lease between the HD and the healthcare district.<sup>193</sup>
- Obtaining a loan under a city loan program for developing businesses after leaving office when the official had participated in creation of the loan program before leaving office.<sup>194</sup>

## 6.7 If Section 1090 Applies, it Prohibits Even Desirable Contracts

Section 1090 can preclude otherwise desirable or necessary contracts. Section 1090 itself and the California courts have given no authority for entering into such contracts that would otherwise be desirable. Section 1090 cannot be overridden by public policy considerations. Unless the limited rule of necessity applies, the contract is prohibited.

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186 *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052, Citing to *Stigall v. City of Taft* (1962) 58 Cal.App.2d 565

187 *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley*, 80 Cal.App.3d 204, 212, 145 Cal.Rptr. 461 (1978) (member of parks and recreation commission cannot perform design services for city when commission recommended the project for which the services would be required, even though the commission had no authority to approve the contract.).

188 See Attorney General Indexed Letter No. IL 92-407 (June 2, 1992); *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572 (sanitation district board member accepted position as district manager before resigning from board). 81 Ops.Cal.Atty.Gen. 274, 278 (1998).

189 *Stigall v. City of Taft* (1962) 58 Cal.App.3d 562, fn. 15.

190 66 Ops.Cal.Atty.Gen. 156 (1983).

191 63 Ops.Cal.Atty.Gen. 19 (1980).

192 See Attorney General Indexed Letter No. IL 92-1212 (Jan. 26, 1993); Cf. 66 Ops.Atty.Gen. 156 (1983).

193 87 Ops.Cal.Atty.Gen. 92 (2004).

194 81 Ops.Cal.Atty.Gen. 317 (1998).

## 6.8 Financial Interest

### 6.8.1 Is There a Financial Interest?

For Section 1090 to apply, the public servant must have a financial interest in the contract in question. Unlike the Political Reform Act, Section 1090 applies regardless of the dollar amount or the effect of the contract on the financial interest.

The term “financial interest” is not defined in the statute; however, case law and the statutory exceptions to the basic prohibition make it clear that the term is to be liberally interpreted. The term can include both direct and indirect interests in a contract<sup>195</sup>.

“Section 1090 is concerned with all financial interests other than statutorily defined remote or minimal interests that prevent public servants from exercising absolute loyalty and undivided allegiance in furthering the best interests of their public agencies.”<sup>196</sup>

The term “financially interested,” as used in Section 1090, has been defined in layman’s terms in jury instructions in several cases as follows:

The phrase “financially interested” as used in Government Code Section 1090 means any financial interest which might interfere with a city officer’s unqualified devotion to his public duty. The interest may be direct or indirect. It includes any monetary or proprietary benefit, or gain of any sort, or the contingent possibility of monetary or proprietary benefits. The interest is direct when the city officer, in his official capacity, does business with himself in his private capacity. The interest is indirect when the city officer, or the board of which he is a member, enters into a contract in his or its official capacity with an individual or business firm, which individual, business firm, by reason of the city officer’s relationship to the individual or business firm at the time the contract is entered into, is in a position to render actual or potential pecuniary benefits directly or indirectly to the city officer based on the contract the individual or business firm has received.<sup>197</sup>

The following have been determined to give rise to the requisite financial interest:

- **County supervisor holding promissory note for printing business that does business with county.** A county supervisor sold his business to his son in return for a promissory note secured by the business. County printing contracts that were awarded to the son enhanced the security for the promissory note and, therefore, a financial interest existed.<sup>198</sup>
- **Council member involved in real estate transaction related to developer’s transaction with city.** Complex multi-party transactions involving the sale of property from a city council member to a developer for conveyance by the developer to the city were found to give rise to a financial interest.<sup>199</sup>
- **Shareholder in insurance firm, even though no compensation from agency contract.** A shareholder in an insurance brokerage firm who would not receive compensation or business expenses from the brokerage firm as a result of a contract with his agency was nonetheless interested in the contract.<sup>200</sup>
- **Contingent payment.** County employee had a financial interest in a contract where his private consulting contract was contingent upon execution of the county’s contract with the city.<sup>201</sup>

195 *Thomson v. Call* (1985) 38 Cal.3d 633, 645.

196 92 Ops.Cal.Atty.Gen. 19 (2009) (citing *Stigall v. Taft* (1962) 58 Cal.2d 565, 569).

197 *People v. Nast* (2002) 101 Cal.App.4th 1271, 1299, n. 9 (citing to decisions where this jury instruction has been approved); *People v. Honig* (1996) 48 Cal. App.4th 289, 322, 323, 332 (same). See also *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1231 (finding no financial interest of council members and that any interest would be too remote or speculative).

198 *Moody v. Shuffleton* (1928) 203 Cal.100.

199 *Thomson v. Call* (1985) 38 Cal.App.3d 633, 637.

200 *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201.

201 *People v. Vallerga* (1977) 67 Cal.App.3d 847.

- **Primary shareholder in contracting party.** City employee involved in purchasing books, awards a contract to a corporation in which, unknown to the city, he and his wife were primary shareholders.<sup>202</sup>
- **Goodwill to law firm partner, even on no fee contract.** The Attorney General has found a financial interest in a no fee contract with a law firm in which the council member is a partner — even where the firm agrees not to accept any fees for service. A financial interest will exist because the contract may serve as a potential financial loss to the public servant or indirect economic benefit in the form of prestige or goodwill.<sup>203</sup>
- **Private corporation loan to potential lessee of agency.** Harbor commissioner whose corporation loaned money to a corporation attempting to secure a lease from the commission while the loan was still outstanding, was financially interested in the contract.<sup>204</sup>
- **Spousal Property.** An official has an interest in the community and separate property income of his or her spouse.<sup>205</sup> A public servant has not only his own financial interests in a contract but also that of a spouse where he “stands in the shoes of his spouse” for purposes of Section 1090.<sup>206</sup> This interest exists even if there were a premarital agreement specifying that each spouse has no interest in the assets of the other.<sup>207</sup>
- **Contingency or Commission Contracts.** The Attorney General has opined that the terms of compensation packages for the City Attorney and other city personnel could make them financially interested in contracts to which the city is a party when compensation is based upon land values which the city attorney and other city personnel’s role in the process could affect and thereby divide their loyalty.<sup>208</sup>
- **Extortion payments.** An extortion payment solicited by a public servant in exchange for approval of a public contract creates an indirect financial interest.<sup>209</sup>

On the other hand, the Court of Appeal has found no financial interest where a nonprofit CEO negotiated with a hospital district (of which he was a board member) for a series of agreements that included the construction of a new hospital. In that case, the court found the CEO did not have a financial interest in the agreements because he did not receive any change in salary, benefits, or employment status as a result of the agreements.<sup>210</sup>

Additionally, the Attorney General has concluded that a redevelopment agency contract with an agency board member’s son, who lives with the board member in the same rented apartment, does not present a financial interest for purposes of Section 1090.<sup>211</sup>

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202 *People v. Sobel* (1974) 40 Cal.App.3d 1046.

203 86 Ops.Cal.Atty.Gen. 138 (2003).

204 *People v. Watson* (1971) 15 Cal.App.3d 28.

205 *Nielsen v. Richards* (1925) 75 Cal.App.680.

206 See *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, 659; *Nielsen v. Richards* (1925) 75 Cal.App. 680.

207 94 Ops.Cal.Atty.Gen. 22 (2011).

208 66 Ops.Cal.Atty.Gen. 376 (1983). See also, AG Opinion No. 12-409, January 28, 2016. 2015 WL 492900 (Cal.A.G.)...where contract city attorney had a financial interest in bond issuance by virtue of compensation as a percentage of the bond issuance; See also Pansky Advice Letter No. 14-096 (private construction attorney does not violate Section 1090 by handling litigation after providing legal advice on a matter where compensation for law firm contract “would be negotiated and determined in advance of any later litigation” and “does not involve a future separate contract.”)

209 *Carson Redev. Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1332.

210 See *Eden Twp. Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208.

211 92 Ops.Cal.Atty.Gen. 19 (2009) (finding a common law conflict of interest due to the appearance of impropriety, even though no financial interest existed under section 1090).

► **PRACTICE TIP: Strict or Relaxed Application**

Several decisions in the past 20 years<sup>212</sup> seem to depart from the past strict application of Section 1090, both in considering whether individuals are covered under Section 1090, and in finding qualifying non-interests. Until such time as the weight of judicial authority renders these decisions as the mainstream, it may be prudent to treat these decisions as limited to their fact situations.

## 6.8.2 Timing of the Financial Interest

An official who has contracted in his or her private capacity with the agency before the official is elected or appointed does not violate this section simply upon election or appointment, and the contract may continue for the duration of the contract. The official's election or appointment does not make the contract void.<sup>213</sup> However, when the time comes for the contract to be extended, re-negotiated or revised, the official faces a new set of problems and the official's position will usually prevent the agency from extending, revising or renegotiating the agreement.<sup>214</sup>

The Attorney General has analyzed a real property lease and water purchase agreement between a city and a general partnership where the general partner thereafter was elected to the city council. The agreement with the partnership required re-negotiation of the rental rate and water fees every five years in accordance with guidelines specified in the agreement. The Attorney General opined that at the end of the five-year period, the city council: (1) could not approve a change in the rental fees; (2) could not allow the rent or fee changes to be decided by a third-party arbitrator in accordance with an arbitration clause contained in the agreement; (3) could not allow the agreement to remain in effect with the previously set rent and fees; but (4) could approve a change in the rent and fees upon transfer of the council member's proscribed interest to another general partner, family member, unrelated third party or trust.<sup>215</sup>

### 6.8.2.1 Interests Acquired After the Fact

In *Thomson v. Call*,<sup>216</sup> the California Supreme Court stated the general rule relative to the temporal nature of an official's involvement as follows:

"Public officers 'are denied the right to make contracts in their official capacity with themselves *or to become interested in contracts thus made.*'"<sup>217</sup>

212 *Eden Twp. Healthcare Dist.*, 202 Cal.App.4th 208; *People v. Christiansen* (2013) 216 Cal.App.4th 1181 (finding consultant was not an "employee" subject to section 1090); *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1092 (finding non-interest where retirement board trustees' only financial interest was in benefits shared generally with their constituents); *City of Vernon v. Central Basin Municipal Water Dist.* (1999) 69 Cal.App.4th 508 (finding non-interest where water district board member who is also owner and officer of private water company purchased reclaimed water from water district).

213 *Beaudry v. Valdez* (1867) 32 Cal. 269.

214 84 Ops.Cal.Atty.Gen. 34 (2001) (section 1090 prohibits city council from modifying terms of ambulance contract with corporation of which mayor is sole shareholder); 76 Ops.Cal.Atty.Gen. 118 (1993) (renewal of cable television franchise held by a council member constitutes the "making of a contract" under section 1090, but would not be prohibited if the rule of necessity applies, depending on the facts).

215 81 Ops.Cal.Atty.Gen. 134 (1998); *see also* 81 Ops.Cal.Atty.Gen. 327 (1998)) (finding that a school district could not renew a contract with a probationary teacher now that the teacher's spouse has been elected to the school board).

216 *Thomson v. Call* (1985) 38 Cal.3d 633.

217 *Id.* at 645 (quoting *Stockton P.&S. Co. v. Wheeler* (1924) 68 Cal.App.592, 602).



The court went on to indicate:

“We have recognized an exception to this rule where the conflict arose after the award of the contract, but this exception turns upon the fact that no earlier agreement — express or implied — existed between the official and the entity contracting directly with the city.”<sup>218</sup>

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► **PRACTICE TIP: Acquisition after the Fact**

Caution should be exercised when relying on “acquisition after the fact” with this limited line of authority. As a practical matter, the public and district attorneys may be skeptical that the public servant had no intention of becoming financially interested in the contract at the time the local agency entered into the contract. In addition, this authority might not apply if the subsequent financial interest involves a new contract with the local agency, even if that contract is entered into after the public servant leaves office.<sup>219</sup>

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### 6.8.2.2 Avoiding the Conflict

At times the public servant must resign from office/employment or eliminate the private interest to avoid violating Section 1090. However, simply resigning a public position may not cure a conflict in all situations. Participation by a public official during the preliminary discussions relative to outside contracting would preclude that public official from becoming a contracting party or an employee of the contracting party after the public official leaves office or his or her appointment.<sup>220</sup>

Since board membership establishes a presumption of participation in forbidden contracts under its jurisdiction, a court would likely conclude that a board member had, as a matter of law, participated in the making of any contract, the planning for which had been commenced during the board member’s time in office.

Section 1090 does not have a “reach-back” provision. Under Section 1090, a public servant is not precluded from participating in a contract simply because the official received a gift or income from the source within 12 months prior to contract negotiations commencing, provided there is no expectation of future income or a gift from the same source. However, the Political Reform Act may exclude participation based on the public servants financial interest in the source.

Even though a public servant cannot resolve a Section 1090 issue by resigning from office prior to execution of the contract, a public servant likely can divest himself or herself from the financial interest before the contract is entered into in order to preserve the contract and avoid a Section 1090 violation.<sup>221</sup> However, the official might have violated the Political Reform Act if he or she participated in the contract before eliminating the financial interest in the contract.

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218 *Id.* citing: *City of Oakland v. Calif. Const. Co.* (1940) 15 Cal.2d 573, 577 (council member accepted employment with defendant construction company after council awarded contract to defendant and had no interest in the contract at the time it was awarded) and *Escondido Lumber Co. v. Baldwin* (1906) 2 Cal. App. 606, 608 (contractor who received construction contract from school district purchased — without previous arrangement or agreement — materials from corporation in which a school district trustee was a stockholder and officer).

219 81 Ops.Cal.Atty.Gen. 317 (1998) (prohibiting former council member from obtaining a loan under a city program, where council member participated in the approval of the loan program while she was (formerly) on the city council).

220 Government Code section 87407. This section applies to both state and local officials and provides that no public official shall make, participate in making or use his or her official position to influence any governmental decision directly relating to any person with whom he or she is negotiating or has any arrangement concerning prospective employment.

221 86 Ops.Cal.Atty.Gen. 187 (2003) (finding there would be no financial interest under section 1090 “if the board member first terminates his business relationship with the firm”).

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► **PRACTICE TIP: Candidate Briefings.**

Given the potential impacts of Section 1090 on elected officials, a pre-election or pre-appointment briefing of candidates who do business in or with the local agency would be helpful to avoid misunderstandings and surprises.

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## 6.9 Special Situations

### 6.9.1 Eminent Domain

A local agency cannot purchase property in which a member of its legislative body has a financial interest. However, absent peculiar facts, a local agency may condemn property in which a member of its legislative body has a financial interest.<sup>222</sup> As always, the public servant is interested in the proceedings, he or she must recuse himself or herself from the vote and all participation and the legal requirements of eminent domain procedures must be strictly followed.<sup>223</sup>

### 6.9.2 Subdivided Lands

A public servant who owns or has an interest in land to be subdivided will not be prohibited from subdividing that land, provided the interest is fully disclosed to the legislative body and the public servant does not vote upon any matter or contract concerning the subdivision in any manner.<sup>224</sup>

The Attorney General has also opined that a city council may enter into a subdivision improvement agreement and a reimbursement agreement with the landowner who is the employer of a member of the city council where each agreement is related to public improvements that are required by the Subdivision Map Act and the city's subdivision ordinances, provided the city council member discloses the interests and abstains.<sup>225</sup>

### 6.9.3 Real Estate Transactions

Real estate transactions in which a public servant has a financial interest are not void "in derogation of the interest of a good faith lessee, purchaser, or encumbrancer where the lessee, purchaser or encumbrancer paid value and acquired the interest without actual knowledge of a violation of any of the provisions of Section 1090."<sup>226</sup> It is unclear whether this provision applies only to persons purchasing or leasing property from a public agency, or whether it also applies to persons selling or leasing property to a public agency.

### 6.9.4 Employment Contracts

Section 1090 does not prohibit employees from negotiating the terms of their employment contracts directly with the local agency so long as they are acting solely in their private capacity.<sup>227</sup> The Attorney General has acknowledged that a public employee's contract may be renegotiated, "so long as the employee totally disqualifies himself or herself from any participation, in his or her public capacity, in the making of the contract."<sup>228</sup> Nevertheless, the Attorney General also stated that "when

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222 *Santa Clara Valley Water District v. Grosse* (1988) 200 Cal.App.3d 1363, 1369.

223 Government Code section 1091.6; *see also* Government Code section 1091(b)(15) (specified procedures to establish remote interest in settlement agreement where official is both a board member and party to the litigation). Subdivision (b)(15), to the extent it conflicts, supersedes prior Attorney General opinions on point (86 Ops.Cal.Atty.Gen. 142 (2003) and 91 Ops.Cal.Atty.Gen. 1 (2008)).

224 Government Code section 1091.1; *see also* 81 Ops.Cal.Atty.Gen. 373 (1998) (finding permissible a reimbursement agreement between the county and subdividers of a parcel where a member of the board of supervisors had an ownership interest in the parcel).

225 89 Ops.Cal.Atty.Gen. 278 (2006).

226 *See* Government Code section 1092.5.

227 *Campagna v. City of Sanger*, (1996) 42 Cal.App.4th 539-540.

228 Conflicts of Interest Guide, California Attorney General's Office, p. 66 (2010).

a contractor serves as a public official (e.g. a city attorney) and renegotiates a contract, this office recommends that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility of a misunderstanding about whether the contractor's statements were made in the performance of the contractor's public duties or in the course of the contractual negotiations."<sup>229</sup> Although this passage is not supported by references to legal authority, the Attorney General's recommendation merits consideration because the retention of legal counsel to conduct contract negotiations could provide additional factual support for the conclusion that the official is truly acting in his or her private capacity.

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► **PRACTICE TIP: Negotiating Employment Contracts**

When negotiating his or her employment contract or amendments thereto, the public servant should notify the city council or other persons with negotiating or contract-approval authority in writing that he or she is representing himself or herself in a personal capacity and not participating in the contract decision in an official capacity. Any letter or memorandum providing this notification should be not be on local agency letterhead.

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## 6.9.5 Effect of Special Statutes

Some statutes contain special provisions which alter or eliminate the general rules of Section 1090 in specific situations.

- Service to redevelopment agency. Health and Safety Code Section 33130 was found to take precedence over the more general law of Section 1090 in allowing an individual to be employed as both a consultant with the Redevelopment Agency and to serve as a member who served on an advisory panel reviewing and making recommendations on redevelopment bids.<sup>230</sup> The relevance of this provision is questionable given the dissolution of redevelopment.
- Successor agency board member with contract with city. A member of an oversight board of a successor agency (that oversees the wind-down of a former redevelopment agency's operations), appointed by the mayor or chair of the board of supervisors, as the case may be, from among specified current employees of the successor agency pursuant to Health and Safety Code sections 34179(a)(7), may participate in voting on a contract with the city as an enforceable obligation of the successor agency without violating Section 1090.<sup>231</sup>
- Small school district board members. The governing board members of school districts with an average daily attendance of 70 or less may contract with their districts under specified circumstances.<sup>232</sup>

Specific conflict of interest rule for board or commission. An act creating a board or commission that includes a very specific conflict of interest rule eliminates the need to consult either general statutes or the common law.<sup>233</sup>

Hospitals and health care districts. For special rules concerning hospitals and health care districts, see Government Code section 37625 (municipal hospitals), Health & Safety Code section 1441.5 (county hospitals) and Health & Safety Code section 32111 (health care districts).

- Health benefits for governing body members. A local agency may provide health benefits to the members of its legislative body, despite Section 1090's general prohibition against personal financial interests in such agreements.<sup>234</sup>

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<sup>229</sup> *Id.* at 67.

<sup>230</sup> *Old Town Dev. Corp. v. Urban Renewal Agency* (1967) 249 Cal.App.2d 313, 328-329.

<sup>231</sup> Health and Safety Code section 34179(a)(7).

<sup>232</sup> Education Code section 35239.

<sup>233</sup> 51 Ops.Cal.Atty.Gen. 30 (1968).

<sup>234</sup> Government Code section 53208; See also 89 Ops.Cal.Atty.Gen. 217 (2006).

Proper delegation of authority under specified conditions. Local agencies cannot “legislate around” the proscriptions of Section 1090 by delegating the authority to another body or employee to enter into a contract in which a member of the legislative body has a financial interest. However, in some limited circumstances, it may be possible for a local agency to enter into an otherwise prohibited contract if there was a proper delegation of authority already in existence prior to the consideration of the contract and/or charter or ordinance provisions which provide independent authority to contract on behalf of the agency, so long as the contract cannot be reviewed by the legislative body.<sup>235</sup>

## 6.10 Section 1091 Remote Interests of Board Members and Commissioners

Government Code Section 1091 provides that a public agency can enter into contracts in which a member of the legislative agency has a specifically defined “remote interest.” In order for Section 1091 to apply, the member of the legislative body must:

- Disclose his/her interest to the agency, board or body;
- Have it noted in the official records of that body; and
- Disqualify<sup>236</sup> herself or himself from any vote or deliberations on the contract and not attempt to influence other members of the legislative body on the contract.<sup>237</sup>

### ► PRACTICE TIP: Board Members

Section 1091 essentially treats members of a legislative body possessing one of the defined “remote interests” the same as staff members by allowing the contract to go forward if the official does not participate in the decision. The section technically does not apply to staff members, who can abstain in any event. However, it is a good idea to check Section 1091 when determining whether Section 1090 applies to a particular contract since it will be clear the staff member is financially interested in the contract if he or she has one of the enumerated “remote interests.”

### 6.10.1 Effect of Failure to Comply With Section 1091 Procedures

The willful failure of a public servant to disclose the fact of his or her interest in a contract pursuant to this section is punishable the same as any other violation of Section 1090 *et seq.*; however, the violation does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.<sup>238</sup>

<sup>235</sup> 97 Ops.Cal.Atty.Gen. 70 (2014) (“Absent independent authority, a contract made by the city staff with the city council member’s business is prohibited.”); 87 Ops.Cal.Atty.Gen. 9 (2004) (delegation of authority to school district superintendent did not avoid section 1090 conflict); *see also* 21 Ops.Cal.Atty.Gen. 90 (1953) (permitting deposit of city funds in bank partly owned by council member where city treasurer — not city council — had exclusive control over deposit of funds); 14 Ops.Cal.Atty.Gen. 78 (1949) (finding member of Legislature may enter into contracts for the sale of goods to the State, as legislator has no official connection with the Department of Finance, which is ordinarily involved in the approval of State contracts); 3 Ops.Cal.Atty.Gen. 188 (1944) (finding county courthouse gardener may sell goods to a county through county purchasing agent); but see Walter Advice Letter No. 15-050 (finding city manager may contract with consulting firm where council member’s spouse is employed, because city manager had independent authority to enter into contracts).

<sup>236</sup> The Attorney General has opined that disqualification is required, notwithstanding that section 1091(a) contains confusing language that could otherwise be interpreted to allow the vote or a vote of the officer with a remote interest, provided that the counting of that vote is not necessary for approval of the contract. The conclusion drawn by the Attorney General is the only reasonable one, particularly in light of section 1091(c) discussed in the footnote below.

<sup>237</sup> 83 Ops.Cal.Atty.Gen. 246 (2000) (describing section 1091’s procedures for officials with a remote interest). Government Code section 1091(c) provides that the remote interest exception is not applicable to any officer interested in the contract who influences or attempts to influence another member of the body or board of which he or she is a member to enter into the contract.

<sup>238</sup> Government Code section 1091(d).

## 6.10.2 Remote Interest Categories

- **An Officer or Employee of a Nonprofit Entity [1091(b)(1)]:** An officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) or a nonprofit corporation, except as provided in Section 1091.5(a)(8) [non interests], has a remote interest in his or her employment.<sup>239</sup>
- **Employee or Agent of a Private Contracting Party [1091(b)(2)]:** A local agency may purchase products from a company even though a council member, or his or her spouse, is an employee of the company and owns stock in the company where all of the following conditions are met:<sup>240</sup>
  - » The contracting party has 10 or more employees other than the council member or the member's spouse;
  - » The council member or the member's spouse was an employee for at least three years before the member took office;
  - » The council member or the member's spouse owns less than 3 percent of the shares and is not an officer or director; and
  - » The council member or the member's spouse did not directly participate in formulating the bid of the contracting party.
- **Special Contracts: Employees of Contracting Party [1091(b)(3)]:** This special exception will apply to an employee or agent of the contracting party if all of the following enumerated factors are present:
  - » The official is an officer in the local agency located in the county with a population of less than 4 million;
  - » The contract must be competitively bid, not for personal services, and the contracting party must be the lowest bidder;
  - » The official must not hold a primary management position with, nor be an officer or director of, the contracting party, nor hold an ownership interest;
  - » The official did not directly participate in formulating the bid of the contracting party;
  - » There must be at least 10 other employees; and
  - » The contracting party is the lowest responsible bidder.
- **Parent [1091(b)(4)]:** A parent has only a remote interest in the earnings of his or her minor child for personal services.<sup>241</sup>
- **Landlord or Tenant [1091(b)(5)]:** A public servant who is a landlord or tenant of the contracting party has a remote interest in contracts with that party.<sup>242</sup> It is unclear whether a remote interest would apply if the decision involves the very property in which the public servant is the landlord or tenant.
- **Attorney, Stockbroker, Insurance or Real Estate Broker/Agent [1091(b)(6)]:** This narrow exception applies to a member of a legislative body who is an attorney of the contracting party or an owner, officer, employee or agent of a firm which renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker or real estate agent/broker if the official owns 10 percent or more of the law practice or firm providing the services to the contracting party.<sup>243</sup> For the exception to apply, the official may not receive any remuneration, consideration or commission as a result of the contract. The Attorney General has limited the non-interest exception of 1091.5(a)(10) to providers of these specifically enumerated types of services.<sup>244</sup> The same result should hold for this remote interest exception.

239 See Government Code section 1091(b)(1); see also 89 Ops.Cal.Atty.Gen. 258 (2006) (council member concurrently president and spouse also an employee of nonprofit chamber of commerce); 85 Ops.Cal.Atty.Gen. 176 (2002) (council member concurrently executive director of nonprofit corporation).

240 Government Code section 1091(b) (2) overruling 81 Ops.Cal.Atty.Gen. 169 (1998).

241 See 88 Ops.Cal.Atty.Gen. 222 (2005).

242 See Government Code section 1091(b)(5); 89 Ops.Cal.Atty.Gen. 193 (2006) (city council may enter into subdivision improvement agreement with a condominium developer, where one council member is a renter at the complex being converted into condominiums).

243 Government Code section 1091(b)(6). For attorneys and agents/brokers who have less than a 10 percent ownership in their firm, see Government Code section 1091.5(a)(10).

244 85 Ops.Cal.Atty.Gen. 34 (2002).

■ **Member of a Nonprofit Corporation Formed Under the Agricultural Code or Corporations Code [1091(b)(7)]:**

This provision would only apply to a board member when the local agency is contracting with one of these nonprofit corporations for the sole purpose of engaging in the merchandising of agricultural products or the supplying of water.<sup>245</sup>

■ **Supplier of Goods and Services [1091(b)(8)]:** This remote interest exception can be confusing. The actual wording of the exception is as follows:

That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.<sup>246</sup>

While this exception seems simple and straightforward, it is not. First, and most importantly, this exception applies only to an official who has been supplying the goods and services to the party contracting with the local agency. The section does not apply to situations where the member of the legislative body has been directly supplying goods or services to the public agency. Public servants sometimes fail to understand the importance of this distinction.

It is also necessary to remember that the five-year rule runs from the beginning of the most recent term. Thus, this provision would prohibit a contract with a firm to which the council member had supplied goods and services for three years prior to first being elected or appointed to office, but would allow the same contract following the commencement of the second term of office, presuming at least one year had elapsed between the commencement of the first and second terms. Where there is an existing contract to provide goods or services to the agency, this contract can continue once the member is elected, but only for the term of that agreement and cannot thereafter be re-negotiated, amended or extended without encountering the Section 1090 issue unless the five-year time provision has been reached.<sup>247</sup>

The Attorney General has declined to find a remote interest under this exception, finding that a senior city staff member may not participate in negotiations and the drafting of an agreement with a developer, where the city staff member's spouse works for a company that provides outreach services for the developer, even though the spouse has no ownership interest in the company, will not work on the city's project, and his income will not be affected by the outcome of the proposed development.<sup>248</sup>

■ **Party to a Land Conservation Contract [1091(b)(9)]:** This exception allows some activity with respect to Williamson Act contracts;<sup>249</sup> however, in one opinion, the Attorney General has advised that county supervisors who had previously made these contracts could not participate in the vote to abolish future use of the contracts based on the common law prohibition against conflicts of interest.<sup>250</sup>

■ **Director or 10 Percent Owner of a Bank or Savings and Loan [1091(b)(10)]:** An official who is a director, or holds a 10 percent or greater interest in a bank or savings and loan has only a remote interest in the contracts of parties who are depositors, borrowers, creditors or debtors at the official's institution.<sup>251</sup>

<sup>245</sup> Government Code section 1091(b)(7).

<sup>246</sup> Government Code section 1091(b)(8).

<sup>247</sup> 76 Ops.Cal.Atty.Gen. 118 (1993).

<sup>248</sup> See 85 Ops.Cal.Atty.Gen. 34 (2002).

<sup>249</sup> See Government Code section 1091(b)(9).

<sup>250</sup> See Attorney General Indexed Letter IL 73197 (November 9, 1973).

<sup>251</sup> But see Government Code section 1091(a)(11) (officers, employees and persons holding less than 10 percent interest); Government Code section 1091.5(b) (competitively bid banking contracts).

- **Employee of a Consulting, Engineering or Architectural Firm [1091(b)(11)]:** An engineer, geologist or architect has a remote interest in a consulting, engineering or architectural firm so long as he or she does not serve as an officer, director or in a primary management capacity.<sup>252</sup> This remote interest exception should be construed narrowly to apply only to these enumerated professions.<sup>253</sup>
- **Housing Assistance Contracts [1091(b)(12)]:** This limited exception applies to an elected officer in any contract entered into pursuant to Section 8 of the United States Housing Act of 1937. Prior to that elected officer becoming subject to section 1090, and only with respect to specified types of tenants in certain circumstances.
- **Salary, Per Diem and Reimbursement from a Government Entity [1091(b)(13)]:** An official has only a remote interest in the salary, per diem and reimbursement received from a government entity.<sup>254</sup>

The Attorney General has determined that this remote interest exception does not apply to a situation in which the public servant has a personal financial interest in the terms of a contract between the governing body and its own employees and instead utilized the limited “rule of necessity” in allowing a board to re-negotiate the amount of health benefits provided in a collective bargaining agreement that affected one of its board members as a retiree from the district.<sup>255</sup>

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► **PRACTICE TIP: Boardmember/Employee for Different Local Agencies**

This remote interest exception also applies to contracts between two government entities where the board member of one is an employee or board member of the other. This remote interest exception needs to be analyzed concurrently with the similar non-interest exception in Section 1091.5(a)(9). The remote interest exception of Section 1091(b)(13) applies to a member of a legislative body who is employed by the same department in another government entity with which the first entity is contracting. Section 1091.5(a)(9) covers the situation where the contract involves a different department of the other contracting entity. By way of example, the remote interest exception of Section 1091(b)(13) applies to a situation in which a city is contracting for sheriff’s services with a county that employs the council member as a sheriff’s deputy.<sup>256</sup> The non-interest exception of Section 1091.5(a)(9) applies to a situation involving the same deputy sheriff/council member when the contract is with a different county department, such as the health department. This distinction is very difficult to apply when the other government entity does not have clearly defined departments. School districts often fall into this category.

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- **Stock Received As Compensation [1091(b)(14)]:** An officer or employee has a remote interest in stock in his or her employer or former employer received as compensation, so long as the stock equates to 3 percent or less of the shares of the company. This permits a company to contract with the agency where the officer or employee or his or her spouse has stock in the company that was derived from his or her former employment with the company.<sup>257</sup>

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252 See 77 Ops.Cal.Atty.Gen. 112 (1994) (finding remote interest inapplicable where partner of architecture firm also served on art commission board that was to consider and approve design of new airport terminal that was prepared by same architecture firm).

253 See 85 Ops.Cal.Atty.Gen. 34 (2002).

254 See also 83 Ops.Cal.Atty.Gen. 246 (2000) (finding council member to have a remote interest in making a city contract for sheriff’s services, where the council member also served as deputy sheriff). For reimbursement provided for actual and necessary expenses incurred in the performance of official duties, see Government Code section 1091.5(a)(2)). For payments made for health and welfare benefits to any member of a local agency’s legislative body, see Government Code section 53208.

255 89 Ops.Cal.Atty.Gen. 217 (2006).

256 See 83 Ops.Cal.Atty.Gen. 246 (2000).

257 For the non-interest exception covering ownership of stock in a corporation, if the association dividend income or other income from that corporation is below five percent of the public servant’s total annual income, see Government Code section 1091.5(a)(1).



- **Settlement of Litigation Where Board Member is also a Party [1091(b)(15)]:** A board member or council member who is a party to litigation involving the legislative body has a remote interest in any settlement agreement if specified conditions are satisfied.<sup>258</sup> This process for approval of a settlement, adopted by the Legislature in 2009, supersedes prior Attorney General opinions,<sup>259</sup> to the extent they conflict with this remote interest exception.
- **Officer or Employee of Investor-Owned Utility [1091(b)(16)]:** A board member of a local agency who is also an officer or employee of an investor-owned utility has a remote interest in a contract between the utility and the official's public agency, if the purpose of the contract is to encourage energy efficiency that benefits the public and if other specified conditions are met.
- **Other Remote Interests [1091.1 to 1091.4].** The Legislature has also established separate statutes for other remote interests relating to (1) subdivision of lands,<sup>260</sup> (2) local workforce investment boards,<sup>261</sup> (3) county children and family commissions,<sup>262</sup> and (4) landowner voting districts.<sup>263</sup>

## 6.11 Non-Interests Categories

Section 1091.5 sets forth circumstances which the Legislature has decided, as a matter of public policy, are exempt from the operation of Section 1090.

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### ► PRACTICE TIP: Non-Interests

The non-interests of Section 1091.5 are situations that might technically create conflicts under Section 1090, but are exempt from its operation. In other words, the interest is treated as no interest at all, and holding such an interest does not require disqualification, but may require disclosure.

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### ► PRACTICE TIP: Non-Interest May Point to Political Reform Act Conflicts

An interest that is a non-interest under this section might still create in rare situations a financial interest for the official under the Political Reform Act, if the Political Reform Act "would prohibit a contract otherwise allowable under Section 1090 *et seq.*"<sup>264</sup>

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### 6.11.1 Non-Interest Categories

An officer or employee shall be deemed to have a non-interest in a contract if his or her private interest is any of the following:

- **Corporate Ownership and Income [1091.5(a)(1)]:** This section exempts corporate ownership and income if the following are met:
  1. Public servant owns less than three percent of the shares of a for profit corporation;
  2. The total annual income to him or her of dividends from the company, including stock dividends, does not exceed five percent of his or her total annual income; and
  3. Any other payments made by the corporation do not exceed five percent of his or her total annual income.

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<sup>258</sup> Government Code section 1091(b)(15) (requiring, among other things, a court to find that the settlement agreement serves the public interest).

<sup>259</sup> See 86 Ops.Cal.Atty.Gen. 142 (2003) and 91 Ops.Cal.Atty.Gen. 1 (2008).

<sup>260</sup> Government Code section 1091.1.

<sup>261</sup> Government Code section 1091.2.

<sup>262</sup> Government Code section 1091.3.

<sup>263</sup> Government Code section 1091.4.

<sup>264</sup> 59 Ops.Cal.Atty.Gen. 604 (1976); Government Code section 81013 (providing that the Political Reform Act prevails over conflicting state law).

The Attorney General has interpreted the words “any other payments made” to include salary. Therefore, if the official is an employee as well as a stockholder, the exception will not apply unless the income received from the company is very small.<sup>265</sup> The Attorney General has interpreted this section to preclude a hospital district from entering into additional contracts with affiliated partnerships, or renew existing ones, where (1) the limited partnership interests held in the individual retirement account represented less than three percent (3 percent) of the affiliated partnerships interest, (2) the total distributions and other income from the affiliated partnerships do not exceed five percent (5 percent) of the total income of the district director and her spouse, and (3) the district, as a general partner in both affiliated partnerships, determines the amount of cash distributed by the partnerships. In that opinion, the Attorney General analyzed whether the interest at issue is limited to corporation shares or a share in a limited partnership.<sup>266</sup>

- **Reimbursement of Expenses [1091.5(a)(2)]:** An official or employee has a non-interest in reimbursement for his/her actual and necessary expenses incurred in the performance of his or her official duties.
- **Public Services [1091.5(a)(3)]:** An official has a non-interest in receiving public services provided by his or her agency or board as long as they are received in the same manner as members of the public.<sup>267</sup>

The Supreme Court has held this exception applies even to benefits provided to employees of the entity so long as the services are broadly available to others similarly situated, such as retirement benefits, rather than narrowly tailored to favor any official(s), and are provided on substantially the same terms for all affected officials.<sup>268</sup>

In an opinion interpreting the breadth of the “public services” non-interest, the Attorney General has found that a city council member may place a business advertisement in the city’s community services and activities brochure if the council member is charged the same rate as charged other business advertisers.<sup>269</sup> Additionally, the Attorney General has concluded that a mayor, who sits on a city council, and a city council member, may participate in a city program that provides funds to residents to make home improvements to mitigate the effects of aircraft noise.<sup>270</sup> The Attorney General has also concluded that members of a city airport commission may rent hanger space at the city airport if the space is rented on a first-come, first-served basis at set rates.<sup>271</sup>

However, an air pollution control district director may not participate in a district grant program, where the grant-award process required the exercise of judgment and discretion of district officials.<sup>272</sup> And a former council member may not participate in a loan program if the program was created while the individual was on the city council.<sup>273</sup>

- **Landlords and Tenants of Governments [1091.5(a)(4)]:** Public servants who are landlords or tenants of the local, state or federal government, or any arm thereof, have a non-interest in that government entity’s contracts unless the subject matter of the contract is the very land upon which he or she is either the landlord or the tenant. In the latter case, the official would have a remote interest rather than a non-interest and would be subject to the provisions of Section 1091.

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265 The Attorney General’s interpretation of this non-interest, found in 81 Ops.Cal.Atty.Gen. 169 (1998), gave birth to Senate Bill 281 (1998), which created a remote interest for an employee or agent of a private contracting party through Government Code section 1091(b)(2) (discussed in Section 6.10.2).

266 89 Ops.Cal.Atty.Gen. 69 (2006).

267 Government Code section 1091.5(a)(3).

268 *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1092 (finding that retirement board trustees’ approval of contracts, where their only financial interest was in benefits shared generally with their constituents, was a qualifying non-interest).

269 88 Ops.Cal.Atty.Gen.122 (2005); *see also City of Vernon v. Central Basin Municipal Water Dist.* (1999) 69 Cal.App.4th 508 (finding non-interest where water district board member who is also owner and officer of private water company purchased reclaimed water from water district).

270 96 Ops.Cal.Atty.Gen. 67 (2013).

271 89 Ops.Cal.Atty.Gen. 121 (2006).

272 92 Ops.Cal.Atty.Gen. 67 (2009).

273 81 Ops.Cal.Atty.Gen. 317 (1998).

- **Public Housing Tenants [1091.5(a)(5)]:** Public housing tenants may serve as housing authority commissioners or community development commissioners.
- **Spouses [1091.5(a)(6)]:** An officer or employee of a public agency has a non-interest in his or her spouse's employment or office if the spouse's employment or office holding existed for at least one (1) year prior to his or her election or appointment.<sup>274</sup> Although not explicitly stated, this provision has been assumed to apply to employment with the same public agency.

The Attorney General has interpreted this to allow (1) a trustee of a community college district board to participate in collective bargaining involving his spouse's bargaining unit, where such bargaining does not result in new or different employment for the spouse,<sup>275</sup> (2) the spouse of a school board member to transfer from one teaching position to another for the same compensation, but with different teaching duties,<sup>276</sup> and (3) the spouse of a school board member to have his or her teaching contract annually renewed so long as the spouse was not promoted or appointed to a new position.<sup>277</sup>

- **Unsalaries Members of a Nonprofit Corporation [1091.5(a)(7)]:** Unsalaries members of nonprofit corporations have a qualifying non-interest, provided the official's interest is disclosed at the time the contract is first considered, and noted in the official records. The Attorney General indicates that the reference to "members" excludes persons who serve as members of the board of directors of such organization.<sup>278</sup>

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► **PRACTICE TIP: Nonprofits**

It is important to also look at the remote interest exception of Section 1091(b)(1) and the non-interest exception of Section 1091.5(a)(8) when analyzing financial interests related to nonprofit entities.

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► **PRACTICE TIP: Terminology "Public Official"**

The Act and the implementing Regulations define and use the term "public official" to refer to the types of public servants that are subject to the disqualifying conflicts summarized in this chapter. Therefore, to the extent this chapter uses the term "public servant" (to be consistent with terminology used in the remainder of the Guide), it is important to remember that the "public servant" must be a "public official" to be subject to these disqualifying conflicts.

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- **Noncompensated Officers of Tax-Exempt Corporations [1091.5(a)(8)]:** An official has a qualifying non-interest where he or she is a non-compensated officer of a nonprofit, tax-exempt corporation which, as its primary purpose, supports the functions of the public body or board or to that the public body has a legal obligation to give particular consideration. The interest must be noted in the official records. The non-interest offers little guidance as to its application. However, the Attorney General offers the example of a nonprofit symphony association that may be organized to support a publicly operated symphony hall and symphony orchestra.<sup>279</sup> This exception might include an organization such as a YMCA with which the agency contracts for recreation programs. However, an official who serves as a noncompensated officer of

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274 See also the discussion earlier in this chapter about an official having a financial interest in the income of his or her spouse.

275 97 Ops.Cal.Atty.Gen. 62 (2014).

276 92 Ops.Cal.Atty.Gen. 26 (2009).

277 See 69 Ops.Cal.Atty.Gen. 225, 259 (1986); *but see* 81 Ops.Cal.Atty.Gen. 327 (1998) (school district cannot renew contract with probationary teacher now that spouse has been elected to the school board).

278 Attorney General's pamphlet, p. 19.

279 Attorney General's pamphlet, p. 75.

the YMCA may wish to seek advice from the Attorney General or FPPC before participating in the agency's decision to contract with the YMCA.

- **Contracts between Government Agencies [1091.5(a)(9)]:** The "government salary" non-interest exception, as with the corresponding remote interest exception,<sup>280</sup> "allow[s] exceptions from the general Section 1090 rule for "a person receiving salary, per diem, or reimbursement of expenses from a government entity."<sup>281</sup> The exception applies when "the contract involves no direct financial gain, does not directly affect the official's employing department, and is only with the general government entity for which the official works."<sup>282</sup> The interest must be disclosed to the board or city council when the contract is considered, and the interest must be noted in the official record.

The Attorney General has opined that a government employee who serves on the board of another public agency could vote on a contract between the agency and his government employer except when a contract involves his particular employing unit.<sup>283</sup> The official's interest in the other government agency must be noted in the official record.

For example, a deputy sheriff who sits on the city council where the city is considering securing law enforcement services from the county sheriff's department could not vote on that contract,<sup>284</sup> but could vote on a contract between the city and county to provide for the joint maintenance of roadways. Also, under the Section 1091(b)(13) remote interest exception, the city could enter into the contract if the council member does not participate in the decision to enter into the contract and satisfies the other requirements of Section 1091.

- **Attorney, Stockbroker, Insurance or Real Estate Broker/Agent [1091.5(a)(10)]:** If the attorney, broker or agent owns less than 10 percent of the firm, this non-interest exception may apply.<sup>285</sup> It is the companion to the remote interest exception in which the official owns 10 percent or more of the firm. It is important to remember, though, that the exception does not apply if the contract will result in more remuneration to the board member. In that case, the contract likely cannot be entered into. Under both Section 1091(b)(6) (remote interest) and Section 1091.5(a)(10) (non-interest), it is important to remember that the purpose of the provisions is to permit contracts that have a financial effect on clients of a board member or staff member or firms only if the board member does not represent the client with respect to the contract and will not represent the client in the future in implementing the contract. This provision is limited to the professions explicitly listed in the section.<sup>286</sup>
- **Officers, Employees and Owners of Less than 10 Percent of a Bank or Savings and Loan [1091.5(a)(11)]:** This non-interest is the companion section to the corresponding remote interest<sup>287</sup> exception, discussed above.
- **Nonprofit, Tax-Exempt Conservation/Park/Historical Resources Corporation and Its Employees [1091.5(a)(12)]:** This non-interest applies to bona fide nonprofit, tax-exempt corporations having among their purposes the conservation, preservation or restoration of park, natural lands, historic resources and employees of those organizations.
- **Employee, Officers and Board members of the California Housing Finance Agency [1091.5(a)(13)]:** This non-interest applies to officers, employees or members of the Board of Directors of the California Housing Finance Agency with respect to a loan product or programs under certain circumstances.

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280 Government Code section 1091(b) (13).

281 97 Ops.Cal.Atty.Gen. 62.

282 *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081, 1084 n.15 (rejecting argument that "government salary" non-interest applies to any interest in government salary as "considerably too broad," as it would mean that officials could hire themselves out for new positions, or modify their own salaries "without resort to the rule of necessity"); *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 950 (finding the "government salary" non-interest does not allow city manager and assistant city manager "to change the City's Supplemental Retirement Plan to benefit themselves").

283 78 Ops.Cal.Atty.Gen. 362 (1995); *Lexin*, 47 Cal.4th at 1081.

284 83 Ops.Cal.Atty.Gen. 246 (2000).

285 Government Code section 1091.5(a)(10).

286 85 Ops.Cal.Atty.Gen. 34 (2002).

287 Government Code section 1091(b)(10) (remote interest).

- **Special District Contracts with Board Member/Landowner [1091.5(a)(14)]:** This non-interest applies to public services contracts with special districts that require a person to be a landowner or represent a landowner to serve on the board, as long as the contract is on the same terms as if the person were not a board member.

## 6.12 Limited Rule of Necessity

The Attorney General and the courts have applied a limited rule of necessity to the application of Section 1090.<sup>288</sup> The rule of necessity allows a legislative body or its subsidiary body that has a duty to act upon a matter before it to do so even if one of its members has a financial interest in the contract that would otherwise prevent approval of the contract. The Attorney General has opined that where a government agency is the only entity capable to act in the matter, “the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty.”<sup>289</sup>

The rule of necessity has two facets, or factual circumstances, in which it will apply. The first facet of the rule concerns a situation where a board must contract for essential services and no source other than that which triggers the application of Section 1090 is available. The second facet of the rule of necessity focuses on the performance of official duties rather than upon the procurement of goods and services. The second facet is similar to the rule of necessity codified in the Political Reform Act.<sup>290</sup> The Attorney General and the California courts have applied this rule in a number of contexts.<sup>291</sup>

When the rule of necessity is applied to a member of a multi-member board, as opposed to a single official or employee, the board member must not participate in any manner. In the case of a single official or employee who is the only person legally allowed to make the decision to enter into the contract, the application of the rule of necessity permits the official or employee to participate in the making of the contract.<sup>292</sup>

The Attorney General has found that under the “rule of necessity” a health care district may advertise on a radio station where (1) the radio station is the only station that accepts advertising in the district’s region, (2) one of the district’s directors served as an employee of the radio station as an engineer and talk show host, (3) the district advertised on the radio station, (4) the station has six employees, (5) the district director’s compensation from the station exceeds fifty percent (50 percent) of his income, and (6) the district director does not have an ownership interest in the station or hold a supervisory or managerial position at the station.<sup>293</sup>

Additionally, the Attorney General has also concluded that a city council member may be paid a fee for performing drug testing of a city employee who was involved in a traffic accident, where the council member is the only certified and then-available drug tester in the area, time is of the essence, and the tester (council member) is paid on the same schedule and terms as any other tester.<sup>294</sup>

The Attorney General also applied the rule of necessity to allow a board to re-negotiate the amount of health benefits provided in a collective bargaining agreement that affected one of its board members as a retiree from the district.<sup>295</sup>

288 Since 2014, the FPPC has issued a number of informational letters and advice letters regarding Government Code section 1090. As relates to the rule of necessity, see Ramos Advice Letter No. A-14-15 and Hammond Advice Letter No. A-15-134.

289 70 Ops.Cal.Atty.Gen. 45 (1987).

290 See *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321 (1990) (suggesting that the rule of necessity set out in the Political Reform Act is a codification of section 1090’s judicially created “rule of necessity”).

291 See *Caminetti v. Pac. Mutual Ins. Co.* (1943) 22 Cal.2d 344, 366-367, explaining the rule of necessity in nonprocurement situations; *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321; 67 Ops.Cal.Atty.Gen. 378 (1984); 59 Ops.Cal.Atty.Gen. 604, 619 (1976); 57 Ops.Cal.Atty.Gen. 458, 463-465 (1974); 69 Ops.Cal.Atty.Gen. 102 (1986).

292 See 65 Ops.Cal.Atty.Gen. 305, 311 (1982).

293 88 Ops.Cal.Atty.Gen. 106 (2005).

294 91 Ops.Cal.Atty.Gen. 08 (2008).

295 89 Ops.Cal.Atty.Gen. 217 (2006).

On the other hand, the Court of Appeal has declined to apply the rule of necessity where a city manager and assistant city manager modified a retirement plan to provide themselves with unique benefits not provided to any other members of the plan.<sup>296</sup>

The Attorney General has also declined to apply the rule of necessity where a city wished to obtain products from a glass business half-owned by a council member, where no other business in the city supplied the same unique products, but there were other businesses in the general vicinity.<sup>297</sup> The FPPC has also issued a few advice letters on the rule of necessity.<sup>298</sup>

## 6.13 Contracts Made in Violation of Section 1090 are Void and Unenforceable

In addition to the penalties imposed on officials making contracts in which they have a financial interest, a contract made in violation of Section 1090 is void.<sup>299</sup> Payments made to the contracting parties under a void contract must be returned to the public agency and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits that it received under the contract<sup>300</sup>.

Every contract made in violation of Section 1090 may be avoided by any party except the official with the conflict of interest.<sup>301</sup> Despite the wording of the section “may be avoided,” case law makes it clear that any contract made in violation of Section 1090 is void, not merely voidable.<sup>302</sup>

Section 1090 does not, by itself, grant a cause of action to any taxpayer. Rather, only “taxpayers who otherwise have standing under Code of Civil Procedure section 526a or the common law may assert that a contract is in violation of Government Code section 1090.”<sup>303</sup> A taxpayer with standing may bring a Section 1090 cause of action on behalf of a public agency, but may generally do so only after first making a demand that the public agency act.<sup>304</sup> Additionally, the FPPC has jurisdiction to bring administrative or civil actions for violations of Section 1090, upon written authorization from the district attorney.<sup>305</sup>

## 6.14 Penalties for Violation by Officials

Any officer or person who is found guilty of willfully violating any of the provisions of Section 1090 is punishable by a fine of not more than \$1,000 or imprisonment in a state prison.<sup>306</sup> Starting in 2015, an individual can be prosecuted for aiding and abetting a violation of Section 1090, even if the individual does not have a personal financial interest in the outcome.<sup>307</sup>

For an official to act “willfully,” his or her actions concerning the contract must be purposeful and with knowledge that he or she might have a financial interest in the contract.<sup>308</sup> Whether the official knew the contract would actually violate Section

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296 *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 948-949.

297 97 Ops.Cal.Atty.Gen. 70 (2014).

298 *Ramona* Advice Letter, No. A-14-105 (2014); *Jernigan* Advice letter No. A-14-173 (2014).

299 See Government Code section 1097.

300 *Thomson v. Call* (1985) 38 Cal.3d 633.

301 Government Code section 1092.

302 *Id.*; *People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931.

303 *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679, 684-685 (emphasis in original).

304 *Gilbane Bldg. Co. v. Superior Court* (2014) 223 Cal.App.4th 1527, 1532-1533 (finding no demand required where demand would be “unavailing” because taxpayer alleged illegal expenditure of funds for unlawful purpose and “its management is in the hands of the persons accused of the wrongdoing”).

305 Government Code section 1097.1(b).

306 Government Code section 1097; *Klistoff v. Superior Court (City of South Gate)* (2007) 157 Cal.4th 469

307 Government Code section 1090(b) (superseding *D’Amato v. Superior Court* (2008) 167 Cal.App.4th 861) (finding no aider and abettor liability)).

308 *People v. Honing* (1996) 48 Cal.App.4th 289, 334339.

1090 is irrelevant for purposes of establishing a Section 1090 violation.<sup>309</sup> An individual convicted under Section 1090 is forever disqualified from holding any office in the State of California.<sup>310</sup>

The statute of limitations for a civil action to a contract made in violation of Section 1090 is four years after a party discovers, or should have discovered, the violation.<sup>311</sup> Thus, as a practical matter, even if a contract is made in violation of Section 1090, the passage of time could mean there would be no contract for the court to void due to the expiration of the statute of limitations.<sup>312</sup>

The statute of limitations for criminal prosecution of a violation of Section 1090 is three years after discovery of the violation.<sup>313</sup>

In a case where a city council member sought and obtained the appointment to the position of city manager and was later charged with violating Government Code Section 1090,<sup>314</sup> she asserted the defense of entrapment by estoppel, claiming that she acted in reliance on the advice of the city attorney. The Supreme Court held that the defense of entrapment by estoppel was not available to the defendant, as “the average citizen cannot rely on a private lawyer’s erroneous advice as a defense to a general intent crime.”<sup>315</sup>

When an agency is informed by affidavit that a board member or employee has violated Section 1090, the agency may withhold payment of funds under the contract pending adjudication of the violation.<sup>316</sup>

### 6.15 FPPC Advisory Authority

Since 2014, the FPPC has been authorized to issue written advice on Section 1090 questions. While the advice does not provide immunity from prosecution for a Section 1090 violation, the advice can be used as evidence of the official’s good faith, but only by the official who requested advice from the FPPC.<sup>317</sup> The use of an FPPC advice letter as a defense to a charge of violating Section 1090 is similar to the use of written advice from the FPPC to defend against a Political Reform Act civil or criminal proceeding.<sup>318</sup> The FPPC also has been granted investigative authority extending to section 1090 issues and may send referrals to the district attorney.

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309 *People v. Chacon* (2007) 40 Cal.4th 558, 570 (stating that “[a]n official is not required to know that his conduct is unlawful”) (emphasis in original).

310 Government Code section 1097.

311 Government Code section 1092(b).

312 *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350.

313 *People v. Honig* (1996) 48 Cal.App.4th 289, 304 n.1; Penal Code sections 801 & 803.

314 *People v. Chacon* (2007) 40 Cal.4th 558; *see also Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 274 (“reliance on legal counsel’s advice is not a defense to a section 1090 violation”).

315 *It* at 572.

316 Government Code section 1096.

317 Government Code section 1097.1(c).

318 Government Code section 83114(b) (providing that written advice from the FPPC is not “a declaration of policy by the Commission,” and that the advice “may provide guidance to others,” but only the official who requested the advice can claim immunity from FPPC administrative action).



## Disqualifying Conflicts Under the Political Reform Act

### 7.1 Introduction

Chapter 7.0 summarizes the rules for determining when a public servant is required by the Political Reform Act<sup>319</sup> to refrain from participating in a governmental decision in which the public servant has a financial interest. This chapter is focused on the rules found in the Act and the FPPC's implementing regulations.<sup>320</sup> This chapter does not address Government Code Section 1090 (see Chapter 6.0) or the "common law" (see Chapter 9.0) conflict of interest doctrine, which also can require a public servant to abstain from participating in a government decision.

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#### ► PRACTICE TIP: Terminology "Public Official"

The Act and the implementing Regulations define and use the term "public official" to refer to the types of public servants that are subject to the disqualifying conflicts summarized in this chapter. Therefore, to the extent this chapter uses the term "public servant" (to be consistent with terminology used in the remainder of the Guide), it is important to remember that the "public servant" must be a "public official" to be subject to these disqualifying conflicts.

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### 7.2 Basic Tenet

No public servant shall make, participate in making, or in any way attempt to use his or her position to influence a governmental decision if he or she knows or has reason to know that he or she has a financial interest in the decision.<sup>321</sup> A public servant has

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319 California Government Code, title 9, Chapter 7. (Government Code sections 87100 through 87450.)

320 California Code of Regulations, title 2, Division 6, Chapter 7, Article 1. (California Code of Regulations, title 2, sections 18700 through 18706.)

321 Government Code section 87100.

a disqualifying financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public servant's financial interests.<sup>322</sup>

There are two exceptions to the basic tenet that authorize a public servant to participate in a governmental decision that has a reasonably foreseeable material financial effect on his or her financial interest:

1. The public servant can demonstrate that the financial effect is indistinguishable from the effect on the public generally,<sup>323</sup> or
2. The public servant's participation is "legally required."<sup>324</sup>

There are also certain situations when a governmental agency may segment a governmental decision into separate decisions so that a public servant with a disqualifying financial interest may be required to recuse himself or herself from only one part of the segmented decision (in which the public servant has a disqualifying interest), while being permitted to participate in the remainder of the segmented decision (in which the public servant has no disqualifying interest).<sup>325</sup>

### 7.3 Transition from "Eight-Step" to "Four-Step" Process

After the operative date of the Act in 1975, the FPPC exercised its authority to adopt a series of regulations to implement the Act.<sup>326</sup> In the late 1990s, the FPPC undertook a "complete and thorough reorganization" of previous conflict of interest regulations, and the FPPC established an eight-step process for evaluating whether a public servant has a disqualifying financial interest in a governmental decision.<sup>327</sup>

In 2013, the FPPC announced a new plan to restructure the conflict of interest regulations.<sup>328</sup> This plan was primarily implemented during FPPC meetings held in 2012 through 2015.<sup>329</sup> In particular, the eight-step process was replaced by a four-step process. (See revised Regulation 18700.)<sup>330</sup>

322 Government Code section 87103; California Code of Regulations, title 2, section 18700(a).

323 Government Code section 87103; California Code of Regulations, title 2, section 18703.

324 Government Code section 87101; California Code of Regulations, title 2, section 18705.

325 California Code of Regulations, title 2, section 18706. "The decision in which the official has a financial interest is considered first and the final decision is reached by the local agency without the disqualified official's participation in any way; and once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified." [Comment by FPPC staff to draft Guide, Feb 2016.]

326 Government Code section 83112; California Code of Regulations, title 2, sections 18110 through 18997.

327 FPPC Staff Memorandum by Zackery P. Morazzini, General Counsel, "Adoption of Proposed Amendments to the Conflict of Interest Regulations," April 25, 2013. The eight-step test, which was documented in FPPC Regulation 18700, included the following steps: (1) Are you an official? (2) Are you participating in a governmental decision? (3) Do you have any economic interests? (4) Are your economic interests directly involved or indirectly involved in the decision? (5) Are the financial effects of the decision material? (6) Are the material financial effects of the decision reasonably foreseeable? (7) May you nevertheless participate in a decision in which you have a disqualifying interest under the "public generally" exception? (8) May you nevertheless participate in a decision in which you have a disqualifying interest under the "legally required participation" exception?

328 FPPC Memorandum, Morazzini, April 25, 2013.

329 The FPPC website ([www.fppc.ca.gov](http://www.fppc.ca.gov), see "Agendas for Commission meetings") includes the documents supporting the Commission's actions, including staff reports describing the history of past regulations and the bases for the updates. See the Past Agendas for Commission meetings on: August 16, 2012, Item 26 (foreseeability); April 25, 2013, Item 28 (four-part test); April 17, 2014, Item 41 (materiality standards for real property interests); January 15, 2015, Item 6 (materiality standards for financial interests in source of income, source of gift, and personal financial effect); February 19, 2015, Item 5 (reorganization of Regulation sections 18700 — 18706); May 21, 2015, Item 23 (consolidating ordinance clarifying rejuvenation sections 18704-18704.4).

330 FPPC Staff Memorandum by John W. Wallace, Assistant General Counsel, "Conflict of Interest Regulation Reorganization; Regulations 18700 et seq. through 18709," February 6, 2015, presented at the Commission meeting on February 19, 2015.

The four-step process consists of the following questions:

1. Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public servant's financial interests?
2. Will the reasonably foreseeable financial effect be material?
3. Can the public official demonstrate that the material financial effect on his or her financial interest is indistinguishable from its effect on the public generally?
4. If after applying the above analysis and determining that the public official has a conflict of interest, absent an exception, he or she may not make, participate in making, or in any way attempt to use his or her public servant position to influence the governmental decision.

As an overview, while the former eight-step process is completely reorganized into the new four-step process, many of the changes are refinements to what was substantively addressed in the previous eight-step process.<sup>331</sup> The most significant change with the four-step process is the deletion of the previous distinction between "direct" versus "indirect" interests, and its replacement with updated definitions of reasonable foreseeability<sup>332</sup> and materiality that incorporate that concept.<sup>333</sup> The new four-step process also embeds three of the previous eight steps into definitions. Thus, although the definitions of "public official,"<sup>334</sup> "governmental decision,"<sup>335</sup> and "financial interest"<sup>336</sup> are not identified as separate steps, they are threshold questions that must be addressed before beginning the new four-step process. Also, the updated regulations replace the phrase "economic interest" with "financial interest," to be consistent with the terminology used in the Act.<sup>337</sup>

## 7.4 Analytical Process: FPPC Regulation 18700

The FPPC's Basic Rule for analyzing potential conflicts of interest can be broken into three parts:

- Threshold Questions (addressed in subsection 7.5)
- The Four Step Process (addressed in subsection 7.6)
- Exceptions To Disqualification (addressed in subsection 7.7)

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331 FPPC Staff Memorandum from Assistant General Counsel Wallace, dated February 6, 2015, presented to the Commission on February 19, 2015, describes the reorganization from the eight-step to the four-step process.

332 California Code of Regulations, title 2, section 18701.

333 California Code of Regulations, title 2, section 18702.

334 California Code of Regulations, title 2, sections 18700(c)(1) and 18700(c)(2).

335 California Code of Regulations, title 2, sections 18700(c)(3), 18700(c)(4), and 18700(c)(5).

336 California Code of Regulations, title 2, section 18700(c)(6).

337 See Government Code section 87100; and California Code of Regulations, title 2, section 18700.

## 7.5 Threshold Questions

If any of the answers to the threshold questions explained below are “no,” then there is not a conflict of interest under the Act and there is no need to pursue the analysis further.

### 7.5.1 Is the individual a “public official” within the meaning of the Act?

The FPPC Regulations define “public official” to mean every member, officer, public official, or consultant of a state or local government agency, but lists certain exceptions.<sup>338</sup> The FPPC has determined that “member” does not include an individual who performs duties as part of a committee, board, commission, group, or other body that does not have decision-making authority.<sup>339</sup> In addition to the public officials required by Government Code section 87200 to file disclosure statements (“87200 Filers”), and designated public servants defined in Government Code section 82048 that are also required to file disclosure statements pursuant to Government Code section 87302(a),<sup>340</sup> certain other less obvious positions are discussed below.

#### 7.5.1.1 Members of Nonprofits

In limited circumstances, members of nonprofit organizations may be deemed “public officials” under the Act if the organization meets the *Siegel* Test (*In re Siegel* (1977) 3 FPPC Ops. 62).

The issue in *Siegel* was whether members of the board of the Pico River Water Development Corporation (the “Corporation”) were public officials under the Act by virtue of the Corporation being a local governmental agency. The Corporation had been formed pursuant to the California General Nonprofit Corporation Law (Corporations Code sections 9000, et seq.), and enjoyed tax-exempt status under state and federal law (Internal Revenue Code section 501(c)(4)). The FPPC, in determining the Corporation was a local governmental agency under the Act, assessed four criteria:

- Did the impetus for forming the entity originate with a local governmental agency;
- Is the entity substantially funded by, or is the primary source of funds, a local governmental agency;
- Was one of the principal purposes for forming the entity to provide services or undertake obligations which local governmental entities are legally authorized to perform or traditionally have performed; and
- Is the entity treated as a public entity by other statutory provisions.

Based on *Siegel*, various nonprofit or quasi-public entities may be deemed to be local governmental agencies and their board members and officers to be public officials within the meaning of the Act.

338 Exceptions pursuant to California Code of Regulations, title 2, section 18701(c)(1) are:

- “(A) A judge or court commissioner;
- (B) A member of the Board of Governors and designated employees of the State Bar of 9 California;
- (C) A member of the Judicial Council;
- (D) A member of the Commission on Judicial Performance, provided that he or she is 12 subject to the provisions of Article 2.5 (commencing with section 6035) of Chapter 4 of 13 Division 3 of the Business and Professions Code as provided in section 6038 of that article; and
- (E) A federal officer or employee serving in an official federal capacity on a state or local 15 government agency.

339 California Code of Regulations, title 2, section 18701(c)(2). A body possesses “decision-making authority” if:

- (i) It may make a final governmental decision;
- (ii) It may compel or 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
- (iii) It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another official or governmental agency.
- (iv) BUT NOT if it is formed or engaged for the sole purpose of researching a topic and preparing a report or recommendation for submission to another official or governmental agency that has final decision-making authority, and does not meet any of the three criteria set forth above in i-iii.

340 Also refer to each jurisdiction’s own Local Conflict of Interest Code.

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► **PRACTICE TIP: Nonprofit Organizations**

Pay close attention when reading regulations about nonprofits. Not all nonprofit organizations have the same standing under the Internal Revenue Code or State Law. For example, 501(c)(3) organizations (commonly called charitable organizations) are offered special treatment both in the Political Reform Act, as well as in Government Code Section 1090. For ease of reference, the following is a general synopsis of the various exempt organizations

\*501(c)(3) — charitable, religious, scientific, literary and other charitable organizations

\*501(c)(4) — civic leagues, community organizations, and other social welfare organizations

\*501(c)(5) — labor and agricultural organizations

\*501(c)(6) — trade associations, chambers of commerce, real estate boards, and other business leagues

\*501(c)(7) — hobby clubs, country clubs, and other organizations formed for social and recreational purposes

\*501(c)(8) or 501(c)(10) — lodges and similar order and associations

\*501(c)(19) — veterans' organizations

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### 7.5.1.2 Consultants

Consultants may also be deemed public officials under the Act. An attorney, architect, building contractor, auditor, engineer, reviewer/evaluator, planner, building inspector, or traffic engineer hired by a government agency may be a "consultant" under the Act with both disclosure and disqualification obligations. An individual is a consultant if either of the following apply:

- The individual serves in a staff capacity with the local agency and in that capacity performs the same or substantially all the same duties for the local agency that would otherwise be performed by an individual holding a position specified, or that should be specified, in the local agency's conflict of interest code; or
- The individual makes a governmental decision whether to:
  - Approve a rate, rule or regulation;
  - Adopt or enforce a law;
  - Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
  - Authorize the local agency to enter into, modify, or renew a contract provided it is the type of contract which requires local agency approval;
  - Grant local agency approval to a contract which requires local agency approval and in which the local agency is a party or to the specifications for such a contract;
  - Grant local agency approval to a plan, design, report, study or similar item; or
  - Adopt, or grant local agency approval of, policies, standards, or guidelines for the local agency or for any subdivision thereof.<sup>341</sup>

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341 California Code of Regulations, title 2, section 18700.3.

### 7.5.1.3 Professional Engineers and Surveyors

Section 87100.1 of the Act provides that a registered professional engineer or licensed land surveyor who renders professional services as a consultant to a local agency, either directly or through a firm in which he or she is employed or is a principal, does not have a financial interest in the governmental decision where the consultant renders professional engineering or land surveying services independently of the control and direction of the local agency and does not exercise decision-making authority as a contract local agency engineer or surveyor.

### 7.5.2 Is there a “governmental decision”?

A “governmental decision” means any action taken by a government agency that has a financial effect on any person other than the governmental agency making the decision.<sup>342</sup> “Governmental agency” under the Act means any state or local agency or any entity or organization acting as a governmental agency.<sup>343</sup> Certain nonprofit entities can be considered a governmental agency, as discussed above in Section 7.5.1.1. A “financial effect” means an effect that provides a benefit of monetary value or provides, prevents, or avoids a detriment of monetary value.<sup>344</sup>

### 7.5.3 Is there a “financial interest”?

“Financial interest” means anything or any person listed in subparagraphs (A-E) of Regulation 18700(a)(6), and includes an interest in the public servant’s own personal finances and those of a member of his or her immediate family.<sup>345</sup> These six categories of financial interests are summarized in subparagraphs 7.5.3.1 through 7.5.3.6 below, and include:

- Business entity investments;
- Real property;
- Sources of income;
- Business entity management or employment interests;
- Sources of gifts; and
- Personal finances.

For two categories of interests (business entity investments and real property), a public servant may have a financial interest based on an “indirect” investment or interest.<sup>346</sup> A public servant has an indirect investment or interest if the investment or interest is owned by:

- The public servant’s spouse or dependent child;
- An agent acting on behalf of the public servant; or
- A business entity or trust in which the public servant, or the public servant’s agents, spouse, and dependent children, own directly, indirectly, or beneficially at least a 10 percent interest.<sup>347</sup>

342 California Code of Regulations, title 2, section 18700 (c)(4).

343 California Code of Regulations, title 2, section 18700 (c)(3).

344 California Code of Regulations, title 2, section 18700 (c)(5).

345 California Code of Regulations, title 2, section 18700 (c)(6).

346 California Code of Regulations, title 2, sections 18700 (c)(6)(A) and (c)(b)(B).

347 Government Code sections 87103(e), 82033, and 82034; and California Code of Regulations, title 2, section 18700(c)(6)(F).

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► **PRACTICE TIP: Campaign Contributions**

Although campaign contributions are not considered to be a “source of income” when analyzing whether a public servant has a disqualifying financial interest, a public servant who willfully or knowingly accepts, solicits, or directs a campaign contribution of more than \$250 (within the twelve months preceding a government decision) is required to abstain from participating in a decision involving the campaign contributor. However, this abstention requirement only applies if the public servant is an elected or appointed officer, or a candidate for elective office, for a local government body that includes members who are not directly elected by the voters. For some examples: (1) if all members of a city council are directly elected by the voters, an incumbent member of council seeking reelection is not subject to these abstention requirements for a campaign contributor applying for a city approval; however, (2) an appointed member of a planning commission seeking election to the same city council is subject to these abstention requirements for a campaign contributor applying for a planning commission approval; and (3) an incumbent member of council, who also serves on a special district board with appointed members, and who is seeking reelection to the same city council is subject to these abstention requirements for a campaign contributor applying for a special district approval.<sup>348</sup>

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### 7.5.3.1 Business Entity Investment

A “business entity” in which the public servant has a direct or indirect investment worth at least \$2,000 is a financial interest.<sup>349</sup> Any entity operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association, is a “business entity.”<sup>350</sup>

For a business entity investment to be considered a potential financial interest for a public servant, the business entity (or its parent, subsidiary, or otherwise related business entity) must have some legal contact with the jurisdiction by either owning real property in the jurisdiction, or doing business, planning to do business or having done business within the jurisdiction at any time during the two years prior to the action.<sup>351</sup> In general terms, a business entity is a “parent” if it controls more than 50% of the voting stock of another corporation. A business entity is a “subsidiary” if more than 50 percent of its voting stock is controlled by another corporation. And business entities are “otherwise related” if a majority of the same people have a 50 percent or greater ownership or control over each business entity.<sup>352</sup>

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348 Government Code sections 84308, 82003, and 82041. The abstention requirements of section 84308(c) only apply to an “agency,” and “agency” is uniquely defined by section 82003 to specifically exclude a “local government agency whose members are directly elected by the voters” and “local government agency” is defined by section 82041 to mean “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.”

349 Government Code section 87103(a).

350 Government Code section 82005.

351 Government Code section 82034.

352 California Code of Regulations, title 2, section 18700.2.



### 7.5.3.2 Real Property

A financial interest is defined to include any real property in which the public servant has a direct or indirect interest of at least \$2,000.<sup>353</sup> The Act defines “interest in real property” to include any leaseholds, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public servant, or his or her immediate family if the fair market value of the interest is \$2,000 or more.<sup>354</sup> Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10 percent interest or greater.<sup>355</sup> Month to month tenancies are not considered an interest in real property.<sup>356</sup>

### 7.5.3.3 Source of Income

The Act generally defines a source of income<sup>357</sup> as any person or entity who makes payment to a public servant in an amount aggregating \$500 or more in value provided or promised to, or received by, the public servant within 12 months prior to the time when the decision is made.<sup>358</sup> Income is “promised to” the public servant if he or she has a legally enforceable right to the promised income.<sup>359</sup> A source of income includes a loan,<sup>360</sup> commission income, and incentive income.<sup>361</sup> A source of income also includes income from a nonprofit organization business entity that is a “parent, subsidiary, or otherwise related business entity,” as defined by the FPPC regulations.<sup>362</sup>

Income includes any community property interest in the income of a spouse.<sup>363</sup> Thus, because a community property interest is normally 50 percent of the spouse’s earned income, the threshold amount will typically be achieved if the spouse’s earned income from a particular source during the 12-month period is \$1,000 or more. “Income” does not include the separate property assets of the public servant’s spouse.<sup>364</sup>

### 7.5.3.4 What is Excluded from the Definition of “Income?”

“Income” does not include gifts<sup>365</sup> or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to public servant status.<sup>366</sup>

“Income” does not include any payment received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.<sup>367</sup>

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<sup>353</sup> Government Code section 87103(b).

<sup>354</sup> Government Code section 82033.

<sup>355</sup> Government Code section 82033.

<sup>356</sup> California Code of Regulations, title 2, section 18233.

<sup>357</sup> Subject to exceptions, summarized below.

<sup>358</sup> Government Code section 87103(c).

<sup>359</sup> California Code of Regulations, title 2, section 18700.1(a).

<sup>360</sup> The entire unpaid balance of the loan would constitute income until repaid. If the loan has been guaranteed by another party, the guarantor would become a source of income to the borrower/official, to the same extent as the lender and regardless of whether the guarantor actually pays off any of the debt. *Kronick Advice Letter*, No. A-91-400.

<sup>361</sup> Commission income and incentive income have lengthy definitions found in California Code of Regulations, title 2, section 18700.1(c) and (d).

<sup>362</sup> California Code of Regulations, title 2, section 18700.1(c)(6)(C); California Code of Regulations, title 2, section 18700.2.

<sup>363</sup> Government Code section 82030(a).

<sup>364</sup> For purposes of the Act and the implementing regulations, the term “spouse” shall include registered domestic partners recognized by state law. California Code of Regulations, title 2, section 18229.

<sup>365</sup> The “source of gift” requirements are summarized in subsection 7.5.3.6 of this Guide.

<sup>366</sup> Government Code section 82030.

<sup>367</sup> Government Code section 82030.

"Income" does not include any payment received from a former employer if (1) all payment from the employer was received by or accrued to the public servant before he or she became a public servant, (2) the payment was received in the normal course of the previous employment, and (3) there was no expectation by the public servant at the time he or she assumed office of renewed employment with the former employer.<sup>368</sup>

Also, payments made by developers and other applicants for the local agency's services in processing a permit, approval, or other form of entitlement from a local agency are deemed by statute to not be a source of income to a local agency public servant or consultant.<sup>369</sup> Finally, a long list of other specific exemptions from the definition of income is set forth in Government Code section 82030(b).<sup>370</sup>

### 7.5.3.5 Manager or Employee of a Business Entity

Any business entity<sup>371</sup> is a financial interest of a public servant if the public servant is a director, officer, partner, trustee, employee, or holds any position of management for the business entity.<sup>372</sup> Note that since this financial interest is specific to a "business entity," an uncompensated director to a nonprofit organization does not have a financial interest under this section. A compensated not-for-profit director would be considered under the source of income interest.

### 7.5.3.6 Source of Gift

If a public servant receives or is promised<sup>373</sup> a gift or gifts amounting to a total of at least \$460<sup>374</sup> from a donor (or intermediary or agent of the donor)<sup>375</sup> within 12 months before a governmental decision is made, then the donor of the gift is a financial interest of the public servant.<sup>376</sup> A gift made to a public servant's family member (including spouse or dependent child) will be considered a gift to the public servant unless, generally, there is an established relationship between the donor and the family member that would make the type of payment from the donor to the family member appropriate.<sup>377</sup>

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368 California Code of Regulations, title 2, section 18700.1, sub. (b).

369 Government Code section 87103.6.

370 Unlike gifts, if income is received and the check is cashed, the public servant cannot subsequently return the income to avoid a potential conflict of interest. On the other hand, the public servant can avoid a potential conflict by declining to accept promised income not yet paid. *Albano* Advice Letter, No. A-92-191.

371 Government Code section 82005.

372 Government Code section 87103(d).

373 California Code of Regulations, title 2, section 18941 defines "receipt" and "promise" of a gift, which is essentially when the official knowingly takes actual possession of the gift, or takes any action exercising direction or control over the gift.

374 Government Code section 87103(e); and California Code of Regulations, title 2, section 18940.2; the dollar threshold for gifts is effective between January 1, 2015 and December 31, 2016, subject to biennial adjustments by the FPPC, based on the Consumer Price Index.

375 California Code of Regulations, title 2, section 18945 establishes the parameters for determining whether the person delivering a gift to an official is the donor, or an intermediary or agent for the donor, including a presumption that the person delivering the gift is the donor per California Code of Regulations, title 2, section 18945(d).

376 Government Code section 87103(e); California Code of Regulations, title 2, section 18700(c)(6)(E).

377 California Code of Regulations, title 2, section 18943.

### ► **PRACTICE TIP: Resources on Gift Issues**

It is important to recognize that the gift thresholds for a public servant's disqualification from participating in a governmental decision, as summarized in this subsection 7.5.3.6, differ from the thresholds for reporting requirements and from prohibitions on the receipt of gifts. There are many helpful guides that will assist a practitioner in advising public servants regarding gifts, including an FPPC guide available on the FPPC website that summarizes thresholds for prohibitions, disqualifications, and reporting related to gifts, and publications from the Institute for Local Government that outline not only the various legal requirements, but also steps that may be taken by public servants to go beyond the minimum requirements of the law to avoid perceptions of a potential conflict of interest.

### ► **PRACTICE TIP: Prohibition from Accepting Honoraria or Certain Gifts**

If a public servant is an "87200 Filer" (e.g., mayor, members of the legislative body, commissioners, chief executives, general counsel, or public servant who manages public investments), the public servant is precluded from accepting: (a) any honorarium, or (b) any gift with a total value of more than \$460. If the public servant is identified as a "designated public official" with full disclosure on a local conflict of interest code, and a payment of a gift is required to be reported, the public servant is precluded from accepting from that source: (a) any honorarium, or (b) any gift with a total value of more than \$460. An "honorarium" generally includes any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering. The value of any gift is measured from each single source in a calendar year.<sup>378</sup>

A "gift" includes any payment that confers a personal benefit (or value) on the public servant, for which the public servant does not provide full consideration for the value of the benefit received.<sup>379</sup> A gift may include any "thing of value" to the public servant, whether tangible or intangible, including real or personal property, a good or a service provided to the public servant, forgiveness of a debt or obligation, or a rebate or discount in price for anything of value.<sup>380</sup> The value of a gift is determined by its fair market value.<sup>381</sup>

378 Government Code section 89501-89503 and California Code of Regulations, title 2, section 18940.2.

379 Government Code section 82028.

380 California Code of Regulations, title 2, section 18940. [Note: Regulation 18940 includes an inaccurate cross-reference to Regulation 18703.4, which was replaced by Regulation 18700, effective February 19, 2015.]

381 California Code of Regulations, title 2, section 18940. California Code of Regulations, title 2, sections 18946 — 18946.5 provide parameters for determining the value of particular types of gifts.

### 7.5.3.7 Exceptions to the Definition of “Gift”

Notwithstanding the relatively broad definition of a “gift,” summarized above, a donor is not a financial interest of a public servant if any one of the following exceptions applies:

- Exceptions for payments offered to a broad audience, not based on the public servant’s status:
  - » **A rebate or discount** is not a “gift” if it is offered in the donor’s ordinary course of business without regard to public servant status.<sup>382</sup> This exception does not apply, and a rebate or discount does create a financial interest, if it is made solely to the public servant or to a select group of specific public servants, such as one local agency or one department or unit within a local agency.<sup>383</sup>
- **Donations of leave time**, as a part of an employer’s bona fide emergency leave program that are available to all public servants in the same job classification, are not gifts.<sup>384</sup>
  - » **Disaster relief** of food, shelter, or similar assistance is not a gift if it is received from a governmental agency or a bona fide charitable organization without regard to public servant status.<sup>385</sup>
  - » **A prize or award** received in a manner not related to the public servant’s status, in a bona fide contest or game of chance, is not a gift.<sup>386</sup> But the prize or award could be considered “income” under the Political Reform Act.
- **Exceptions for payments related to the public servant’s official duties:**
  - » Payments for **travel, lodging, and subsistence** reasonably related to a legislative or **governmental purpose** are gifts, but are not prohibited or limited under the “gift” regulations.<sup>387</sup>
  - » Paid **admission** to an event, as well as **food** and nominal items (e.g., pens, paper, or stress balls), are not gifts if the public servant makes a **speech** at the event.<sup>388</sup>
  - » Paid admission to an event, show, or performance is not a gift if the public servant is **performing a ceremonial role** on behalf of the local agency. The ceremonial role must include a period of time in which the focus of the event is on the act performed by the public servant (e.g., cutting a ribbon, or presenting a certificate or proclamation); however, a local agency is authorized to establish a local policy to define “ceremonial” roles for its public servants if the policy is filed with the FPPC. This exception for payment for a public servant’s ceremonial role may include one guest, and any public servant assisting in the public servant’s ceremonial role.<sup>389</sup>
  - » **“Informational material”** is not a gift.<sup>390</sup> This generally includes any goods or services that serve primarily to convey information to assist the public servant in the performance of his or her duties, such as books, reports, pamphlets, calendars, periodicals, photographs, audio or video recordings, scale models, or on-site demonstrations or tours.
  - » **A campaign contribution** is not a gift if it is required to be reported under Chapter 4 of the Act.<sup>391</sup> Payments for travel in connection with campaign activities are not a gift.<sup>392</sup>

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382 Government Code section 82028; and California Code of Regulations, title 2, sections 18940 and 18941.

383 Government Code section 82028(b)(2); and California Code of Regulations, title 2, section 18940.1(e).

384 California Code of Regulations, title 2, section 18942(a)(9).

385 California Code of Regulations, title 2, section 18942(a)(10).

386 California Code of Regulations, title 2, section 18942(a)(14).

387 Government Code section 89506; and California Code of Regulations, title 2, section 18942(b)(1).

388 California Code of Regulations, title 2, sections 18942(a)(11) and 18950(a)(2).

389 California Code of Regulations, title 2, sections 18942(a)(13) and 18942.3.

390 Government Code section 82028(b)(1); and California Code of Regulations, title 2, sections 18942 and 18942.1.

391 Government Code section 82028(b)(4); and California Code of Regulations, title 2, section 18942(a)(4).

392 California Code of Regulations, title 2, sections 18942(a)(12) and 18950.3.

- » **Gifts to local agency.** A payment made by an individual to a local agency that is, in turn, paid to a public servant is not a “gift” to the public servant if (1) the payment is used for official agency business, (2) a local agency head determines and controls the use of the payment, (3) the local agency head does not pay himself or herself unless the local agency head is one of a general group who has access to the payment, and (4) the local agency reports all such payments on forms prescribed by the FPPC.<sup>393</sup>
- » **A ticket or pass** for admission to a facility, event, show, or performance **distributed by a local agency** to a public servant (other than an elected public servant) is not a gift, if the local agency exercises its discretion to distribute the ticket or pass for a public purpose in accordance with a policy adopted by the local agency (which restricts transfers of the ticket), and if the local agency reports the distribution on forms prescribed by the FPPC.<sup>394</sup>
- » **A prize won** by a public servant at a **raffle held by a local agency** is not a gift if the prize is paid for by another public servant, or if the prize is paid for by the local agency (by a lawful expenditure of public moneys).<sup>395</sup> A prize at such a raffle is a gift from an individual if the individual donated the prize to the local agency, and the local agency is the intermediary of the gift to the public servant.<sup>396</sup>
- **Exceptions for payments based on social customs:**
  - » **Wedding gifts** are not prohibited or limited under the gift regulations, but are reportable.<sup>397</sup>
  - » Benefits received as a guest at a **wedding** or civil union are not a gift, so long as they are substantially the same as benefits received by other guests.<sup>398</sup>
  - » **Bereavement** offerings typically provided in memory of and concurrent with the passing of a relative of the public servant are not a gift.<sup>399</sup>
  - » Any **devise or inheritance** is not a gift.<sup>400</sup>
  - » Benefits commonly exchanged between a public servant and an individual who is not a lobbyist, on a **holiday, birthday**, or other occasions, are not a gift, as long as the value of the benefits exchanged is not substantially disproportionate. These types of reciprocal exchanges typically include food, entertainment, and nominal benefits.<sup>401</sup>
  - » **“Acts of neighborliness”** that would not normally be part of an economic transaction between like participants under similar circumstances (e.g., loan of an item, an occasional needed ride, personal assistance in making a repair, or similar acts of ordinary assistance consistent with polite behavior in a civilized society) are not gifts.<sup>402</sup>
  - » A personalized **plaque or trophy** valued at less than \$250 is not a gift.<sup>403</sup>

393 California Code of Regulations, title 2, section 18944.

394 California Code of Regulations, title 2, section 18944.1.

395 California Code of Regulations, title 2, sections 18944.2, 18944.3, and 18944.1(a)(2).

396 California Code of Regulations, title 2, sections 18944.2(b)(1).

397 California Code of Regulations, title 2, section 18942(b)(2).

398 California Code of Regulations, title 2, section 18942(a)(15).

399 California Code of Regulations, title 2, section 18942(a)(16).

400 Government Code section 82028(b)(5); and California Code of Regulations, title 2, section 18942(a)(5).

401 California Code of Regulations, title 2, section 18942(a)(8)(A).

402 California Code of Regulations, title 2, section 18942(a)(17).

403 Government Code section 82028(b)(6); and California Code of Regulations, title 2, section 18942(a)(6).

- Exceptions for payments based on a personal relationship between an individual and the public servant:
  - » **Payment** from a specified member of the public servant's family is not a gift,<sup>404</sup> unless the family member is acting as an intermediary of a donor who is not a specified family member.<sup>405</sup>
  - » **"Home hospitality"** is not a gift.<sup>406</sup> Home hospitality generally includes food, typical home entertainment, or occasional overnight lodging provided by an individual to the public servant (and the public servant's family members who accompany the public servant) as a part of a relationship, connection, or association between the homeowner (or tenant) and the public servant that is unrelated to the public servant's position. The homeowner must be present for the exception to apply. Home hospitality does not include costs of hospitality that are paid by a person other than the homeowner (or tenant) with whom the public servant has a relationship.<sup>407</sup>
  - » **Reciprocal exchanges** made in a social relationship between a public servant and an individual (who is not a lobbyist), where the parties rotate payments on a continuing basis for social events or activities are not gifts, as long as each party pays for approximately his or her share of the costs of the continuing activities, and the total value of payments received by the public servant within the calendar year is not substantially disproportionate to the amount paid by the public servant (e.g. morning coffee, doughnuts, lunch, newspapers, etc.) Additionally, no single payment to the public servant may exceed the gift limit set forth in Regulation 18940.2 (i.e., \$460 as of the publication of this Guide). The types of social events or activities include lunches, dinners, rounds of golf, or attendance at a sporting event.<sup>408</sup>
  - » Any other payment to a public servant is not a "gift" if the payment is made by an individual who is not a lobbyist, and it is clear that the payment was made **because of an existing personal or business relationship** unrelated to the public servant's position and there is no evidence whatsoever at the time the gift is made that the public servant makes or participates in the type of governmental decisions that may have a reasonably foreseeable financial effect on the individual who is the source of the payment.<sup>409</sup>
- Exceptions for payments based on a personal relationship between an individual and the public servant or **acts of human kindness** (subject to limitations if the individual is a lobbyist or will have an action pending before the public servant):
 

Personal benefits commonly exchanged between two people on a **date or in a dating relationship** are not a gift. However, if the individual is a lobbyist, or it is reasonably foreseeable that the individual will have a matter pending before the public servant, as summarized below, the benefits will not be reportable as subject to limits, but can trigger disqualification under the conflict of interest rules.<sup>410</sup>

  - » Payments that are made by an individual to a public servant as an **act of human compassion** are not a gift if the payments are not based on the public servants' official status, and the type of assistance is commonly provided for the type of unexpected calamity or humanitarian efforts, based on either a personal relationship or common community outreach. The types of unexpected calamity or humanitarian efforts include accidents, illness, employment loss, death in the family, or expenses associated with the adoption of an orphaned child. However, if the individual is a lobbyist, or it is reasonably foreseeable that the individual will have a matter pending before the public servant, as summarized below, the payments will be a gift.<sup>411</sup>

404 Government Code section 82028(b)(3); and California Code of Regulations, title 2, section 18942(a)(3) identify the specified family members to include the official's: spouse or former spouse; child or step-child; parent; grandparent; grandchild; brother; sister; current or former parent-in-law, brother-in-law, or sister-in-law; nephew; niece; aunt or uncle; including grandnephew, grandniece, grand aunt, or grand uncle, or first cousin including first cousin once removed or the spouse, or former spouse, of any such person other than a former in-law.

405 California Code of Regulations, title 2, section 18945.

406 California Code of Regulations, title 2, sections 18942(a)(7) and 18942.2.

407 California Code of Regulations, title 2, section 18942(a)(7).

408 California Code of Regulations, title 2, section 18942(a)(8)(B).

409 California Code of Regulations, title 2, section 18942(a)(19).

410 California Code of Regulations, title 2, section 18942(a)(18)(A).

411 California Code of Regulations, title 2, section 18942(a)(18)(B).

- » A payment provided to a public servant by an individual is not a gift if it is based on a **long term, close personal friendship** unrelated to the public servant's position with the local agency. However, if the individual is a lobbyist, or it is reasonably foreseeable that the individual will have a matter pending before the public servant, as summarized below, the payment will be a gift.<sup>412</sup>
- » The limitations placed on the last two exceptions to the definition of "gift," as summarized above, are set forth in Regulation 18942(a)(18)(D), and generally provide that the exceptions **do not apply**, and the payment from the individual to the public servant is a "gift" if the individual is: (a) a person who may reasonably foreseeably have a **contract, license, permit**, or other entitlement for which the public servant may participate, and for 12 months following action on the entitlement; or (b) a person who may reasonably foreseeably have a license or enforcement proceeding for which the public servant may participate, and for 12 months following action on the **license or enforcement** proceeding.<sup>413</sup>

Even if a public servant receives a "gift" (based on the rules summarized above), a public servant does not "accept" a gift, and the donor is not a "financial interest" of the public servant, if the public servant takes any one of the following actions within 30 days of receipt:

- returns the gift to the donor (unused and without any value in exchange);
- donates the gift to a 501(c)(3) charitable organization (in which no position is held by the public servant or the public servant's immediate family), or to a governmental agency (unused, and without any tax deduction); or
- reimburses the donor for the value of the gift. Any such return, donation, or reimbursement must occur either:
  - » before the public servant participates in the governmental decision in question; or
  - » within two working days following the governmental decision in question, but only if (prior to participating in the decision) the public servant discloses the gift and its value, and declares that the return, donation, or reimbursement will occur within two working days following the decision.<sup>414</sup>

### 7.5.3.8 Personal Financial Interest

A public servant has a financial interest in his or her personal finances and those of his or her immediate family.<sup>415</sup>

#### ► PRACTICE TIP: Dependents

A child is considered a "dependent" for purposes of the Act if the child is under 18 years old and can be claimed as a dependent for federal income tax purposes.<sup>416</sup>

412 California Code of Regulations, title 2, section 18942(a)(18)(C).

413 California Code of Regulations, title 2, section 18942(a)(18)(D).

414 California Code of Regulations, title 2, section 18941.

415 California Code of Regulations, title 2, section 18700(c)(6).

416 *Ovrom* Advice Letter, No. A-02-254 (2014); *Ovrom* Advice Letter, No. A-02-306 (2014).



## 7.6 4-Step Process

### 7.6.1 Is it “reasonably foreseeable” that the decision will have a financial effect on any of the public servant’s financial interests?

#### 7.6.1.1 The Rule

The FPPC now takes a two-pronged approach:

- If the public servant’s financial interest is “explicitly involved” — a named party or the subject of the proceeding — then reasonable foreseeability is presumed.
- If not, then a financial effect is reasonably foreseeable and requires recusal if it can be recognized as a realistic possibility, but more than “hypothetical or theoretical,” that a public servant will be impacted financially by a governmental decision in which he or she is participating. This is a standard that requires much less certainty than the substantially likely (more than 50 percent likely) standard.<sup>417</sup>

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► **PRACTICE TIP: Disregard FPPC Opinions Prior to September 2012 on Issue of “Reasonably Foreseeable”**

Notwithstanding certain prior FPPC opinions, “reasonably foreseeable” does not mean “substantially likely” (more than 50 percent likely). The FPPC does not use the “substantially likely” standard. Instead, less than 50 percent likelihood is needed for an impact to be reasonably foreseeable. In light of this, be aware that many pre-September 2012 FPPC opinions cannot be relied on.

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The question is not whether the public servant is certain to benefit from the governmental decision, but whether the likelihood that he or she might benefit is so great that he or she would be subject to those temptations which the statute seeks to avoid. However, if the financial result cannot be expected absent extraordinary circumstances not subject to the public servant’s control, it is not reasonably foreseeable.<sup>418</sup> For these financial interests that are not explicitly involved, the FPPC provides a non-exclusive list of factors that must be considered:

- The extent to which the occurrence of the financial effect is contingent upon intervening events;
- Whether the public servant should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care;
- Whether the public servant has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public servant has a financial interest;
- Whether a reasonable inference can be made that the financial effects of the governmental decision on the public servant’s financial interest could compromise the public servant’s ability to act in a manner consistent with his or her duty to act in the best interests of the public;
- Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the public servant’s financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision; and
- Whether the public servant has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position.<sup>419</sup>

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417 California Code of Regulations, title 2, section 18701.

418 California Code of Regulations, title 2, section 18701.

419 California Code of Regulations, title 2, section 18701.

### 7.6.1.2 Exception — Licensed Professionals

There is also an express exception for licensed professionals:

“Possession of a real estate sales or brokerage license, or any other professional license, without regard to the public servant’s business activity or likely business activity, does not in itself make a material financial effect on the public servant’s economic interest reasonably foreseeable.”<sup>420</sup>

### 7.6.1.3 Examples

The FPPC relied heavily on its 1975 *Thorner* Opinion<sup>421</sup> in drafting the reasonable foreseeability standard. The facts of that opinion provide a useful example to consider when applying this rule. In *Thorner*, Water District Director Jack McPhail considered voting on a variance to the moratorium on water connections for a proposed building. He owned a supply company that would supply materials to the contractor who had submitted a bid to construct the building. The FPPC held in that case that “[t]he question is not whether he was certain to benefit from the contract, but whether the likelihood that he might benefit was so great that he would be subject to those temptations which the statute seeks to avoid.” Further, the FPPC wrote: “It is possible, of course, that there could be special circumstances present which would indicate that there is only a remote likelihood of McPhail’s being awarded a supply contract. For example, McPhail might have a reason for making a bid even though it is clear the contract will be awarded elsewhere. Under such circumstances, no financial effect on McPhail would be reasonably foreseeable and Director MacPhail would not be disqualified from participation in the variance decision.”

This rule can also be illustrated by these two examples.

First, assume a council member owns a hamburger franchise. Assume also that the council member has a right of first refusal for any new hamburger franchises in town. If a big box store seeks approval to open a new center and plans to include a fast food store in the center, even if a fried chicken place is more likely to be chosen, the fact that there is a realistic possibility that the burger franchise might be chosen gives rise to a conflict of interest for the council member.

Second, assume that a planning commissioner is an architect. If the commissioner would be one of four architects in the local agency’s jurisdiction that might receive a contract to design a proposed new development, recusal is required from a vote to approve entitlements for that new development.

### 7.6.2 Will the reasonably foreseeable financial effects be “material?”

The sections that follow describe the standards to apply to determine whether the financial effects of a decision will be considered material. There are different standards applicable to each of the financial interests described above. Notwithstanding the results of the application of these standards, the financial effect of a decision is not material if it is nominal, inconsequential, or insignificant.<sup>422</sup>

<sup>420</sup> California Code of Regulations, title 2, section 18701.1.

<sup>421</sup> FPPC Op. 75-089, 1 FPPC Op. 198, 1975 WL 37363.

<sup>422</sup> California Code of Regulations, title 2, section, 18702 (b). The “nominal, inconsequential, or insignificant” language was adopted by the FPPC in January 2015 and is not defined in the FPPC regulations. Practitioners should consult FPPC advice letters subsequent to January 2015 to determine how this language will be interpreted and applied.

### 7.6.2.1 Real Property

Different standards apply to real property, depending on whether the public servant's interest is located inside or outside a 500 foot radius from a project's boundaries.<sup>423</sup> Outside a 500 foot radius, the public servant must consider a number of factors to determine whether he or she can participate in a decision such as whether the decision will impact the development potential or income-producing potential of his or her property, or whether the decision will impact the use of his or her property or the character of the neighborhood in which his or her property is located (e.g., noise, traffic, view, privacy, etc.)<sup>424</sup> There is also a "catch all" provision which requires a recusal if a reasonably prudent person would believe that the governmental decision was of such a nature that the decision's reasonably foreseeable effect would influence the market value of the public servant's property.<sup>425</sup>

However, if the public servant's property boundary is within 500 feet of the subject property, the public servant may not participate in a decision unless he or she obtains written advice from the FPPC that the decision will have no measurable impact on the property.<sup>426</sup> If the public servant has a leasehold interest in property as opposed to an ownership interest, the regulations provide that a public servant's leasehold interest in property is material if the decision changes the termination date of the lease, or affects the potential rental value of the property, affects the rental value of the property and the public servant has a right to sublease the property, or changes the public servant's actual or legally allowable use of the real property, or impacts the public servant's use and enjoyment of the real property.

There are exceptions for real property and leaseholds, i.e., if the decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities, or upon the adoption or amendment of a general plan in certain described instances then the financial effect is not material.<sup>427</sup>

### 7.6.2.2 Business Entities

The Act identifies two distinct interests a public servant may have in a business entity. The first is where the public servant has "a direct or indirect investment worth two thousand dollars (\$2,000) or more," and the other is where the public servant "is a director, officer, partner, trustee, public official, or holds any position of management" in the entity.<sup>428</sup> The regulations establish a single standard to be applied to determine whether a decision will have a material financial effect on a business entity in which the public servant has an interest.<sup>429</sup>

If the business entity is a party to, or the subject of, the governmental decision, the financial effects of the decision will be deemed material, unless the business entity is the manufacturer of, or sales provider of, any products sold to the public servant's agency that aggregates to less than \$1,000 in any 12 month period.<sup>430</sup>

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423 California Code of Regulations, title 2, section 18702.2 (a) (11) appears to have an error in syntax. It provides: "(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18702.1." This regulation states on its face that there is a presumption of materiality if the decision affects the value of any property within 500 feet of the official's real property. (Real property value is not "located" anywhere, so the phrase "affecting real property value located within 500 feet..." is ambiguous.) Under this reading, there would be a conflict if the decision would affect the value of property 400 feet away from the official's property, even if the property that is the subject of the decision is 2,000 feet away from the official's property. That is probably not what was intended. This was probably intended to read: "Would consider any decision affecting the value of the official's real property when the real property subject to the decision is located within 500 feet of the property line of the official's real property. From reviewing the FPPC staff memorandum for the April 17, 2014 FPPC meeting, there does not appear to have been an intent to change the 500 foot measurement from the property line.

424 California Code of Regulations, title 2, section 18702.2.

425 California Code of Regulations, title 2, section 18702.2.

426 California Code of Regulations, title 2, section 18702.2.

427 California Code of Regulations, title 2, section 18702.2.

428 Gov. Code section 87103.

429 California Code of Regulations, title 2, section 18702.1.

430 California Code of Regulations, title 2, section 18702.1.

If the business entity is not a party to, or the subject of the governmental decision, the effects of the decision will be deemed material “if a prudent person with sufficient information would find that 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.”<sup>431</sup> In making this determination the applicable regulation requires that the public servant consider a number of factors relating to the effect of the decision on the legal, physical, and business environment in which the entity conducts its business.<sup>432</sup>

Notwithstanding the rule that the effects of a decision to purchase from an entity in which the public servant has an interest shall be deemed material, any financial effect on a business that occurs as a result of a travel payment made for food, lodging, transportation, or fuel, when the public servant is on public business shall not be deemed material, unless the purchase would contribute to a change in the value of the entity or its publicly traded stock.<sup>433</sup> This would allow a public servant to buy gasoline at an Exxon station while traveling on a conference on public issues, even though the public servant owned \$2,000 worth of Exxon stock.

### 7.6.2.3 Sources of Income

If the income received by the public servant is from the sale of goods or services in the ordinary course of business (including salary), the financial effects of a decision on the source of income will be considered material:

- If the source of income is a party to, or the subject of, the decision; or
- If the source is an individual, and the individual’s personal finances will be affected in the manner described in the standard applicable to personal finances (see section 7.6.2.5, below); or
- If the source is an individual, and the public servant knows or has reason to know the source has an interest in a business entity, or an interest in real property, and the source’s interests will be affected in the manner described in the standards applicable to business entities (see section 7.6.2.2, above) or real property (see section 7.6.2.1, above); or
- If the source is a nonprofit, and the nonprofit will experience a measurable benefit or loss<sup>434</sup> as a result of the decision; or
- If the source is a nonprofit, and the public servant knows or has reason to know the nonprofit has an interest in real property, and the nonprofit’s interests will be affected in the manner described in the standards applicable to real property (see section 7.6.2.1, above); or
- If the source of income is a business entity, and the business entity will be affected in the manner described in the standard applicable to business entities (see section 7.6.2.2, above).<sup>435</sup>

#### *Retail Sales*

The Act contains an exception to the rules pertaining to sources of income when the income is derived from the retail sales of a business entity. Retail customers of entities engaged in the retail sale of goods or services to the public generally are not considered sources of income to a public servant who owns a 10 percent or more interest in the entity, if the customers of the business constitute a significant segment of the public generally, and the amount of income received by the business from the customer is not distinguishable from the amount of income it receives from its other customers.<sup>436</sup> A business’ customers constitute a significant segment of the public generally if the business is open to the public, and provides goods or services to customers that represent a broad cross

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431 California Code of Regulations, title 2, section 18702.1.

432 California Code of Regulations, title 2, section 18702.1.

433 California Code of Regulations, title 2, section 18702.1.

434 This new standard of “measurable benefit or loss” was adopted by the FPPC in February 2015 and is not defined in the FPPC regulations. Practitioners should consult FPPC advice letters subsequent to February 2015 to determine how this language will be interpreted and applied.

435 Government Code section 87103.5 and California Code of Regulations, title 2, section 18702.3.

436 California Code of Regulations, title 2, section 18702.3.

section of the jurisdiction, as opposed to any specialized occupation, profession, or business. Income received from a particular customer is considered indistinguishable from the amount received from other customers when the business is of the type that sales to any one customer will not have a significant impact on the business's annual sales, or the business has no records or other information that would allow the public servant to determine whether the customer provides significantly more income to the business than the average customer.<sup>437</sup>

### ***Sale of Property***

If the income is received from the sale of the public servant's real or personal property (or the community property of the public servant's spouse), the financial effect of the decision is material if the public servant knows or has reason to know that the purchaser of the property is a party to, or the subject of, the decision, or if the public servant knows or has reason to know that the purchaser has an interest in a business entity, or an interest in real property, and the purchaser's interests will be affected in the manner described in the standards applicable to business entities (see section 7.6.2.2, above) or real property (see section 7.6.2.1, above).<sup>438</sup>

Any effect on a source of income to a public servant will be deemed material if the public servant received the income to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the decision.<sup>439</sup>

### **7.6.2.4 Sources of Gifts**

The Act requires that a public servant consider the financial effects of a governmental decision on a source of gifts if the aggregated value of gifts received from the source equal or exceed \$460 during the 12 month period before which the decision is made.<sup>440</sup> If the public servant receives gifts from a single source that meet this threshold, the financial effects of a decision on the source of gifts will be considered material as follows:

- If the source of gifts is a party to, or the subject of, the decision; or
- If the source is an individual, and the individual's personal finances will be affected in the manner described in the standard applicable to personal finances (see section 7.6.2.5, below); or
- If the source is an individual, and the public servant knows or has reason to know the source has an interest in a business entity, or an interest in real property, and the source's interests will be affected in the manner described in the standards applicable to business entities (see section 7.6.2.2, above) or real property (see section 7.6.2.1, above); or
- If the source is a nonprofit, and the nonprofit will experience a measurable benefit or loss<sup>441</sup> as a result of the decision; or has an interest in real property, and the nonprofit's interests will be affected in the manner described in the standards applicable to real property (see section 7.6.2.1, above); or
- If the source is a business entity, and the business entity will be affected in the manner described in the standard applicable to business entities (see section 7.6.2.2, above).<sup>442</sup>

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437 California Code of Regulations, title 2, section 18702.3.

438 California Code of Regulations, title 2, section 18702.3.

439 California Code of Regulations, title 2, section 18702.3.

440 California Code of Regulations, title 2, section 18702.4.

441 See footnote 434 of this Guide, regarding measurable benefit or loss.

442 California Code of Regulations, title 2, section 18702.4.

### 7.6.2.5 Personal Finances

The Act prohibits a public servant from being involved in governmental decisions when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the public servant, or on a member of his or her immediate family.<sup>443</sup> An effect on the public servant, or a member of his or her immediate family, that does not affect one of the financial interests described in sections 7.6.2, is referred to as an effect on the public servant's personal finances. If a decision affects real property or a business entity in which the public servant has a financial interest, the personal finances standard is not applied, and materiality is determined by application of the real property or business entity standard.<sup>444</sup>

Financial effects on a public servant's personal finances are deemed material if the public servant, or his or her family member, will receive a measureable financial benefit or loss from the decision.<sup>445</sup> There are several exceptions to this rule that relate to the provision of compensation and benefits in connection with public service. A personal effect does not include:

- Changes to **benefits** provided under an **employment or retirement policy**, if the effect of the decision applies equally to all public servants in the same bargaining unit or other representative group. While government salaries are generally excluded under the definition of "income" (Gov. Code section 82030(b)(2)), the regulation establishing the materiality standard for personal financial effects clarifies that, for purposes of personal financial effects, the exception is limited to those decisions that affect only salary, per diem, or reimbursement for expenses of the public servant or a member of his or her immediate family. The exception does not apply if the decision is to hire, fire, promote, demote, suspend, or otherwise take disciplinary action. The exception also does not apply to setting a salary for the public servant or his or her immediate family that is different from salaries paid to other public servants of the local agency in the same job classification or position, or setting a salary for a position held by a member of the immediate family if the family member is the only person in the job classification or position;
- Payment of **travel expenses** while attending a meeting as an authorized representative of a local agency;
- **Stipends** received for attendance at meetings of any group or body created by law or formed by the public servant's agency for a special purpose, so long as the appointing body posts on its website information about the appointees, the term of office, and the amount of the stipend they receive;<sup>446</sup>
- The **use of government property** such as vehicles, cellphones, and other equipment provided by the local agency for carrying out the public servant duties of a position; and
- Any **personal reward** received by the public servant when using a personal **charge card** or **membership rewards program**, so long as the program is available on the same terms to the general public and the charges are incurred for the public servant's approved travel expenses.

In addition, personal financial effect does not include **additional compensation** a public servant might receive if they are appointed to a position on the body of which the public servant is a member (e.g., mayor).<sup>447</sup>

<sup>443</sup> California Code of Regulations, title 2, section 18702.5.

<sup>444</sup> California Code of Regulations, title 2, section 18702.5.

<sup>445</sup> California Code of Regulations, title 2, section 18702.5.

<sup>446</sup> FPPC Form 806 is available in both pdf and Excel formats on FPPC website.

<sup>447</sup> California Code of Regulations, title 2, section 18702.5.

### 7.6.3 Are the reasonably foreseeable, material financial effects “indistinguishable from the effects on the public generally?”

A public servant has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, *distinguishable from the effect on the public generally*, on the public servant or on one of his or her financial interests.<sup>448</sup> If the effect of a decision on the public servant’s interests is indistinguishable from the effect on the public generally, the public servant may participate in the decision.

The FPPC has adopted a regulation to define the circumstances under which the effects of a decision on the public generally will be deemed indistinguishable from the effects on a public servant’s interest.<sup>449</sup> This regulation sets forth a general rule and several exceptions that are to be applied in special circumstances.

#### 7.6.3.1 The General Rule

The effect of a decision on a public servant’s financial interest is indistinguishable from the effect on the public generally if a significant segment of the public is affected and the effect on the public servant’s interest is not unique as compared to the effect on the significant segment.<sup>450</sup>

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

- All businesses or nonprofit entities within the jurisdiction;
- All real property, commercial real property, or residential real property within the jurisdiction; or
- All individuals within the jurisdiction.<sup>451</sup>

The effect of a decision on the public servant’s interest is considered unique if it results in a disproportionate effect on:

- The development potential, use, or income producing potential of real property or a business entity in which the public servant has an interest;
- The public servant’s business entity or real property as a result of the proximity of the project that is the subject of the decision;
- The public servant’s business entity or real property interests as a result of 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;
- The public servant’s business entity or real property interests as a result of the public servant’s substantially greater business volume or larger real property size when the decision will affect all interests by the same or similar rate or percentage;
- A person’s income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the public servant; or
- The public servant’s personal finances or those of his or her immediate family.<sup>452</sup>

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448 Government Code section 87103.

449 California Code of Regulations, title 2, section 18703.

450 California Code of Regulations, title 2, section 18703(a).

451 California Code of Regulations, title 2, section 18703(b).

452 California Code of Regulations, title 2, section 18703(c).



### 7.6.3.2 Special Exceptions

The FPPC has identified several special exceptions to the general rule for determining when the effect of a decision on the public servant's interests is indistinguishable from the effect of the public generally. The effects of a decision will be deemed indistinguishable if the decision:

- Sets or adjusts assessments, taxes, fees, or rates for water, utility or other broadly provided public services or facilities that are applied equally, proportionally, or by the same percentage to the official's interest as is applied to other businesses, properties, individuals;
- Affects the public servant's personal finances as a result of an increase or decrease to a generally applied fee such as parking rates, permits, license fees, application fees;
- Affects residential real property in a specific location and the decision establishes, amends, or eliminates restrictions on on-street parking, imposes traffic controls, deters vagrancy, reduces nuisance, improves public safety, provided the decision is based upon evidence to support the need for such action at the specific location;
- Affects all renters of residential property within the jurisdiction and the public servant's only affected interest is his or her leasehold interest in his or her residence;
- Is made by a board or commission when the law creating the board or commission requires that appointees have a representative interest in a particular industry, trade, profession, or other interest and the public servant is an appointed member representing that interest;
- Is made pursuant to an official proclamation of an emergency when required to mitigate against the effects directly arising out of the emergency and there is no unique effect on the public servant's interest; or
- Affects a federal, state, or local government entity in which the public servant has an interest and there is no unique effect on the public servant's interest.<sup>453</sup>

### 7.6.4 Will the public servant be "making, participating in the making, or using their official position to influence the governmental decision?"

FPPC regulation specifically defines "making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision" as set forth below.<sup>454</sup>

#### 7.6.4.1 "Makes a Governmental Decision"

A public servant "makes a governmental decision" when he or she authorizes or directs any action, votes, appoints a person, obligates or commits his or her local agency to any course of action, or enters into any contract on behalf of the local agency.<sup>455</sup>

#### 7.6.4.2 "Participates in Making a Governmental Decision"

A public servant "participates in making a governmental decision," when he or she provides information, an opinion, or recommendation for the purpose of affecting the decision without significant intervening substantive review.

<sup>453</sup> California Code of Regulations, title 2, section 18703(e).

<sup>454</sup> California Code of Regulations, title 2, section 18704.

<sup>455</sup> California Code of Regulations, title 2, section 18704(a).

### 7.6.4.3 Using or Attempting to Use His or Her Official Position to Influence a Governmental Decision

A public servant uses his or her official position to influence a governmental decision when he or she:

- Contacts or appears before any official in his or her local agency or in any local agency subject to the authority or budgetary control of his or her local agency for the purpose of affecting a decision; or
- Contacts or appears before an official in any other government agency for the purpose of affecting a decision and the public servant acts or purports to act within his or her authority or on behalf of his or her local agency in making the contact.<sup>456</sup>

### 7.6.4.4 Exceptions

A public servant is not making, participating in making, or influencing a governmental decision when:

- The actions of the public servant are **solely ministerial, secretarial, or clerical**;
- The public servant **appears as a member of the general public before** a local agency in the course of its prescribed governmental function and the matter he or she is appearing on relates solely to his or her personal interests;
- The actions of the public servant relate to his or her **own compensation** or terms or **conditions of employment** or consulting contract, provided that the public servant may not make a decision to appoint, hire, fire, promote, demote, or suspend himself or herself or a member of his or her immediate family, or set a salary for himself or herself or a member of his or her immediate family different from other employees of the local agency in the same job classification or position;
- The public servant is **communicating** to the general public or the media;
- The public servant is making a **teaching** decision, such as the selection of books or other educational materials;
- The public servant is a **teacher** or researcher at an institution of higher learning and the decision relates to his or her **professional responsibilities**;
- The public servant is submitting **drawings or documents** of an **architectural, engineering**, or similar nature **prepared by the public servant** for a client to submit in a proceeding before the public servant's agency, and the work is performed pursuant to the public servant's official profession, and the public servant does not make any other contact with the public servant's agency (other than contact with staff on the process or evaluation of the drawings or documents);
- The public servant appears before a **design review** or **architectural review** committee of which he or she is a member to present documents prepared for a client, where the committee's sole function is to review designs or engineering plans and to make recommendations on the plans to another body, the review board is required to include architects, engineers, or similar professionals and the public servant is appointed to fulfill this requirement, and the public servant is a sole practitioner; or
- The public servant is a **consultant** and is making a **recommendation** regarding **additional services** for which the public servant will receive additional income, provided that the consultant already has a contract with the local agency, for an agreed upon price, to make recommendations of the type offered by the consultant and the public servant does not have any other financial interest other than in the firm that would be foreseeably and materially affected by the decision.<sup>457</sup>

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<sup>456</sup> California Code of Regulations, title 2, 18704(c).

<sup>457</sup> California Code of Regulations, title 2, section 18704(d).

## 7.7 Exceptions to Disqualification

### 7.7.1 Legally required participation

#### 7.7.1.1 Statement of the Rule

A public servant is legally required to make or participate in the making of a governmental decision only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.<sup>458</sup> A typical example of when this situation arises is when a majority of the members of a legislative body each have a disqualifying financial interest in a particular decision and the legislative body is unable to assemble a quorum.

#### 7.7.1.2 Required Disclosure

Whenever a public servant who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she must state the existence of the potential conflicts as follows:

1. Disclose the existence of the conflict and describe with particularity the nature of the financial interest (Regulation 18705(b)(1)(A) and (B) describes the specificity required for each financial interest).
2. The public servant or another officer or public servant of the local agency must give a summary description of the circumstances under which he or she believes the conflict may arise.
3. Either the public servant or another officer or public servant of the local agency must disclose the legal basis for concluding that there is no alternative source of decision.
4. The timing of the disclosure and the manner in which the disclosure is to be made is prescribed by the regulation.<sup>459</sup>

#### 7.7.1.3 When Is Participation in a Decision Not “Legally Required?”

The Regulation states that it must be construed narrowly and must not be construed to permit any of the following:

1. To allow an otherwise disqualified public servant to vote to break a tie.
2. To allow an otherwise disqualified public servant to vote if a quorum can be convened of other members of the local agency who are not disqualified under Government Code section 87100, whether or not such other members are actually present at the time of the disqualification.

In addition, Regulation 18705 requires participation by the smallest number of public servants with a conflict that are “legally required” for the decision to be made. A random means of selection may be used to select only the number of public servants needed. When a public servant is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists.

#### 7.7.1.4 Quorum

For purposes of Regulation 18705, “quorum” constitutes the minimum number of members required to conduct business. When the vote of a supermajority is required to adopt an item, the “quorum” must be the minimum number of members needed for that adoption.

### 7.7.2 Segmentation of the Decision

Regulation 18706 allows for a decision that presents conflicts of interest in some form to one or more members to be bifurcated, trifurcated or otherwise to allow the disqualified members to vote on the portions of the decision which are not causing the conflict of interest.

<sup>458</sup> California Code of Regulations, title 2, section 18705(a).

<sup>459</sup> California Code of Regulations, title 2, section 18705(b)(4)(A-C). *But see, Brown v. Fair Political Practices Commission* (2000) 84 Cal.App.4th 137, where the court rejected the FPPC’s application of the “legally required participation” regulation and found that Mayor Jerry Brown was nonetheless legally required to participate in a redevelopment decision because of his obligations under the City Charter.

### **7.7.2.1 Statement of the Rule**

A local agency may segment a decision in which a public servant has a financial interest to allow participation by the public servant, provided all the following conditions apply:

1. The decision can be broken down into separate decisions that are not “inextricably interrelated” to the decision in which the public servant has a disqualifying financial interest;
2. The decision in which the public servant has a financial interest is segmented from the other decisions;
3. The decision in which the public servant has a financial interest is considered first and a final decision is reached by the local agency without the disqualified public servant’s participation in any way; and
4. Once a decision in which the public servant has a financial interest has been made, the disqualified public servant’s participation in the separate decisions does not result in a reopening of, or otherwise financially affect, the decision from which the public servant was disqualified.

Regulation 18706 provides that decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

### **7.7.2.2 Budget Decisions and General Plan Adoption or Amendment Decision Affecting an Entire Jurisdiction**

Once all separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public servant may participate in the final vote to adopt or reject the local agency’s budget or to adopt, reject or amend the general plan.

## **7.8 Seeking FPPC Advice**

See Section 2.4 *Obtaining Advice From the FPPC* for a discussion of how to seek help or obtain advice from the FPPC.



## Local Conflict of Interest Codes

### 8.1 Introduction

The Political Reform Act is the foundation for California conflict of interest law, providing that public servants shall not make, participate in making, or attempt to influence the making of a government decision in which they have a financial interest.

The purpose of the Act's conflict of interest provisions is to prevent public decision makers from participating in government decisions in which they have a personal financial stake. This is primarily achieved by disqualifying officials who have a personal financial interest in a decision from the decision-making process.

This purpose is also achieved by requiring public servants to disclose financial interests that may be impacted by virtue of their position.<sup>460</sup> The disclosure requirement serves to remind public servants of their private interests which may be impacted by their public acts and, because disclosure statements are public records, the requirement provides the public with the opportunity to ensure compliance with the disqualification rule.

The Act specifically requires members of local agency boards and planning commissions, as well as local agency managers, treasurers, attorneys and others, to disclose specified financial interests.<sup>461</sup> Public officials and employees not specified in the Act are subject to disclosure requirements set forth in their agencies' local conflict of interest codes.

This chapter will address requirements for adopting a local conflict of interest code. The discussion will address the procedures for adopting and amending a code, the required components of a valid code, and requirements for maintaining a code. The chapter will also address enforcement mechanisms under the Act to achieve compliance with the requirements.

### 8.2 Adoption and Promulgation of a Local Conflict of Interest Code

All state and local government agencies are required to adopt a local conflict of interest code ("code"). The code is an independent set of rules adopted pursuant to the Act, having the force and effect of law. Violation of the local agency's code is deemed a violation of the Act.<sup>462</sup>

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<sup>460</sup> Government Code section 87302(a).

<sup>461</sup> Government Code sections 87200 — 87210.

<sup>462</sup> Government Code section 87300.

The purposes of a local agency's code are to:

- Set forth the provisions (rules) for disclosure of income and assets as specified under the Act and the process of disqualification from action;
- Designate local agency positions subject to those provisions and required to file Statements of Economic Interests (Form 700 or SEI) due to their responsibilities with the local agency;
- List disclosure categories to be assigned to the designated positions indicating the types of income and assets to be disclosed on SEIs; and
- Inform designated positions and the public of the foregoing.

The requirements of the code are in addition to other requirements of the Act and other local or state laws pertaining to conflicts of interest that may govern the local agency and its public servants.

The discussion that follows describes the procedures for local agencies to follow in adopting their codes, as well as the substantive requirements which must be incorporated in the codes.

### 8.2.1 Procedure for Adopting Local Conflict of Interest Codes

The Act is silent on specific procedures for the adoption of a code, other than to provide that:

- Every local agency must adopt and promulgate a code with the required provisions;
- Every local agency must carry out the review and preparation of a code to guarantee to officers, employees, members and consultants of the local agency and to residents of the jurisdiction, adequate notice and a fair opportunity to present their views;
- Codes are not effective until approved by the local agency's code reviewing body. Each local agency must submit its proposed code, amendments or revisions to the code reviewing body, which shall do one of the following:
  - i. Approve the code as submitted;
  - ii. Revise the proposed code and approve it; or
  - iii. Return the proposed code to the local agency for revision and resubmission within 60 days.
- When a proposed code or amendment is approved by the code reviewing body, it is deemed adopted and promulgated by the local agency.<sup>463</sup>

A local government agency for this purpose means "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."<sup>464</sup> The city council is the code reviewing body for cities and city agencies. The county board of supervisors is the code reviewing body for the county, county agencies, and other independent agencies wholly within a single county, i.e., school districts, water districts, and other special districts or agencies. Not including the judiciary and the State Bar, the FPPC is the code reviewing body for state agencies and multi-county agencies (agencies with jurisdictions that fall within more than one county).<sup>465</sup>

Conflict of interest codes are to be formulated at the most decentralized level possible, but without precluding intra-departmental review. The practice of having a code at the department level is generally reserved for larger cities, counties or state institutions where compartmentalization may be necessary for accurate review and designation. Depending on the local agency's size and structure, there may be a single code with multiple appendices covering different departments. This all depends on what is best for review and control of the local agency, to ensure that all appropriate positions are designated in the code and that the code is easily accessible by the public along with the statements filed under the code. Any question of the level of a department which should be deemed an "agency" for purposes of adopting a code are to be resolved by the local agency's code reviewing body.<sup>466</sup>

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<sup>463</sup> Government Code sections 87303 and 87311.

<sup>464</sup> Government Code section 82041.

<sup>465</sup> Government Code section 82011.

<sup>466</sup> Government Code section 87301.



Medium to small sized local agencies usually do not adopt a code for each department. Often the code is either prepared or reviewed by the local agency counsel, or another official, who in turn makes recommendations to the agency board for the adoption or amendment to the code. The agency board then adopts the code as the conflict of interest code for the local agency as a whole.

### 8.2.2 Most Common Process: Resolutions

Neither the Act nor the FPPC Regulations specify what mechanism to use to adopt a code. For ease and expediency, most agencies adopt the code by resolution because codes are amended often. Adopting a code by ordinance is more cumbersome than by resolution and could create problems due to time constraints with statutory deadlines conflicting with the need for multiple board reviews or multiple readings. This is usually an item that can go on a local agency's consent calendar.

The deadline for any newly created local agency to submit its proposed conflict of interest code to the code reviewing body is no later than six months after the new local agency comes into existence.<sup>467</sup>

As noted above, within 90 days after receiving the proposed code or amendments, the local agency board or its code reviewing body, must approve the proposed code, revise and approve the code as revised, or return the code to staff with directions to revise and resubmit the code. Any proposed code which has been returned with directions to revise must be resubmitted to the local agency board within 60 days.

### 8.2.3 Adoption Process

Before a local agency can submit its code to its code reviewing body, certain official actions must take place, as follows:

- **Positions** must be analyzed for designation;
- The code must be properly drafted and made **available for public viewing** and copying;
- A Notice of Intention, where required,<sup>468</sup> with specific information must go to all affected officials and employees with a copy of the code/amendments. Amendments need to be done in redline format showing the changes made;
- A **Notice of Intention**, where required,<sup>469</sup> must also be provided to the **public**, and anyone else who has specifically requested such a notice, specifying the time and place that adoption of the code will be considered by the governing board and indicating the name, address and phone number of who to contact at the local agency for submitting written comments and obtaining additional information — usually the filing officer/official. This public notice does not have to be published but must be posted in a public place in the same manner as the governing board's agenda;<sup>470</sup>
- There is no specific notice period but it must provide those affected enough **time for review** and to attend the meeting. Notice should certainly be no later than the posting of an agenda;
- The code must be **adopted at a regular meeting**;
- After adoption of the code, a clean **final and redline version** must be submitted to the local agency's **code-reviewing body** for review and approval; and
- The code goes into effect upon being approved by the code-reviewing body of the local agency, if approved by resolution. If approved by ordinance, then 30 days after approval.
- The foregoing is true not only for the adoption of a code but also for any proposed **amendments** to a code. With certain exceptions, all steps must be followed before the amendments can become effective.

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<sup>467</sup> Government Code section 87303.

<sup>468</sup> See California Code of Regulations, title 2, sections 18750.1 through 18750.3. Even if a local agency is not compelled to provide a notice of intention, it may serve as a tool to ensure proper notice and an opportunity to be heard.

<sup>469</sup> *Id.*

<sup>470</sup> Notices of Intention provide the required noticing under Government Code section 87311.

### 8.3 Code Structure

The Act requires that a code contain certain provisions.<sup>471</sup> Specifically, a code must:

1. Enumerate local agency positions, other than those listed in Government Code Section 87200, involved in making or participating in making decisions that may materially affect their financial interests and specify the types of personal financial interests that could be affected by each listed position.
2. Require that each designated position file disclosure statements as described, disclosing reportable economic interests (at the times specified, depending on the type of statement being filed).
3. Include provisions setting forth circumstances for disqualification from making, participating in making or using an official position to influence the making of any decision. Disqualification must be required if it is reasonably foreseeable that a financial interest of a designated employee may be materially affected by a decision.
4. Provide that a listed employee who resigns a position within 12 months of appointment, or 30 days of the date of notice mailed by the filing officer with the obligation to file a disclosure statement, is not deemed to assume or leave office (provided that, during the period between appointment and resignation, the individual does not make or participate in making, or use the position to influence any decision of the local agency, or receive, or become entitled to receive, any form of payment by virtue of being appointed to the position). A specific process for resignation is provided.

While the governing principles related to disclosure of economic interests are the same for all local agencies, a code is a unique document that must be tailored for the reporting requirements applicable to the type of decisions each designated position makes on behalf of its agency.

#### 8.3.1 The Three Components of a Code

Each code must contain the following:

1. **Body of the Code.** The provisions for disclosing financial interests and the disqualification procedures.
2. **Designated Positions.** The positions that make or participate in making decisions that are subject to the disclosure and disqualification requirements of the code.
3. **Disclosure Categories.** The types of assets and income to be disclosed by persons holding the designated positions that are subject to the code.

The body consists of the terms of the code, including how interests are reported, when SEIs are due, and disqualification procedures. The FPPC has adopted Regulation 18730 for use, and recommends that local agencies adopt that Regulation by reference into their codes. The information required for the main body can be complex and Regulation 18730 contains all of the provisions. The FPPC regularly amends Regulation 18730 to include legislative and regulatory changes that affect the main body, so the component remains automatically in compliance with the Act without any further action on the part of the local agency. The incorporation of Regulation 18730 also provides the legal basis for the code to be a document that has the force and effect of law. For example, every two years the gift limit is changed and the FPPC updates Regulation 18730. Therefore, each local agency's code does not need to be amended to indicate the revised gift limit or other changes made to Regulation 18730.

A local agency usually adopts Regulation 18730 through the use of an Incorporation Page. The Incorporation Page contains two (2) paragraphs — an initial paragraph providing authority for adoption and incorporation, and a second paragraph covering the filing of SEIs and public access.

The initial paragraph expresses the statutory requirements (under Government Code section 81000 et seq.) for adopting a code, and incorporates by reference the provisions of Regulation 18730. Incorporating the terms of Regulation 18730, along with attaching an appendix designating positions and establishing disclosure categories, constitute the formation and promulgation of a code as required by the Act. Regulation 18730 outlines the references to statutes and regulations that govern designated positions, disclosure categories, time of filing SEIs, contents of and period covered by SEIs, manner of reporting, how interests are to be reported, definition of terms, disqualification, and prohibition on receipt of honoraria, gifts, loans and travel payments.

<sup>471</sup> Government Code section 87302.

The second paragraph of the Incorporation Page provides for the place of filing of SEIs by all officials and designated positions, and how SEIs will be treated. Certain SEIs are forwarded to the FPPC while others are retained by the local agency. The paragraph also makes clear that the public can review and obtain copies of statements during regular business hours, as provided under Government Code section 81008.<sup>472</sup>

The Incorporation Page also authenticates the code as a legal document and provides the terms and standards to be followed by the local agency's filers as well as the location of where statements are to be filed by officials and obtained by the public. Without these terms and standards, there is no authority for the local agency to require filing of an SEI by any official not specifically listed in Government Code section 87200.

This style of code is referred to as the FPPC Standard Model Conflict of Interest Code. The FPPC and most other code reviewing bodies will not approve any other style of code.

### **8.3.2 The Appendix**

The code's appendix makes it specific to the local agency. The appendix must fully list all of the required local positions that make, participate in the making, or influence the making of local agency (or department) decisions. The appendix must also assign specific disclosure categories to each of the positions listed. Without these categories, no one would know what their "reportable investments and income" are for the purposes of disclosure under the code. It is only with the creation of the list of disclosure categories and the specific assignment of the categories that persons holding these positions can know what types of investments, interests in real property, income and business positions they must disclose. Disclosure categories tell filers what interests to disclose and Form 700 tells filers how to disclose those interests.

### **8.3.3 Appendix — Part 1: Designated Positions**

The list in the appendix specifies who is subject to the provisions of the code and informs the designated positions and the public as to which disclosure category each position has been assigned. This part of the appendix usually also declares which officials are designated in Government Code section 87200 and are thus subject to the Act rather than the code. It also identifies who within the local agency meets the particular criteria of "officials who manage public investments."

Local agencies cannot require all of their employees to file an SEI. As noted above, a code must specifically list positions that make or participate in the making of government decisions. This typically includes positions involved in voting on matters, negotiating contracts, or making recommendations on purchases, policies, budget decisions, or advising or making recommendations to decision-makers on such matters. Government Code section 87200 are not included in the appendix's list of positions. Those positions are subject to the full disclosure requirements of the Act, which is outside of the scope of a local agency's code. Disclosure requirements for Section 87200 Filers cannot be narrowed.

Local agency codes may include the same terms and list of disclosure categories, but it is the list of designated positions that makes a local agency's code a unique document to the agency. Even if a position title is identical, the responsibilities in various local agencies may not be. For example, an "analyst" in one local agency may not be designated, whereas an analyst in another agency may have much more authority and therefore be designated.

The Act requires that every local agency adopt a code and that the code contain specific "enumeration of the positions" within the local agency involved in the making or participation in the making of decisions that may foreseeably have a material effect on any of the official's financial interests. The Act further prohibits code reviewing bodies from approving codes that fail to differentiate between designated positions with different powers and responsibilities.<sup>473</sup> This ensures that only positions required

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<sup>472</sup> The FPPC will not approve a code without a clear statement of where SEIs are filed and a notice that such SEIs are public records subject to Government Code section 81008.

<sup>473</sup> Government Code section 87309.

to be designated are listed and that disclosure requirements relate to the duties of the position to which they are assigned. Required disclosure of economic interests under the Act has been found to be appropriate where it is narrowly tailored to avoid unwarranted intrusion into the privacy of the public servants involved.<sup>474</sup>

A public servant “makes a governmental decision” when the official authorizes or directs any action votes, appoints a person, obligates or commits his or her local agency to any course of action, or enters into any contractual agreement on behalf of his or her local agency.<sup>475</sup> Such positions should be designated in the local agency’s code.

A public servant “participates in a governmental decision” when, without significant intervening substantive review, the official provides information, an opinion, or a recommendation to the decision-maker for the purpose of affecting the decision.<sup>476</sup> If a superior relies on an individual’s professional judgment, then the individual is participating in making a governmental decision. In other words, if the individual influences the final decision by supporting a position or suggesting a course of action, he or she is participating in the decision even if he or she is not making the final decision. Therefore, the individual’s position must be designated in the conflict of interest code.

There are several ways to determine which positions need to be designated in the code. These include:

- Reviewing organizational charts — generally, the positions listed closest to the top must be designated. The larger the local agency, the more likely it is that lower level positions have narrower duties and are subject to additional, substantive review by senior positions, and therefore do not need to be designated.
- Meeting minutes and annual reports also provide information on position responsibilities and provide insight as to which positions warrant supplementary review.
- Local agency websites provide additional clues as to whether all positions on an organizational chart are current.
- Job duty statements should be reviewed. The duty statements may reveal whether a position is involved in making or participating in the making of decisions or recommendations involving budget issues, contractors, vendors, purchases, policies, and possible courses of action involving departmental programs. This is especially important at a department or division level.

High level positions have authority to vote on matters, appoint individuals and obligate the local agency to a course of action. Mid-level positions have authority to negotiate decisions on behalf of the local agency without significant substantive review. This includes positions that advise or make recommendations to decision-makers by conducting research or investigations and preparing or presenting reports, analyses or opinions requiring the exercise of independent judgment in attempting to influence a decision. All of these positions should be designated in the local agency’s code.

Appropriate boards, committees and commissions need to be listed and assigned related disclosure categories. However, there is no additional disclosure obligation for public servants on a subsidiary body if they are designated in the local conflict of interest code in the same capacity or if the geographical jurisdiction of the body is the same or wholly included with the local agency’s jurisdiction.<sup>477</sup>

The list of designated positions must also include the generic title of consultant and new positions with the appropriate footnote language provided by the FPPC, requiring the full disclosure of assets by these individuals unless narrowed in writing by the head of the local agency. This language is not to be rewritten so that these individuals only need to file when specified. That would defeat the purpose of the designation and the required identification on FPPC Form 804 (new positions) and Form 805 (consultants).

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<sup>474</sup> *Hays v. Wood* (1979) 25 Cal.3d 770.

<sup>475</sup> California Code of Regulations, title 2, section 18704(a).

<sup>476</sup> California Code of Regulations, title 2, section 18704(b).

<sup>477</sup> California Code of Regulations, title 2, section 18730(b)(3).

Do not designate:

- Members of unsalaried boards, committees or commissions that serve in a solely advisory capacity. (They can be designated later if a history develops showing involvement in decision-making.)
- Positions that are strictly clerical, manual, or ministerial.
- Public officials listed in Government Code section 87200, including officials who manage public investments.

### 8.3.4 Appendix — Part 2: Disclosure Categories

A primary purpose of a code is to require designated positions to disclose those types of investments, interests in real property, sources of income and business positions that may be affected in their decision-making. For example, the general manager of a local agency would most likely be assigned full disclosure (all investments, interests in real property, sources of income and business positions) because the general manager makes decisions that would affect a wide range of interests. Alternatively, an administrative assistant whose decision-making is limited to the purchase of office supplies should only be assigned disclosure of investments, sources of income and business positions in entities that provide office supplies, equipment or merchandise of the type used by the local agency or the position's department, depending on the breadth of the position's authority.

One problem is that agencies may tend to require their designated positions to disclose too much information. It has been determined, through analysis and case law, that the Act prohibits agencies from assigning disclosure categories that require the disclosure of interests that could not be affected through the decision-making of the official.<sup>478</sup> The code reviewing body has an obligation and responsibility to ensure these specifications have been met.<sup>479</sup>

The local agency cannot require, or give the appearance of requiring, over-disclosure by a designated employee. Disclosure categories must be designed and assigned depending on the duties and responsibilities of the position. A purchasing agent does not participate in decisions involving real property and, therefore, cannot be required to disclose interests in real property. Likewise, the recreation supervisor does not have the same decision-making responsibilities as the finance director and cannot be required to disclose on the same level, or disclose more than his or her position would be responsible for. Therefore, a number of categories can be designated, giving the list flexibility in its application but making disclosures specific to the responsibilities or duties of the position. Disclosure categories must be assigned on a narrowly-tailored basis to prevent or minimize requiring over-disclosure.

Developing disclosure categories:

- Disclosure categories tell officials which economic interests to report, and Form 700 tells officials how to report those economic interests;
- Disclosure categories should not be too specific. Otherwise they may become inflexible and easily outdated;
- A few flexible disclosure categories may work for all positions;
- Financial interests are not disclosure categories; and
- Categories should require disclosure of all types of financial interests.

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<sup>478</sup> *City of Carmel-by-the Sea v. Young* (1970) 2 Cal.3d 259; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662.

<sup>479</sup> *Alperin* Opinion, 3 Fair Political Practices Commission Ops.77.

## 8.4 Maintenance, Availability and Retention

### 8.4.1 Maintenance and Amendments

As stated previously, the FPPC keeps the provisions of a code current for a local agency through Regulation 18730. However, it is up to the local agency to regularly amend its code to keep it current as circumstances change within the local agency. Every local agency must amend its code following the same adoption processes, when necessitated due to changed circumstances, including the creation of new positions which must be designated and significant changes in the duties of existing positions affecting disclosure requirements.

The local agency must submit its amendment or revision to its code reviewing body within 90 days after the “changed circumstances necessitating the amendments have become apparent.”<sup>480</sup>

Additionally, every even-numbered year local agencies are required to conduct a biennial review and update their codes, if necessary.

No later than July 1 of every even-numbered year, the code-reviewing body directs every local agency that has adopted a conflict of interest code to review its code and, if a change in the code is necessitated by changed circumstances, submit an amended code as provided in Government Code sections 87302 and 87303 to the code reviewing body.<sup>481</sup>

Between July 1 and October 1, the local agency must review its code to determine if any amendments are necessary. The review and filing of the biennial notice is required regardless of how recently the code has been updated and amended. Upon review of its code, the head of the local agency must submit a written statement reflecting the results of the review, no later than October 1 of the same year. The FPPC provides a form to be used as the written statement and for filing the biennial notice. If an amendment is necessary, under Section 87303 the local agency will have 90 days from the date of filing the biennial notice with the agency clerk or other filing officer to submit the amendment for adoption and approval by the governing body.

### 8.4.2 Availability and Retention

As a public document retained under the Act, the local agency’s complete conflict of interest code — with all three of its components — must be kept in the same location and manner as the SEIs filed with the agency’s Filing Officer. The code and the SEIs must always be available to the public for viewing and copying during regular business hours. Further, the local agency may not impose any conditions on anyone desiring to inspect or reproduce the code or the statements, nor may the local agency charge more than ten cents per page for the reproduction of the documents. Finally, the local agency is required to retain the copies of the statements forwarded to the FPPC for a minimum of four years, and is required to retain the original statements filed by all other designated positions for a minimum of seven years. However, after two years, the statements may be placed and retained on electronic space-saving devices.<sup>482</sup>

## 8.5 Enforcement

**Code and Code Amendment.** If a new local agency does not adopt its code within six months of the agency’s creation, or if an existing agency does not amend its code within nine months after an occurrence necessitating the amendment, the superior court may issue an order to compel the adoption or amendment of the code. An action seeking such an order may be brought by the FPPC, the code reviewing body, any officer, employee, member or consultant of the local agency, or any resident of the jurisdiction.<sup>483</sup>

**Other Actions of the Code Reviewing Body.** Judicial review of any action taken by a code reviewing body under the Act may be sought by the FPPC, the local agency, an officer, employee, member or consultant of the local agency, or a resident of the jurisdiction.<sup>484</sup>

<sup>480</sup> Government Code section 87306.

<sup>481</sup> Government Code section 87306.5.

<sup>482</sup> Government Code sections 81008, 81009.

<sup>483</sup> Government Code sections 87305, 87306.

<sup>484</sup> Government Code section 87308.



## Common Law Conflicts of Interest

### 9.1 Common Law Conflict of Interest Doctrine

#### 9.1.1 Introduction

The common law is comprised of published California Supreme Court and appellate court decisions. Unlike conflicts of interest under Government Code Section 1090 or the Political Reform Act, in which the Legislature and state agencies have determined what constitutes a conflict, a common law conflict of interest is one that is found by a court to exist in particular instances and in the absence of a statutory violation. The body of decisions in which these court-determined conflicts exist, when viewed together and over time, constitutes a doctrine that guide judges in making new court decisions in similar situations.

It is possible for a public servant to have both statutory and common law conflicts of interest at the same time. However, there is some continuing uncertainty in the courts as to whether the common law doctrine should be applied when statutory conflict of interest laws already address the particular situation.<sup>485</sup> For example, in *BreakZone Billiards v. City of Torrance*, the court indicated, “We continue to be cautious in finding common law conflicts of interest ... We reject the application of the doctrine in this case, assuming, arguendo, it exists.”<sup>486</sup>

A common law conflict of interest, if it exists in a particular situation, can require disqualification of the conflicted public servant or rehearing of the matter in question.<sup>487</sup> A court reviewing the matter can invalidate a legislative or quasi-judicial action, order an unwinding of a transaction, order disgorgement of profit and damages, and award costs and attorney’s fees.

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#### ► PRACTICE TIP: Non-Financial Interests

Common law conflicts may be based on purely non-financial interests.

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<sup>485</sup> See, e.g., *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 (construing a public servant’s personal bias and interests to constitute a conflict of interest under the common law doctrine in a situation where the public servant had no statutory conflict of interest) as compared to in *BreakZone Billiards* (2000) 81 Cal.App.4th 1205, 1233 (where the court declined to construe allegations of a public servant’s bias in a decision to constitute a conflict of interest at common law when the statutory laws already had been construed not to create a conflict of interest in that situation).

<sup>486</sup> *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1233.

<sup>487</sup> See *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470; *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81; *Mennig v. Culver City* (1978) 86 Cal.App.3d 341; 70 Ops.Atty. Gen. 45 (1987).



The common law conflict of interest is premised on the basic presumption that a “public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public.”<sup>488</sup> Thus, a decision-maker should not be tempted by his or her own personal or pecuniary interest, and the doctrine will apply to situations involving a nonfinancial personal interest.<sup>489</sup>

For example, the Attorney General concluded that when an adult child of a board member applied to the redevelopment agency for a loan for his corporation that he solely owned, the parent (and agency board member) should disqualify herself from participating in the loan decision. The parent shared a rented apartment with the adult child, but the adult child was not dependent on the parent.<sup>490</sup> The Attorney General concluded that “it is difficult to imagine that the agency member has no private or personal interest in whether her son’s business transactions are successful or not.”<sup>491</sup> The opinion further stated that, at a minimum, there is an appearance of impropriety or conflict that would arise if the board member voted on an agreement that would benefit her adult child.

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► **PRACTICE TIP: The Appearance of Impropriety**

The doctrine of common law conflicts reaches to even the appearance of impropriety.

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However, in an opinion where it might appear that a public servant would have a conflict of interest under the common law doctrine, the Attorney General concluded that a city council member who served on the board of directors of a nonprofit trust created to support a national park could participate in a city council decision to lease a parcel of land to a business owner from whom the council member had solicited contributions on behalf of the nonprofit trust.<sup>492</sup>

Thus, when reviewing conflict of interests under the common law doctrine, it is important to carefully review the cases and opinions for differences in the underlying facts and analyses. It is also important to consider whether the interest at issue is one that is expressly found to be below a threshold for a conflict of interest under the Political Reform Act or Section 1090, or whether it is a type of interest that falls between a gap in those two laws and that, based on judicial decisions, should give rise to a disqualification under the common law conflict of interest doctrine.

## 9.2 The Right to Fair and Unbiased Decision-Makers

An applicant appearing before a legislature that is acting in a quasi-judicial or adjudicatory capacity has the right to a fair and unbiased decision-maker under the due process clause.<sup>493</sup> These situations occur when, for example, a local agency board is deciding whether to grant or revoke a use permit or otherwise affect an individual’s right or entitlement, and is contrasted with the board acting in a legislative capacity where the board is deciding whether to enact an ordinance or regulation with broad applicability. Whenever a board member is making a quasi-judicial decision, the common-law prohibition against biased decision-making must be considered.

A public servant is disqualified from participating if the public servant is biased in favor of or against a party involved in a quasi-judicial decision. The public servant also may be disqualified from participating if the public servant has a personal interest in the decision’s outcome or if the public servant has received information outside of the public hearing that causes the public servant to have a closed mind to any factual information that may be presented at the hearing. Mere familiarity with the facts does

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488 *Noble v. City of Palo Alto* (1928) 89 Cal.App.47, 51.

489 *Clark v. City Hermosa Beach* (1996) 48 Cal.App.4th 1152.

490 92 Ops.Cal.Atty.Gen. 19 (2009).

491 *Id.* at 24.

492 88 Ops.Cal.Atty.Gen. 32, 38-40 (2005).

493 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 557; see also *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 772.

not necessarily constitute bias. Rather, the public servant must be prepared to apply the law to the particular factual situation presented during the hearing, regardless of what prehearing opinions the public servant may hold.<sup>494</sup>

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► **PRACTICE TIP: Sample Regulation/Code Provision**

An example follows of a regulation that can be adopted by local agencies to explain the requirements relative to fair hearings and ex parte contacts:

**Ex Parte Contacts and Fair Hearings.** The council (or board) shall refrain from receiving information and evidence on any quasi-judicial matter while such matter is pending before the city council, or any agency, board or commission thereof, except at the public hearing.

If any member is exposed to information or evidence about a pending matter outside of the public hearing, through contacts by constituents, the applicant, or through site visits, the member shall disclose all such information and/or evidence acquired from such contacts, which is not otherwise included in the written or oral staff report, during the public hearing and before the public comment period is open.

A matter is “pending” when an application has been filed. Information and evidence gained by members via their attendance at noticed public hearings before subordinate boards and commissions are not subject to this rule.

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*Clark v. City of Hermosa Beach* provides a good example of when a decision-maker had a non-financial personal interest in the outcome of a decision that prevented fair and unbiased decision-making.<sup>495</sup> In that case, a city council member was found to be biased against an applicant who proposed building a residential project that would block the city council member’s view from his rented apartment, and the court held he had a closed mind about the project. The court found that, even though the type of personal interest (i.e., an interest in protecting his view from obstruction) was not a type of financial interest that gave rise to a conflict of interest under the Political Reform Act or Section 1090, the council member had a common law conflict of interest which resulted in a denial of due process to the applicant.

Similarly, in *Nasha v. City of Los Angeles*, the Court of Appeal directed the Los Angeles Planning Commission to conduct a new hearing based on the fact that a Commission member had anonymously authored a critical article in a neighborhood newsletter concerning the developer’s project.<sup>496</sup> The commissioner had then participated in an appeal of the project approval to the Planning Commission that resulted in the staff’s conditional approval of the project being overturned.

The *Nasha* court found that procedural due process principals were applicable because the proceeding before the Planning Commission was quasi-judicial. It involved the determination and application of facts peculiar to an individual case. The developer had shown there was an unacceptable probability of actual bias on the part of the commission, based on the commissioner’s authorship of the article attacking the project.<sup>497</sup> The court found authorship of the article sufficient to preclude the commissioner from serving as a reasonable, impartial, noninvolved reviewer. The appellate decision also included a review of whether or not the developer had waived the challenge for not raising it at the administrative level.<sup>498</sup>

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494 See *Mennig v. City Council* (1978) 86 Cal.App.3d 341 and *City of Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768.

495 *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152.

496 *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 486.

497 *Id.* at 484.

498 *Id.* at 484-485.

In *Cohan v. City of Thousand Oaks*, the appellate court found that cumulative errors impaired the adequacy of the plaintiff's hearing.<sup>499</sup> The case involved a city council's self-appeal of a planning commission decision approving a subdivision map. After holding a public hearing, the city council overturned the planning commission decision. The city, however, also made a number of procedural errors in noticing, failing to follow the city's own procedural rules, shifting the burden of proof to the developer rather than to the appellant city council, and failing to file timely findings. The city council appeared to be responding to citizens who did not want a development in their backyard. Thus, the court noted that "ironically, the council's very attempt to protect the due process rights of interested citizens cavalierly erode those same rights of the [developer]. This stands due process on its head."<sup>500</sup> The court also found that "[w]hile a single procedural error might have caused appellants no prejudice, the cumulative effect of the council's actions resulted in a violation of the [applicant's] substantive and procedural due process rights."<sup>501</sup>

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499 See also, *Woody's Group v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, as another example.

500 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 560.

501 *Id.* at 561.

## Specialty Conflict Laws

### 10.1 Introduction

This chapter addresses the meaning of statutory conflicts other than those embodied in the Political Reform Act or Government Code section 1090. At a minimum, consideration is required of the following list of other possible areas where private interests may collide with public policy and, to a limited extent, where dual duties themselves conflict. The following areas will be examined:

- Incompatible outside activities;
- Incompatible offices;
- Redevelopment agency conflicts;
- Special Rules — Housing Authority conflicts;
- Federal CDBG conflict rules;
- Discount passes on common carriers;
- Public Contracts Code; and
- The Revolving Door Limitations.

### 10.2 Incompatible Outside Activities

#### 10.2.1 Introduction

The Government Code regulates incompatible activities. It provides that a local agency, officer or employee shall not engage in any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with or inimical to his or her duties as a local agency officer or employee, or with the duties, functions or responsibility of his or her appointed power or agency.<sup>502</sup>

The officer or employee is forbidden to perform any work, service or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board or commission of his or her employing body, unless otherwise approved by the local agency in the manner prescribed by Government Code

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<sup>502</sup> Government Code section 1125 *et seq.*

section 1126(b).

### 10.2.2 Implementation

Section 1126 is not self-executing. In order to discipline an employee for engaging in incompatible activities, the local agency must promulgate a statement of incompatible activities and, before imposing sanctions, must adopt rules establishing notice and appeal rights.<sup>503</sup>

#### 10.2.2.1 Persons and Activities Covered

The prohibition applies to officers and employees of all local agencies, and the Attorney General has opined that employees include temporary consultants such as special counsel hired as independent contractors.<sup>504</sup>

- **Not Applicable to Elected Officials.** The Attorney General's Office has concluded that, in light of the Mazzola case, Section 1126 does not apply to elected officials because they would not be subject to rules handed down concerning these incompatible activities by "an appointing power." To activate the prohibition, the appointing power must promulgate guidelines as to what activities will be incompatible and elected officials are not subject to an "appointing authority." As such, the Attorney General concluded that Section 1126 only applies to local employees and officers, and not to elected officials.<sup>505</sup>
- **School Board Exception.** The Legislature has overruled the Mazzola opinion as it applies to school board members by amending Education Code Section 35233 to make school board members subject to Section 1126. To keep faith with the logic of the exclusion of other public servants, the Attorney General opined that the provisions of Section 1126(a) were self-executing (i.e., no need for an "appointing authority") with regard to school boards notwithstanding that it is not self-executing to other elected officials.

#### Activities That Have Been Analyzed

The following are examples that have been analyzed by the Attorney General:

- A county supervisor may be employed as the secretary/executive director of the county housing authority.<sup>506</sup>
- Service as a member of school board and service as a member of a city personnel board does not violate the incompatible office doctrine.<sup>507</sup>

A county assessor may determine that an employee's purchase of land at a tax-deed sale within the county is incompatible with his or her duties as an appraiser in the assessor's office.<sup>508</sup> (Note: There may also be a Section 1090 issue here.)

- A city may allow its police chief as a private individual to act as an agent with private parties to provide private security services by off-duty police officers for a fee.<sup>509</sup>

A school board may determine that a board member's operation of a private preschool for profit conflicts with his or her duties as a board member.<sup>510</sup>

503 Government Code section 1126(c); *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141, 154-155.

504 70 Ops.Cal.Atty.Gen. 271, 274 (1987); 61 Ops.Atty.Gen. 18, 23 (1978).

505 64 Ops.Cal.Atty.Gen. 795 (1981).

506 81 Ops.Cal.Atty.Gen. 274 (1998).

507 58 Ops.Cal.Atty.Gen. 109 (1975).

508 63 Ops.Cal.Atty.Gen. 868 (1980).

509 68 Ops.Cal.Atty.Gen. 175 (1985).

510 70 Ops.Cal.Atty.Gen. 157 (1987).

### 10.2.3 An Employee's Outside Employment, Activity or Enterprise May Be Prohibited If It:

- Involves the use for private gain or advantage of his or her local agency time, facilities, equipment and supplies, the badge, uniform, prestige or influence of his or her local agency or office or employment.<sup>511</sup>
- Involves receipt or acceptance of any money or other consideration from anyone other than his or her local agency for the performance of an act that he or she would be required or expected to render in the regular course of his or her duties with the local agency.<sup>512</sup>

Involves the performance of an act, in other than his or her capacity as a local agency officer or employee, which act may be later subject, directly or indirectly, to the control, inspection, review, audit or enforcement of any other officer or employee of the local agency by which he or she is employed.<sup>513</sup>

- Involves time demands that would render performance of his or her local agency duties less efficient.<sup>514</sup>

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#### ► **PRACTICE TIP: Coordinate with Section 1090 and Political Reform Act Analyses**

Many of the examples above also present Section 1090 and Political Reform Act issues. Therefore, even in the absence of a formal statement pursuant to Section 1126(c), an activity that involves a contract may require analysis pursuant to these laws. Although the official may not be prohibited from engaging in the outside activity, he or she may be prohibited from participating in a decision that will impact his or her private financial interests, or the legislative body may be prohibited from contracting altogether. Also consider whether the doctrine of common law conflicts applies.

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### 10.2.4 Exceptions

Section 1127 sets forth that it is **not** the intent of the statute to prevent the employment of a public employee by private business, such as a peace officer, firefighter, forestry service employee, among others, to work off-duty in vocations related to and compatible with his or her regular employment, or past employment, provided the person has approval of his or her local agency supervisor and is certified as qualified for that endeavor by his or her local agency.

Section 1128 expressly provides that service on an appointed or elected government board, commission, committee or other body by an attorney employed by a local agency in a nonelected position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacating of either such office.

### 10.2.5 Penalties and Enforcement

The statute contains no special penalties or remedies for violation. With respect to local agency employees, disciplinary action can be taken for a violation, the severity of which will depend on the seriousness of the violation. In addition, a member of the public may have the right to seek relief through injunction or mandamus.

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#### ► **PRACTICE TIP: Outside Employment Activities**

For local agency attorneys who represent entities other than cities and counties, always be alert for the possibility that a statute might regulate outside employment activities. A good example would be Labor Code section 1150, which provides that each member of the Agricultural Labor Relations Board and its general counsel shall not engage in any other business, vocation, or employment.

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511 Government Code section 1126(b)(1).

512 Government Code section 1126(b)(2).

513 Government Code section 1126(b)(3).

514 Government Code section 1126(b)(4).

## 10.3 Incompatible Offices

### 10.3.1 Government Code Section 1099

The Legislature in 2005 adopted Government Code section 1099: “Simultaneous Occupation of Incompatible Public Offices; Effects; Enforcement of Prohibition; Exceptions.” In adopting this provision, Section 2 of the statute (uncodified) provides as follows:

“Nothing in this act is intended to expand or contract the common law rule prohibiting an individual from holding incompatible public offices. It is intended that courts interpreting this act shall be guided by the judicial and administrative precedent concerning incompatible public offices developed under the common law.”

The statute in essence codifies the common law, with these key provisions:

- Prohibits a “public officer” from simultaneously holding two public offices if the offices are incompatible.
- Offices are incompatible when:
  1. Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;
  2. Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices; and
  3. Public policy considerations make it improper for one person to hold both offices.
- When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second.
- Inapplicable:
  - » Where specifically authorized by statute;
  - » To a position of employment, including a civil service position;
  - » To a governmental body that has only advisory powers; and
  - » Where a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.

### 10.3.2 The Common-Law Doctrine of Incompatible Offices

#### 10.3.2.1 Introduction

The doctrine of incompatibility of office concerns the potential clash of two public offices held by a single official and potentially overlapping public duties. This is to be compared to the concept of conflicts of interest that involve a potential clash between an official’s private interest and his or her public duties.

#### 10.3.2.2 The Basic Prohibition

To fall within the common law doctrine of incompatibility of office, two elements must be present:

- The official must hold two public offices simultaneously; and,
- There must be a potential conflict or overlap in the functions and responsibilities of the two offices.<sup>515</sup>

<sup>515</sup> 68 Ops.Cal.Atty.Gen. 337 (1985).



In the landmark California Supreme Court case of *Chapman v. Rapsey*,<sup>516</sup> the Court outlined issues to be addressed in evaluating the incompatibility of office issues:

- Whether there is any significant clash of duties or loyalty between the offices;
- Whether considerations of public policy make it improper for one person to hold both offices; and,
- Whether either office excises a supervisory, auditory, appointive or removal power over the other.

These factors are now codified in Government Code section 1099.

In *Rapsey*, a city judge accepted an appointment as city attorney. The court concluded that both positions were public offices and that there was a significant clash in respect to duties and functions.

### 10.3.2.3 “Public Office” Defined

What is “public office?” In *Rapsey*, the court defined the elements of a “public office” as including “the right, authority and duty created and conferred by law — the tenure of which is not transient, occasional or incidental — by which for a given period an individual is invested with power to perform a public function for the public benefit.” The Attorney General summarized the court’s conclusion as follows:

“For the purpose of the doctrine of incompatible public offices, a public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state.”<sup>517</sup>

Therefore, members of purely advisory boards are not subject to the doctrine.

In addition, the Attorney General has opined that employment is not an office. Since “employment” is not an “office,” the doctrine of incompatibility of office does not preclude an official from simultaneously holding an office and an employment position.<sup>518</sup> However, the opinions have not produced clarity primarily because of the lack of precise delineation between “employment” and “office.” For example, statutorily created positions that are often held by “employees,” such as city manager, police chief, fire chief, and city attorney, have been deemed public offices subject to the incompatible offices doctrine. In another example, the Attorney General has opined that a deputy principal is not necessarily holding the same office as the principal for purpose of incompatible offices and only does so when he or she stands in the principal’s shoes as acting principal.<sup>519</sup> This creates more confusion than clarity. In a 2004 Attorney General’s Opinion,<sup>520</sup> the Attorney General determined that a county veteran’s service officer is employment and therefore the position would not be incompatible with the position of undersheriff.

Nonetheless, Government Code section 53227, enacted in 1995, prohibits an employee of a local agency from being sworn in as an elected or appointed member of the legislative body (e.g., the city council) without resigning the employment position.

The Attorney General acknowledged that the county positions of auditor-controller, county administrative officer, and director of mental health services are all “offices” for purposes of the incompatible offices doctrine. The Attorney General went on to opine that these three offices can be consolidated by county ordinance.<sup>521</sup>

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516 People ex rel. *Chapman v. Rapsey* (1940) 16 Cal.2d 636, 640.

517 68 Ops.Cal.Atty.Gen. 337 (1985).

518 58 Ops.Cal.Atty.Gen. 109, 111 (1975).

519 78 Ops.Cal.Atty.Gen. 362 (1995), *modifying* 63 Ops.Atty.Gen. 710 (1980).

520 87 Ops.Cal.Atty.Gen. 142 (2004).

521 88 Ops.Cal.Atty.Gen. 130 (2005).

### 10.3.2.4 Examples

For examples where the doctrine of incompatible offices has been applied to the holding of two offices, see the following:

- Position of police chief is incompatible with that of city manager.<sup>522</sup>
- A county supervisor may be employed by the county housing commission as its secretary and executive director.<sup>523</sup>
- Full-time position as fire chief is incompatible with the office of city council where fire chief is responsible to the fire district and council members serve as directors of the fire district.<sup>524</sup>
- Offices of school district trustee and city council member are incompatible where the district and city have common territory.<sup>525</sup>
- Offices of city manager and school district trustee are incompatible where the district and city have common territory.<sup>526</sup>
- Offices of hospital district general manager and superintendent of schools are incompatible with the office of the community services district director.<sup>527</sup>
- Offices of school trustee for high school and elementary school districts are incompatible.<sup>528</sup>
- Offices of deputy sheriff and county supervisor are incompatible even if the salary for one of the positions was waived.<sup>529</sup>
- Offices of county planning commissioner and city planning commissioner are incompatible.<sup>530</sup>
- Offices of community college board member and county board of supervisors' member are incompatible.<sup>531</sup>
- Offices of school board member and city council member are incompatible.<sup>532</sup>
- Office of county planning commissioner and county water district director are incompatible.<sup>533</sup>
- Offices of city council member and water district director are incompatible.<sup>534</sup>
- Offices of board of directors of a public utility district and county board of supervisors are incompatible.<sup>535</sup>
- County planning commissioner and city council member are incompatible offices.<sup>536</sup>

A clash of duties in water district positions was reviewed in a 2007 Attorney General's Opinion.<sup>537</sup>

- A county officer does not forfeit his or her office by accepting a standby appointment (Government Code Section 8638) for the office of county supervisor.<sup>538</sup>

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522 81 Ops.Cal.Atty.Gen. 304 (1998).

523 81 Ops.Cal.Atty.Gen. 274 (1998).

524 76 Ops.Cal.Atty.Gen. 38 (1993).

525 73 Ops.Cal.Atty.Gen. 354 (1990).

526 80 Ops.Cal.Atty.Gen. 74 (1997).

527 68 Ops.Cal.Atty.Gen. 337 (1985).

528 68 Ops.Cal.Atty.Gen. 171 (1985).

529 68 Ops.Cal.Atty.Gen. 7 (1985).

530 66 Ops.Cal.Atty.Gen. 293 (1983).

531 78 Ops.Cal.Atty.Gen. 316 (1995).

532 65 Ops.Cal.Atty.Gen. 606 (1982).

533 64 Ops.Cal.Atty.Gen. 288 (1981).

534 82 Ops.Cal.Atty.Gen. 74 (1999).

535 64 Ops.Cal.Atty.Gen. 137 (1981).

536 63 Ops.Cal.Atty.Gen. 607 (1980).

537 90 Ops.Cal.Atty.Gen. 12 (2007).

538 97 Ops.Cal.Atty.Gen. 54 (2004).

- Offices of school district board of trustees member and city planning commissioner are incompatible.<sup>539</sup>
- Office of director of a water district is incompatible with the position of trustee of a school district.<sup>540</sup>
- Offices of city administrator and fire chief are incompatible.<sup>541</sup>
- Offices of city council member and fire chief are incompatible.<sup>542</sup>
- Offices of county board of supervisors member and fire chief of a fire protection district are incompatible.<sup>543</sup>
- Although decided on Section 1090 grounds, the Attorney General identified incompatible offices as an issue in ruling that a council member's law firm could not donate its services to the city. The discussion in the opinion is instructive on divided loyalties.<sup>544</sup>
- Offices of water district director and city council member are incompatible.<sup>545</sup>
- Offices of county superintendent of schools and member of the state board of education determined are incompatible.<sup>546</sup>
- Offices of community services district director and school district trustee are incompatible where territory of the districts is shared.<sup>547</sup>
- Offices of city council member and director of water reclamation district having common territory are incompatible.<sup>548</sup>
- Sanitary district director (elected) and recreation and park district director (elected), where territory was in common and the sanitary district served the sanitation needs of the recreation and park district, presents substantial issues of fact and law requiring judicial resolution.<sup>549</sup>
- City clerk (elected) and school district trustee (elected) were not incompatible.<sup>550</sup>

This is not an exclusive list. There are additional Attorney General Opinions that can be consulted.<sup>551</sup>

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► **PRACTICE TIP: Actual v. Potential for Conflict of Duties**

In evaluating the conflict in the duties or functions, it is enough that there be a potential for conflict in duties and functions. An actual conflict need not be established.

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<sup>539</sup> 84 Ops.Cal.Atty.Gen. 91 (2001).

<sup>540</sup> 87 Ops.Cal.Atty.Gen. 153 (2004); and see also 85 Ops.Atty.Gen. 60 (2002) for a similar result.

<sup>541</sup> 82 Ops.Cal.Atty.Gen. 201 (1999).

<sup>542</sup> 76 Ops.Cal.Atty.Gen. 38 (1993).

<sup>543</sup> 66 Ops.Cal.Atty.Gen. 176 (1983).

<sup>544</sup> 86 Ops.Cal.Atty.Gen. 138 (2003).

<sup>545</sup> 75 Ops.Cal.Atty.Gen. 10 (1992).

<sup>546</sup> 74 Ops.Cal.Atty.Gen. 116 (1991).

<sup>547</sup> 73 Ops.Cal.Atty.Gen. 183 (1990) and 75 Ops.Cal.Atty.Gen. 112 (1992).

<sup>548</sup> 91 Ops.Cal.Atty.Gen. 25 (2008).

<sup>549</sup> 93 Ops.Cal.Atty.Gen. 144 (2010).

<sup>550</sup> 93 Ops.Cal.Atty.Gen. 110 (2010).

<sup>551</sup> For example, see 94 Ops.Cal.Atty.Gen. 87 (2013), 97 Ops.Cal.Atty.Gen. 50 (2014), and 98 Ops.Cal.Atty.Gen. 97 (2015).

### 10.3.2.5 Legislative Intervention

The common-law doctrine can be superseded by legislative enactment. Thus, the Legislature may choose to expressly authorize the holding of two offices notwithstanding the fact that dual holding would otherwise be prohibited by the common-law doctrine. For example, the Legislature has exempted LAFCOs,<sup>552</sup> the Coastal Commission<sup>553</sup> and River Port Districts<sup>554</sup> from the scope of the common-law doctrine. As such, members of local legislative bodies may simultaneously serve on a LAFCO and on their local legislative body. In addition, the Attorney General has opined that Government Code section 6508 (Joint Powers Agencies) was intended to ensure that the common-law rule did not prevent local legislative body members from serving on joint powers agencies and their governing boards.<sup>555</sup>

Incompatible situations are often presented by some of the newer legislation creating, for example, transportation corridor agencies and county transportation agencies which, by their terms, require membership of city and county representatives. Loyalties of the city representatives obviously compete in their city capacity for dollars and project priority with other city, county, and at-large members. Nonetheless, by virtue of the legislative scheme, the statutory makeup of the board avoids the common-law doctrine of incompatible offices.

This issue has been reviewed in a 2007 Attorney General's opinion,<sup>556</sup> finding that a general manager or department head of a (1) municipal water district, (2) public utility district, (3) county water district, or (4) irrigation district, or a city manager or city department head, may serve on the board of directors of a county water authority as the representative of a member agency.

### 10.3.2.6 Local Agency Intervention

In a 2005 opinion, the Attorney General indicated that a county board of supervisors may, by ordinance, consolidate the duties of three offices. In that opinion, the county board of supervisors had established a number of management positions and thereafter adopted an ordinance consolidating the duties of three offices — auditor-controller, county administrative officer, and director of mental health services. This result can lead to the conclusion that a local agency can do so by ordinance. However, the local agency must be mindful of its local charter (if applicable), which may set out those offices. In that case, the consolidation of the offices would likely have to be accomplished through charter amendment.<sup>557</sup>

Similarly the Attorney General has concluded that the office of county treasurer, county auditor, and county tax collector may be consolidated and held by the same person, and that a county treasurer, who is also a county auditor, may be appointed to a county retirement board operating under the County Employees Retirement Law of 1937. The Attorney General's interpretation of constitutional and statutory provisions relative to retirement and pension systems was determinative in reaching this conclusion.<sup>558</sup>

### 10.3.2.7 Penalties and Enforcement

Under the common-law doctrine and Government Code section 1099(b), where a public servant is found to have accepted two public offices, the doctrine and statute provides for an automatic vacating of the first office.<sup>559</sup>

The doctrine can be enforced in a suit for *quo warranto* under Section 803 of the California Code of Civil Procedure. Disqualification or abstention from those decisions where an actual clash of the two offices occurs is not an available remedy under the common-law doctrine or the statute.<sup>560</sup> A willful omission to perform any duty imposed on the public servant under the law is also

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552 Government Code section 56337.

553 Public Resources Code section 30318.

554 Harbors and Navigation Code section 6835.1.

555 78 Ops.Cal.Atty.Gen. 60 (1995).

556 90 Ops.Cal.Atty.Gen. 24 (2007).

557 88 Ops.Cal.Atty.Gen. 130 (2005).

558 89 Ops.Cal.Atty.Gen. 152 (2006); *see also*, 94 Ops.Cal.Atty.Gen. 87 (2013) and 95 Ops.Cal.Atty.Gen. 67 (2013)

559 66 Ops.Cal.Atty.Gen. 293, 295 (1985) and 66 Ops.Atty.Gen. 176, 178 (1983).

560 66 Ops.Cal.Atty.Gen. 176, 177-178 (1983).

punishable as a misdemeanor.<sup>561</sup>

If a *quo warranto* action is filed, notwithstanding the “legal forfeiture language,” the person remains in the prior office as a de facto member until he or she actually resigns or is removed from office by the *quo warranto* or other lawsuit.<sup>562</sup>

### 10.3.2.8 Brown Act Considerations

Officials who hold two or more offices should be cautious in avoiding violation of the Brown Act. Where an official releases confidential information acquired during the closed session of one government body to anyone else — including the other governmental body on which the official serves — he or she may be subject to disciplinary action and civil or criminal sanctions.

Until 2003, there was no express deterrent to prevent public officers from disclosing confidential information acquired during a duly-held closed session meeting of a local legislative body. The Attorney General had opined the confidentiality of the information received by a person during a closed session is implicit in the Brown Act, but there was no express statement in the law. However, the Legislature enacted Government Code section 54963, which makes it unlawful to disclose any “confidential” information acquired in any duly held closed session of a local legislative body.<sup>563</sup>

Thus, a person may not reveal confidential information acquired by being present in a duly authorized closed session meeting of a local legislative body.<sup>564</sup> Confidential information is defined as any information made in closed session that is specifically related to the basis for the legislative body to meet in closed session.<sup>565</sup>

The law provides the following remedies: (1) injunctive relief to prevent the disclosure of confidential information prohibited by this section; (2) disciplinary action against an employee who has willfully disclosed confidential information in violation of this section; (3) referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the Grand Jury; and (4) any other remedy available at common law.<sup>566</sup>

Pursuant to this provision of the Brown Act, a board member serving more than one government agency may run the risk of violating the Brown Act if he or she reveals information disclosed in a closed session meeting of one body to another person or government agency.

### 10.3.3 Special Provisions for Public Attorneys

Government Code section 1128 concerns the right of public attorneys to hold other elective or appointive office. The statute provides the following:

“Service on an appointed or elected governmental board, commission, committee or other body by an attorney employed by a local agency in a nonelected position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office.”

The Attorney General has opined that this statutory provision modified the common law in several respects and allows a public attorney to hold the second appointive or elective office even where a potential conflict may arise. This would then require transactional disqualification rather than forfeiture if a conflict presents itself. Finally, the statute not only applies to a deputy who stands in the shoes of his or her principal, but to the principal himself or herself.<sup>567</sup>

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<sup>561</sup> Government Code, section 1222; *see also*, 82 Ops.Cal.Atty.Gen. 248 (1999)

<sup>562</sup> 74 Ops.Cal.Atty.Gen. 116 (1981).

<sup>563</sup> Government Code section 54963.

<sup>564</sup> Government Code section 54963(a).

<sup>565</sup> Government Code section 54963(b).

<sup>566</sup> Government Code section 54963(c).

<sup>567</sup> 78 Ops Cal.Atty.Gen. 362 (1995).

Specific opinions have allowed a deputy district attorney to serve on a city council,<sup>568</sup> an appointed city attorney to serve on an airport commission<sup>569</sup> and a deputy county counsel to serve on a city council.<sup>570</sup>

## 10.4 Redevelopment/Successor Agency Conflicts

Health and Safety Code Section 33130 provides no officer or employee who in the course of her or her duties is required to participate in the formulation or approval of plans or policies for the redevelopment of the project area shall acquire any interest in any property included within the project area.

It further provides that if any officer or employee owns or has any direct or indirect financial interest in the property included within the project area, that officer or employee shall immediately make a written disclosure of that financial interest to the local agency and the legislative body, entering the disclosure in the official minutes of the local agency and the legislative body. Failure to make this disclosure constitutes misconduct in office.

### 10.4.1 Redevelopment Agency Dissolution Legislation

ABX1 26<sup>571</sup> was passed by the Legislature in 2011 and dissolved redevelopment agencies by the creation of “successor agencies” to wind down the affairs of the former redevelopment agencies. The California Redevelopment Association and the League of California Cities challenged the constitutionality of ABX1 26 in the California State Supreme Court, which ultimately upheld ABX1 26.<sup>572</sup> Under the Supreme Court’s decision, redevelopment agencies were dissolved effective January 31, 2012.<sup>573</sup> The Legislature further clarified many of the ambiguities it created in enacting ABX1 26 by enacting AB 1484 in 2012, to add processes and procedures to fill some of the gaps in the dissolution process.<sup>574</sup> ABX1 26 and AB 1484 will be referred to as the “redevelopment dissolution legislation.”

With the enactment of the redevelopment dissolution legislation, there was a debate among practitioners as to whether or not the conflict of interest provisions of Health and Safety Code sections 33130 and 33130.5 were still good law and whether or not they applied to successor agencies. In an opinion issued in October of 2014, the Attorney General answered both questions in the affirmative.<sup>575</sup>

The Attorney General reached these conclusions on two bases. The first is Health and Safety Code Section 34173(b), which was added by ABX1 26 to redevelopment dissolution legislation to provide:

“Except for the provisions of the Community Redevelopment Law that are repealed, restricted, or revised pursuant to the Act adding this part, all authority, rights, powers, duties, and obligations previously vested with the former redevelopment agencies, under Community Redevelopment Law, are hereby vested in the successor agencies.”

The Attorney General notes that:

“Neither Section 33130 nor Section 33130.5 was repealed, restricted, or revised by ABX1 26 or by any other legislation. The successor agency therefore steps into the shoes of the former redevelopment agency for purposes of these statutes.”<sup>576</sup>

<sup>568</sup> 74 Ops.Cal.Atty.Gen. 86 (1991).

<sup>569</sup> 67 Ops.Cal.Atty.Gen. 347 (1984).

<sup>570</sup> 85 Ops.Cal.Atty.Gen. 115 (2002).

<sup>571</sup> Assembly Bill No. 26 (2011-2012 1st Ex. Sess.), enacted as Stats. 2011, 1st Ex. Sess. 2011-2012, Ch. 5.

<sup>572</sup> *California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231.

<sup>573</sup> *Id.* at 275.

<sup>574</sup> Assembly Bill No. 1484 (2011-2012, 2nd Session) enacted as Stats. 2012, Ch. 26.

<sup>575</sup> 97 Ops.Cal.Atty.Gen. 75 (2014).

<sup>576</sup> *Id.*

The Attorney General's second reason for concluding that the Community Redevelopment Law's conflict of interest rules still apply is that successor agencies are charged to wind down the affairs of the former redevelopment agencies both expeditiously and to maximize the value of the assets. These decisions require that the decision-making process be conducted so as to "*avoid the possibility of divided loyalty or bias on the part of public servants in executing their responsibilities.*"<sup>577</sup> Consequently, it appears that the best approach is to conclude that the conflict of interest provisions in Community Redevelopment Law still apply and that they apply to successor agencies.

#### **10.4.1.1 Exception**

Section 33130 does not, however, prohibit any officer or employee from acquiring an interest in property within the project area for the purpose of participating as an owner or reentering into business pursuant to the State redevelopment law if the officer or employee has owned a substantially equal interest as that being acquired for three years immediately preceding the selection of the project area.<sup>578</sup> A rental agreement or lease of property which meets four conditions set forth in the statute is not an "interest in real property" for purposes of Subdivision (a).<sup>579</sup>

A further exception is found in Section 33130.5, which permits any officer or employee of the local agency to acquire property for personal residential use by lease or purchase within a project area after the local agency has certified that the improvements to be constructed or work to be done on the property to be purchased or leased has been completed or has certified that no improvements need to be constructed or that no work needs to be done on the property. Section 33130.5 also requires immediate written disclosure to the local agency, recording the disclosure in the minutes, and disqualification from voting on any matters directly affecting such purchase, lease, or residency. Finally, failure to disclose constitutes misconduct in office.

As a practical matter, an officer or employee of a redevelopment agency or city who occupies a position that requires the person to participate in the formulation of or approval of plans or policies for the redevelopment of the project area is generally disqualified from acquiring any interest in real property included within the project area, except for the narrow exceptions set forth above.

#### **10.4.1.2 Non-Dependent Children**

The Attorney General has concluded that an adult, non-dependent child of a member of a redevelopment agency may purchase real property within the agency's redevelopment project area provided that the member does not obtain a direct or indirect financial interest in the property as a result of the purchase.<sup>580</sup>

### **10.5 Special Rules For Housing & CDBG<sup>581</sup>**

#### **10.5.1 Housing Authority Conflicts**

Health and Safety Code section 34281 should be consulted to evaluate conflicts involving a commissioner or employee of a housing authority. Section 34281 provides that an employee or commissioner of an authority shall not acquire any direct or indirect interest in any housing project or any property included or planned to be included in any project, nor have any direct or indirect interest in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project.

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<sup>577</sup> *Id.*

<sup>578</sup> Health & Safety Code section 33130(b).

<sup>579</sup> Health & Safety Code section 33130(c).

<sup>580</sup> 88 Ops.Cal.Atty.Gen. 222 (2005).

<sup>581</sup> The Guide discusses CDBG related conflicts as an example of conflicts requirements of state and federal grant programs. A full discussion of all such programs is beyond the scope of this Guide. Local counsel should consult the conflict requirements of each separate grant program. The federal Office of Management and Budget, Circular A-133 provides a description of many federal grant conflict requirements.



If the commissioner or employee owns or controls a direct or indirect interest in any such property, that person shall immediately make a written disclosure of either to the authority, which shall be entered in the official minutes. Failure to affect this disclosure constitutes misconduct in office.

This section also mirrors the legislative intent of Government Code section 1091.5(a)(5) to allow a tenant of an authority to serve as commissioner of that authority, provided such tenancy is disclosed to the authority in writing and entered in the official minutes of the authority.

### 10.5.2 Federal CDBG Conflict Rules

Most, if not all, cities administer Community Development Block Grant (CDBG) funds between the U.S. Department of Housing and Urban Development (“HUD”) and local nonprofit agencies that implement community-wide programs. CDBG has its own conflict of interest rules, with the general prohibition being:

“ ... that no persons described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this part, or who are in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from a CDBG-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to a CDBG-assisted activity, or with respect to the proceeds of the CDBG-assisted activity, either for themselves or those with whom they have business or immediate family ties, during their tenure or for one year thereafter ... ”<sup>582</sup>

Paragraph (c) describes the individuals covered by CDBG’s conflict of interest rules to include:

“ ... any person who is an employee, agent, consultant, officer, or elected official or appointed official of the recipient, or of any designated public agencies, or of subrecipients that are receiving funds under this part.”<sup>583</sup>

Just like conflicts of interest under the Political Reform Act and Government Code section 1090, conflict of interest issues under CDBG can come up in both normal and usual circumstances and in unique and unusual circumstances. For example, it is not uncommon for someone who runs a local nonprofit that is partially funded by CDBG to become active in the community and ultimately elected to the city council. The new city council member now has a conflict of interest under CDBG — as well as issues that require analysis under the Political Reform Act and Government Code section 1090. The more unusual circumstances are where either elected officials or staff become close to a CDBG recipient and gifts or other compensation begins to flow to them as a result of this relationship.

HUD’s regulations for CDBG have established a process for the city as the recipient of the CDBG funds to apply for an exception to the application of CDBG’s conflict of interest provisions. This determination by HUD is made on a case by case basis when:

- A disclosure of the nature of the conflict has been made by the official with the potential conflict;
- The disclosure of the potential conflict has been made publically;
- There is a description of how the public disclosure was made; and
- There is an opinion of the recipient’s attorney (i.e., local agency attorney) that the potential conflict of interest identified would not violate state or local law.<sup>584</sup>

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582 24 Code of Federal Regulations, title 24, section 570.611(b), Part 570.

583 24 Code of Federal Regulations, title 24, section 570.611(c), Part 570.

584 24 Code of Federal Regulations, title 24, section 570.611(d)(1), Part 570.

Once these threshold requirements have been met, HUD then bases its decision on the following factors:

“HUD shall conclude that such an exception will serve to further the purposes of the Act and the effective and efficient administration of the recipient’s program or project, taking into account the cumulative effect of the following factors, as applicable:

- (i) Whether the exception would provide a significant cost benefit or an essential degree of expertise to the program or project that would otherwise not be available;
- (ii) Whether an opportunity was provided for open competitive bidding or negotiation;
- (iii) Whether the person affected is a member of a group or class of low- or moderate-income persons intended to be the beneficiaries of the assisted activity, and the exception will permit such person to receive generally the same interests or benefits as are being made available or provided to the group or class;
- (iv) Whether the affected person has withdrawn from his or her functions or responsibilities, or the decision making process with respect to the specific assisted activity in question;
- (v) Whether the interest or benefit was present before the affected person was in a position as described in paragraph (b) of this section;
- (vi) Whether undue hardship will result either to the recipient or the person affected when weighed against the public interest served by avoiding the prohibited conflict; and
- (vii) Any other relevant considerations.”<sup>585</sup>

Attorneys should pay particular attention to the operation of Government Code section 1090 with respect to the treatment of the interest of an unpaid board member of a nonprofit seeking funds from the local agency. For example, a local legislative body member who participates in distribution of the CDBG funds and who also serves as a board member of a nonprofit organization (e.g., the American Red Cross), may need to disqualify himself or herself from participation in the CDBG item by virtue of the Attorney General’s interpretation of Section 1091(b)(1), as opposed to an alternative interpretation that it would fall within the purview of Section 1091.5(a)(8) as a non-interest.

In addition, just as Government Code section 1090 would allow someone who has a local agency contract to continue with that contract if they were subsequently elected to the local legislative body but prohibit the contract from being amended, extended, or renewed, the conflict of interest provisions of CDBG would similarly preclude the same types of actions because they violate state law.

While it is not clear that a violation of CDBG’s conflict of interest provisions is by itself a crime, it can result in sanctions from HUD ranging from requiring the return of significant portions of already expended CDBG funds to suspension from eligibility for funding for a significant period of time. Furthermore, federal prosecutors can be uniquely creative in finding other federal laws that individuals engaging in activities constituting a conflict of interest violate.<sup>586</sup>

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► **PRACTICE TIP: Ranking**

If a “ranking” of organizations to receive funds is undertaken, a common technique is to have the conflicted member not participate in the vote on funds his or her local agency will receive and then allow participation in the ranking of the remaining organizations if there are sufficient funds to meet all requests. This may avoid the problem created if the ranking of recipients with that member’s involvement could affect whether his or her local agency will or will not receive a grant. However, if there are more requests than funds to award, participation by the public servant with a conflict as to one requestor may taint the process if he or she participates in ranking other competing requestors.

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585 24 Code of Federal Regulations, title 24, section 570.6111(d)(2), Part 570.

586 *United States v. Moore* (2006) 44 F.3d 671.

## 10.6 Discount Passes on Common Carriers

This basic prohibition reads as follows:

A transportation company may not grant free passes or discounts to anyone holding an office in this state; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.<sup>587</sup>

The Attorney General has opined that the prohibition applies in the following manner:

- The prohibition applies to public officers, both elected and nonelected, but not employees.
- The prohibition applies to interstate and foreign carriers as well as domestic carriers, and to transportation received outside of California.
- The prohibition applies irrespective of whether the pass or discount was provided in connection with personal or public business.
- Violation of the prohibition is punishable by forfeiture of office. Quo warranto proceeding is the appropriate way to enforce the remedy.

The Attorney General has indicated that where free flights or travel is part of a compensation package (i.e., the public officer was a spouse of a flight attendant), the free transportation was offered to the public officer as a member of a larger group under a generally authorized or approved plan — so a violation does not result.<sup>588</sup> The Attorney General has also sanctioned frequent flyer discounts and a coach to first-class upgrade as part of the airline's policy of providing free first class upgrades to honeymooning couples.<sup>589</sup>

Thus, if the pass or discount is provided to the official because of his or her position as a government official, the prohibition applies. If it is provided to the official as a member of a larger group that is not related to the functions of his or her office, the prohibition may not apply.

## 10.7 Public Contracts Code Sections 10410 and 10411

Section 10410 of the Public Contracts Code provides that no officer or employee in the state civil service, or other appointed state official, shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, or sponsored and funded, by any state agency or department through or by a state contract unless the employment, activity or enterprise is required as a condition of the officer's or employee's regular state employment. Further, no officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods.

Section 10411 provides that no retired, dismissed, separated or formerly employed person of any state agency or department employed under the state civil service or otherwise appointed to serve in the state government may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning arrangements or any part of the decision-making process relevant to a contract while employed in any capacity by any state agency or department. The prohibition applies to any person only during the two year period beginning on the date the person left state employment.

For a period of twelve months following the date of his or her retirement, dismissal, or separation from state service no person employed under state civil service or otherwise appointed to serve in state government may enter into a contract with any state agency if he or she was employed by that state agency in a policy making position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement, dismissal or separation. The prohibition does not

<sup>587</sup> California Constitution, Article XII, section 7.

<sup>588</sup> 67 Ops.Cal.Atty.Gen. 81 (1984).

<sup>589</sup> 74 Ops.Cal.Atty.Gen. 26 (1991).

apply to serving as an expert witness in a civil case or to a contract for the continuation of an attorney's services on a matter he or she was involved with prior to leaving state service.

## 10.8 Government Code Section 87404: Revolving Door for Local Agencies

The Political Reform Act places three restrictions on the activities of governmental officials who are leaving or anticipating leaving local government office or reemployment.

### 10.8.1 Section 87406.3: One-Year Ban

The basic prohibition in Government Code section 87406.3 provides: (1) no specified local official, (2) shall for compensation act as a representative for any other person, (3) for one year after leaving local government office or employment, (4) before his or her former local agency, (5) for the purpose of influencing an administrative or legislative action, or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or the sale or purchase of property or goods.<sup>590</sup>

This restriction applies to local elected officials, chief administrative officers of counties, city managers or chief administrative officers of cities, and general managers or chief administrators of special districts who held a position with a local government agency. The restriction extends for 12 months after a specified official permanently leaves or takes a leave of absence from the particular office or employment covered by the ban.

During the one-year period, the official cannot represent another person for compensation by appearing before or communicating with his or her former agency, including any officer or employee thereof, for the purpose of influencing the former agency's:

- "Administrative action," meaning the proposal, drafting, development, consideration, amendment, enactment, or defeat of any matter, including any rule, regulation, or other action in any regulatory proceeding. This includes both quasi-legislative proceedings involving rules of general applicability and quasi-judicial proceedings that determine the rights of specific parties or apply existing laws to specific facts.<sup>591</sup>
- "Legislative action," meaning the drafting, introduction, modification, enactment, defeat, approval, or veto of any ordinance, amendment, resolution, report, nomination, or other matter by the local agency's legislative body.<sup>592</sup>
- Discretionary acts involving permits, licenses, grants, contracts, or the sale or purchase of goods or property.<sup>593</sup>

For the purpose of this prohibition, an official's "former agency" includes both the local government agency for which the official served as an officer or employee and any local government agency which budget, personnel, or other operations were subject to the direction and control of the official's agency.<sup>594</sup>

The prohibition does not apply when a former official is representing his or her own personal interests before the agency unless the appearance is in a quasi-judicial proceeding in which the official previously participated, when the official receives no compensation for making the appearance or communication, or when the official's only compensation for making the appearance or communication is for travel costs.<sup>595</sup> Additionally, the prohibition does not apply when the official is appearing or communicating with his or her former agency as an officer or employee of another government agency.<sup>596</sup>

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590 California Code of Regulations, title 2, sections 18746.2 and 18746.3.

591 California Code of Regulations, title 2, sections 18746.3(b)(5)(A), (B) and (C).

592 California Code of Regulations, title 2, section 18746.3(b)(5)(D).

593 California Code of Regulations, title 2, section 18746.3(b)(5).

594 California Code of Regulations, title 2, section 18746.3(b)(6)(B).

595 California Code of Regulations, title 2, sections 18702.4(b)(1) and 18746.3(b)(3).

596 California Code of Regulations, title 2, section 18746.3(c).

### 10.8.2 Section 87407: Influencing Prospective Employment

Before leaving government office or employment, Government Code section 87407 prohibits all public servants, including both state and local officials, from making, participating in the making, or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any arrangement, concerning prospective employment.<sup>597</sup>

A decision “directly relates” to a prospective employer if:

- The employer, either directly or by an agent, has initiated a proceeding in which a decision will be made by filing an application, claim, appeal, or similar request.
- The employer, either directly or by an agent, is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the subject person.
- The employer will be financially affected by the decision, as defined in the FPPC’s conflict-of-interest regulations.<sup>598</sup> Officials should consult the conflict-of-interest regulations to determine the dollar threshold of the financial effect on the prospective employer that will trigger the official’s disqualification from a decision.

The prohibition does not apply if the prospective employer is a state, local, or federal governmental agency; the official is legally required to make or participate in the making of the governmental decision; or the governmental decision will affect the prospective employer in substantially the same manner as it will affect a “significant segment” of the public generally.

### 10.8.3 Government Code Section 87406.1: One-Year Ban for Air Pollution Control or Air Quality Management Districts

Government Code section 87406.1 provides a one-year ban applicable to former district board members, officers, or employees of air pollution control or air quality management districts who made, or participated in making, decisions which may have foreseeably had a material financial effect on any financial interest of the districts. Under this ban, specified officials are prohibited, after leaving the district, from representing any other person by appearing before or communicating with, their former district in an attempt to influence any regulatory action for a one-year period. For purposes of this section, “regulatory action” has been interpreted to include any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding before the district.<sup>599</sup>

Former general managers and chief administrative officers of air pollution control and air quality management districts are subject to both Government Code section 87406.1 (the one-year ban for air pollution control or air quality management districts) and Government Code section 87406.3 (the one-year ban for local officials).

<sup>597</sup> California Code of Regulations, title 2, section 18747.

<sup>598</sup> California Code of Regulations, title 2, sections 18705.1 and 18705.3.

<sup>599</sup> Fair Political Practices Commission, *Wood* Advice Letter, No. A-95-167.

## Enforcement of Conflict Violations

### 11.1 Enforcement of Political Reform Act

Enforcement of public servant obligations under the Political Reform Act can take several forms, as discussed in this chapter.

#### 11.1.1 Criminal Prosecutions

A knowing or willful violation of the Act is a misdemeanor.<sup>600</sup>

A violator may be fined, for each violation, the greater of \$10,000 or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received.<sup>601</sup>

A person convicted of a misdemeanor under the Act is barred from being a candidate for any elective office or acting as a lobbyist for four years following the conviction.<sup>602</sup>

The statute of limitations for criminal enforcement actions is four years from the date of violation.<sup>603</sup>

#### 11.1.2 Civil Actions

A person who violates the reporting requirements of the Act is subject to a civil penalty of “not more than the amount or value not properly reported.”<sup>604</sup>

A person who makes a cash contribution or expenditure or anonymous contribution in violation of the Act is liable in a civil action for an amount up to \$1,000 or three times the amount of the unlawful contribution or expenditure, whichever is greater.<sup>605</sup>

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<sup>600</sup> Government Code section 91000(a).

<sup>601</sup> Government Code section 91000(b).

<sup>602</sup> Government Code section 91002.

<sup>603</sup> Government Code section 91000(c).

<sup>604</sup> Government Code section 91004.

<sup>605</sup> Government Code section 91005(a).

A state lobbyist or lobbying firm that makes a gift in violation of the Act is liable in a civil action for an amount up to \$1,000 or three times the amount of the unlawful gift, whichever is greater.<sup>606</sup>

A person who makes or receives an honorarium, gift or expenditure in violation of the requirements of the Act is liable in a civil action brought by the FPPC for an amount of up to three times the amount of the unlawful honorarium, gift, or expenditure.<sup>607</sup>

Any designated employee or public servant specified in Section 87200, other than an elected state officer, who realizes an economic benefit as a result of a violation of a disqualification provision is liable in a civil action for an amount of up to three times the value of the benefit.<sup>608</sup>

Depending on the circumstances, various persons, including residents of the jurisdiction, may pursue civil prosecution for violations of the Act.<sup>609</sup> Further, injunctive relief may be sought by the civil prosecutor or any person residing in the official's jurisdiction.<sup>610</sup> The court, in its own discretion, may require a plaintiff to file a complaint with the FPPC prior to seeking injunctive relief. If an action would not have been taken but for a conflict of interest, the court is empowered to void the decision.<sup>611</sup>

The civil prosecutor or any resident of the jurisdiction also may seek civil damages for violations of the Act.<sup>612</sup> A plaintiff who prevails in a civil action may receive attorney's fees.<sup>613</sup> Such fees are awarded under Code of Civil Procedure section 1021.5, and include the potential use of a multiplier.<sup>614</sup> A prevailing defendant, however, may be awarded attorney's fees, but only if the plaintiff's suit is frivolous, unreasonable or without foundation.<sup>615</sup>

The statute of limitations for civil enforcement actions is four years from the date of violation.<sup>616</sup>

### 11.1.3 Violations of Gift and Honoraria Rules

Persons who violate the gift or honoraria rules in Section 89500 et seq. are also subject to a civil action brought by the FPPC for up to three times the amount of the unlawful gift or honoraria.<sup>617</sup> Violators are also subject to administrative sanctions, which include fines of up to \$5,000 per violation, but are exempt from the civil or criminal penalties contained in Section 91000 et seq.<sup>618</sup>

### 11.1.4 Administrative Actions

The FPPC has the authority to bring an administrative action for any violation of the Act.<sup>619</sup>

An employee who violates the disclosure or conflict of interest sections of the Act is subject to discipline by the employing agency, including dismissal consistent with that agency's personnel rules and applicable civil service laws and regulations.<sup>620</sup>

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606 Government Code sections 91005(a), 86201, 86204.

607 Government Code section 89521.

608 Government Code section 91005(b).

609 Government Code section 91001 et seq.

610 Government Code section 91003(a).

611 Government Code section 91003(b); *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.

612 Government Code Sections 91004 & 91005.

613 Government Code Section 91012.

614 *Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528; *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d at p. 997.

615 *People v. Roger Hedgecock for Mayor Com.*, (1986) 183 Cal.App.3d 810, 816-19; see also *Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562, 574-77).

616 Government Code section 91011(b).

617 Government Code section 89521.

618 Government Code section 89520.

619 Government Code section 83116.

620 Government Code section 91003.5.



The FPPC may levy administrative penalties for violations of the Act after a hearing or stipulation.<sup>621</sup> Administrative penalties include a \$5,000 fine per violation, cease and desist orders, and orders to file reports.<sup>622</sup> The FPPC has the authority to bring administrative actions against both state and local officials<sup>623</sup>. In addition, any person who purposely or negligently causes any other person to commit a violation, or aids and abets in the commission of a violation, may be subject to administrative sanctions.<sup>624</sup> But there are specific exceptions for government and private attorneys who provide advice to persons with filing responsibilities under the Act.<sup>625</sup> Generally, legislators and other elected state officers are exempt from administrative, civil and criminal penalties for violation of the disqualification requirement contained in Section 87100. However, the Legislature adopted limited disqualification requirements for legislators and other elected state officers. These disqualification requirements are subject only to administrative enforcement by the FPPC.<sup>626</sup>

The statute of limitations for administrative actions brought by the FPPC is five years from the date of violation.<sup>627</sup>

A person who violates any provision of the Act is subject to an administrative order to cease and desist violation of the Act, to file any reports or statements as required, and to pay a fine of up to \$5,000 per violation.<sup>628</sup>

In addition to all other penalties and remedies, any person failing to timely file any statement or report, as required by the Act, shall be liable to pay to the filing officer the sum of \$10 per day for each day the statement is late.<sup>629</sup>

### 11.1.5 Injunctions

A person residing in the jurisdiction may sue to enjoin violations or to compel compliance with the provisions of the Act.<sup>630</sup>

### 11.1.6 Fees & Costs

Attorney's fees and court costs may be awarded by the court to a prevailing plaintiff or defendant (other than an agency).<sup>631</sup>

Whether or not a violation is inadvertent, negligent or deliberate, the presence or absence of good faith will be considered in applying the remedies and sanctions of the Act.<sup>632</sup>

### 11.1.7 Enforcement Authority

The following chart briefly describes who has authority to initiate enforcement proceedings under the Act, for each type of proceeding (administrative, civil and criminal).

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<sup>621</sup> Government Code section 83116.

<sup>622</sup> Government Code section 83116.

<sup>623</sup> Government Code sections 82048 & 83123; see also *McCauley v. BFC Direct Marketing* (1993) 16 Cal.App.4th 1262, 1268-69 (concluding certain provisions of the Act can be addressed only by an FPPC administrative action.)

<sup>624</sup> Government Code section 83116.5; *People v. Snyder* (2000) 22 Cal.4th 304.

<sup>625</sup> California Code of Regulations, title 2, section 18316.5.

<sup>626</sup> Government Code sections 87102.5-87102.8.

<sup>627</sup> Government Code section 91000.5.

<sup>628</sup> Government Code section 83116.

<sup>629</sup> Government Code section 91013.

<sup>630</sup> Government Code section 91003.

<sup>631</sup> Government Code section 91012.

<sup>632</sup> Government Code section 91001(c).

## ENFORCEMENT AUTHORITY FOR THE POLITICAL REFORM ACT

TYPE OF ENFORCEMENT ACTION	ACTIONS AGAINST STATE OFFICIALS	ACTIONS AGAINST LOCAL OFFICIALS
<b>Administrative</b> Sections 83116, 91001(b), 91001.5, 91003, 91003.5 et seq.	The FPPC may impose administrative sanctions.  An employee who violates the disclosure or conflict of interest sections is subject to discipline by the employing agency.	The FPPC may impose administrative sanctions.  An employee who violates the disclosure or conflict of interest sections is subject to discipline by the employing agency.
<b>Civil</b> Sections 91001(b), 91001.5, 91003 et seq., 91004, 91005, and 91007.	The FPPC is the civil prosecutor of state and state agency officials.  The Attorney General is the civil prosecutor of the FPPC and its employees.  If a resident notifies the civil prosecutor and the civil prosecutor fails to act, individual residents may file suit.	The District Attorney is the civil prosecutor on any matter which a resident could bring.  The elected city attorney of a charter city may act as a civil prosecutor of violations occurring within the city.  If a resident notifies the civil prosecutor and the civil prosecutor fails to act, individual residents may file a civil suit.  The FPPC may file an action that a resident could bring if the District Attorney authorizes the FPPC to file a civil suit.
<b>Criminal</b> Sections 91001 (a), 91001.5	The Attorney General and the District Attorney have concurrent authority.	The District Attorney has authority.  The elected city attorney of a charter city may act as criminal prosecutor for violations occurring within the city.

## 11.1.8 Procedures to Collect Political Reform Act Penalties, Fees and Civil Penalties

The FPPC or filing officer, within four years after the imposition of a penalty, fee, or civil penalty, may bring a civil action and obtain a judgment in superior court to collect the unpaid amounts. To obtain a judgment, the FPPC or filing officer must show that the amounts were imposed following the appropriate procedures, the defendant(s) received actual or constructive notice of the imposition of the monetary penalties, fees, or civil penalties, and full payment has not been received.<sup>633</sup>

Additionally, the FPPC, within four years after it imposes penalties,<sup>634</sup> and once the time for judicial review of the final FPPC order or decision has lapsed or all means of judicial review have been exhausted, may apply to the clerk of the applicable court for a judgment to collect the penalties imposed. A proper application itself constitutes a sufficient showing to warrant issuance of the judgment to collect the penalties, and the clerk of the court must enter the judgment immediately in conformity with the application. Such a judgment has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action.<sup>635</sup>

<sup>633</sup> Government Code section 91013.5.

<sup>634</sup> Unlike Section 91013.5 enacted in 1984, the title and substance of which expressly relate to “monetary penalties, fees, or civil penalties,” Section 91013.7 (enacted in 2013) only refers to “penalties.” The legislative history of Section 91013.7 does not discuss whether the newer statute’s scope is intended to be the same or different than the earlier statute. The issue is further confused by the Legislative Counsel’s Digest, identifying the newer statute’s subject as “Political Reform Act: collection of ‘fines’” (emphasis added).

<sup>635</sup> Government Code section 91013.7.

## 11.2 Enforcement of Section 1090

### 11.2.1 Contracts are Voidable

In addition to the penalties imposed on officials making contracts in which they have a financial interest pursuant to Section 1097, a contract made in violation of Section 1090 is void. Payments made to the contracting parties under a void contract must be returned and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits that it receives under the contract, pursuant to the California Supreme Court's decision in *Thomson v. Call*.<sup>636</sup>

Section 1092 provides that every contract made in violation of Section 1090 may be avoided by any party except the official with the conflict of interest. See Government Code section 1092.5 (exception concerning the good faith of parties involved in the lease, sale or encumbrance of real property). Despite the wording of the section "may be avoided," case law demonstrates that any contract made in violation of Section 1090 is void, not merely voidable.<sup>637</sup>

### 11.2.2 Statute of Limitations for Avoidance of Contracts

The statute of limitations for an action to avoid a contract (Government Code section 1092(a)) is four years "after the plaintiff has discovered, or in the exercise of reasonable care should have discovered," such a violation."<sup>638</sup>

### 11.2.3 Possible Defense to Section 1090

A person subject to Section 1090 may request the FPPC to issue an opinion or advice with respect to his or her duties under Section 1090 for future conduct. The FPPC will forward a copy of the request for an opinion or advice to the Attorney General's office and the local district attorney before proceeding with the advice or opinion.

When issuing the advice or opinion, the FPPC must either provide to the person who made the request a copy of any written communications submitted by the Attorney General or a local district attorney regarding the opinion or advice, or must advise the person that no written communications were submitted. The failure of the Attorney General or a local district attorney to submit a written communication will not give rise to an inference that the Attorney General or local district attorney agrees with the opinion or advice.

FPPC advice does not provide immunity, but may be offered as evidence of "good faith conduct by the requester in an enforcement proceeding, if the requester truthfully disclosed all material facts and committed the acts complained of in reliance on the opinion or advice."<sup>639</sup>

### 11.2.4 Penalties for Violation

Any officer or person who is found guilty of willfully violating any of the provisions of Section 1090 *et seq.* is punishable by a fine of not more than \$1,000 or imprisonment in a state prison and being forever disqualified.<sup>640</sup> For an official to act "willfully," his or her actions concerning the contract must be purposeful and with knowledge that he or she might have a financial interest in the contract.<sup>641</sup> It is also unlawful for any individual to aid or abet an officer or employee in violation of Section 1090.<sup>642</sup>

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<sup>636</sup> *Thomson v. Call* (1985) 38 Cal.3d 633.

<sup>637</sup> *Thomson v. Call* (1985) 38 Cal.3d 633; *People ex rel. State of CA v. Drinkhouse* (1970) 4 Cal.App.3d 931.

<sup>638</sup> Government Code section 1092(b).

<sup>639</sup> Government Code section 1091.7.

<sup>640</sup> Government Code section 1097. *But see, Klistoff v. Superior Court (City of Southgate)* (2007) 157 Cal.4th 469. Only public servants and employees can violate Government Code section 1090; a private contracting party cannot be liable for conspiracy to violate Section 1090. *See also*, Government Code section 1097(b) making "an individual" subject to criminal penalties.

<sup>641</sup> Government Code section 1097; *People v. Honing* (1996) 48 Cal.App.4th 289, 334339.

<sup>642</sup> Government Code sections 1090(b), 1093(b), and 1097(b).

The statute of limitations for criminal prosecution under Section 1090 is three years after discovery of the violation.<sup>643</sup> An individual convicted under Section 1090 is forever disqualified from holding any office in the State of California.

In a case where a city council member sought and obtained appointment to the position of city manager and was later charged with violating Section 1090, she asserted the defense of entrapment by estoppel, claiming she had acted in reliance on the advice of the city attorney. The trial court embraced the argument and ruled in a motion in limine that she could assert the defense. The appellate court disagreed and the Supreme Court affirmed, concluding the defense of entrapment by estoppel was not available to the defendant. The court did not extend the defense to public servants who seek to defend conflicts of interest accusations by claiming reliance on the advice of public attorneys charged with counseling them and advocating on their behalf. The court noted that it was particularly inappropriate because the city attorney was a subordinate officer of the city council and served at its pleasure. The court also pointed out that the average citizen cannot rely on a private lawyer's erroneous advice as a defense to a general intent crime. It made no difference that the attorney who had mistakenly advised her held a government position.<sup>644</sup>

When an agency is informed by affidavit that a board member or employee has violated Section 1090, the agency may withhold payment of funds under the contract pending adjudication of the violation.<sup>645</sup>

### ENFORCEMENT AUTHORITY FOR GOVERNMENT CODE SECTION 1090

TYPE OF ENFORCEMENT ACTION	ACTIONS AGAINST STATE OFFICIALS	ACTIONS AGAINST LOCAL OFFICIALS
<b>Administrative</b> Sections 1097.1, 1097.2, 1097.3, 1097.4, 1097.5 Sections 83115, 83116, & 91000.5	The FPPC may pursue administrative action with the permission of the Attorney General, but does not have authority to void contracts.	The FPPC may pursue administrative action with the permission of the District Attorney.
<b>Civil</b> Sections 1097.1, 1097.2, 1097.3, 1097.4, 1097.5 Sections 83115, 83116, & 91000.5	The FPPC may pursue administrative action with the permission of the Attorney General.	The FPPC may pursue administrative action with the permission of the District Attorney.
<b>Criminal</b>	The Attorney General has concurrent authority with the District Attorney.	The District Attorney has authority.

<sup>643</sup> *Id.* at p. 304, fn. 1; Cal. Penal Code sections 801, 803.

<sup>644</sup> *People v. Chacon* (2007) 40 Cal.4th 558.

<sup>645</sup> Government Code section 1096.





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