Conflicts of Interest

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California Attorney General's Office

CONFLICTS OF INTEREST

OFFICE OF THE ATTORNEY GENERAL

Edmund G. Brown Jr.
Attorney General

Prepared by the Civil Division,
Government Law Section

David S. Chaney
Chief Assistant Attorney General
Jonathan K. Renner
Senior Assistant Attorney General
Zackery P. Morazzini
Supervising Deputy Attorney General
Ted Prim, Editor
Deputy Attorney General
Erin V. Peth, Editor
Deputy Attorney General

INTRODUCTION

Conflict-of-interest laws are grounded on the notion that government officials owe paramount loyalty to the public, and that personal or private financial considerations on the part of government officials should not be allowed to enter the decision-making process. The purpose of this Guide is to assist government officials in complying with California's conflict-of-interest laws and to assist the public and the news media in understanding these laws so that conflict-of-interest situations can be monitored and avoided.

This Guide does not purport to cover all conflict-of-interest laws. Rather, it focuses on financial conflicts of interest by local and state executive and legislative officials. It does not cover judicial conflicts of interest, the Legislative Code of Ethics, or the ethical requirements of the California State Bar.

If you suspect that a government official or a candidate may have a conflict of interest, you can consult this Guide to familiarize yourself with the basic requirements of the law and of the enforcement remedies that are available. Although this Guide will be helpful to both officials and the public, it is not a substitute for directly consulting the law in question, or an attorney.

By providing information about the requirements of these laws, the ways in which they have been interpreted and the ways in which they can be enforced, we hope that fewer misunderstandings will result about what is and what is not a conflict of interest. Through an understanding of these laws, government officials should be able to avoid conflict-of-interest situations and members of the public will be better able to determine whether a conflict of interest exists.

This Guide relies upon statutory and case law, as well as the administrative law of the State. While most of the significant statutes and cases are discussed, this Guide is not intended to be a complete compendium of all statutes and court cases in this area.

We refer to published opinions and letter opinions issued by this office. Attorney General opinions, unlike appellate court decisions, are advisory only. However, with respect to conflict-of-interest laws, courts have frequently adopted the analysis of Attorney General opinions, and have commented favorably on the service afforded by those opinions and this Guide. (See *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1087; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 662.) Published opinions are cited by volume, page number and year (e.g., 59 Ops.Cal.Atty.Gen. 339 (1979)). Indexed letters or letter opinions are cited by year and page number (e.g., Cal.Atty.Gen., Indexed Letter, No. IL 75-255 (July 21, 1975)). Published opinions are available through law libraries and some attorneys' offices. As a general rule, indexed letters are available only in the Offices of the Attorney General. Copies may be obtained by a request to the editors.

We also refer to the regulations, published opinions and informal advice letters of the Fair Political Practices Commission ("FPPC"). The regulations are found in title 2 of the California Code of Regulations in section 18000 et seq. The opinions of the FPPC may be found in publications of Continuing Education of the Bar and are cited by name, year of publication,

volume and page number (e.g., *In re Lucas* (2000) 14 FPPC Ops. 15). We also make reference to FPPC informal advice letters, which are referred to by name and number (e.g., *Best* Advice Letter, No. A-81-032). Copies of these materials may be obtained from the FPPC, or online through LEXIS-NEXIS in the CA-FAIR database or WESTLAW in the CA-ETH database.

If you have specific questions, you should consult an attorney, or for questions concerning the Political Reform Act, the FPPC. For questions concerning the Legislature or its employees, you should contact the Legislative Ethics Committee for the house of the Legislature in question. If you have concerns about potential violations of a conflict-of-interest statute, you should first consult with a representative of the government agency, board or commission that may be affected by the conflict of interest. If you continue to think that a conflict-of-interest violation may exist, you may wish to contact the District Attorney for your county, or other enforcement authority described in the relevant Chapter of this Guide.

The Guide is current through September 30, 2010. You may download this Guide from the Attorney General's web site at www.ag.ca.gov. Other publications of the Attorney General on related topics such as open meetings, public records, and Quo Warranto may be found at http://ag.ca.gov/publications.php.

Ideas and suggestions for future editions of this pamphlet are welcome and should be addressed to the editors.

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ISSUE SPOTTER CHECKLIST

LAW	GUIDEPOSTS
Financial Conflict of Interest Political Reform Act Gov. Code, § 87100 et seq.	✓ Is a state or local official participating in a government decision? ✓ Does the decision affect an interest in real property or an investment of $2,000 or more held by the official? Or a source of income to the official of $500 or more? Or gifts to the official of $420 or more? ✓ If so, is there a reasonable possibility that the decision will affect significantly any of the economic interests (e.g., real property, business entities, or sources of income or gifts) involved? ✓ Are the official's economic interests affected differently than those of the general public or a significant segment of the public? • If the answer to these questions is yes, the official may have a conflict of interest and be required to disqualify from all participation in that decision. (See Ch. I.)
Financial Interests in Contracts Gov. Code, § 1090 et seq.	✓ Does a board member have a direct or indirect financial interest in a contract being made either by the board or by any agency under the board's jurisdiction? • If so, and the contract is made, the member may be subject to criminal sanctions and the contract may be void and any private gain received by the official under the contract may have to be returned.

	• Board members may not avoid the conflict by abstaining from participation in the decision absent a special exception. ✓ Does any other state or local officer or employee have a direct or indirect financial interest in the contract? • If so, the official is required to avoid any participation in the making of the contract. Failure to completely disqualify may subject the official to criminal sanctions and the contract may be void and any private gain received by the official under the contract may have to be returned. (See Ch. VII.)
Limitations on State Contracts Pub. Contract Code, § 10410	✓ Is a state official (other than a part-time board member) involved in an activity, employment or enterprise, some portion of which is funded by a state contract? ✓ Is a state official, while employed by the state, contracting with a state agency to provide goods or services as an independent contractor? • If the answer to either of these questions is yes, a prohibited activity may have occurred. (See Ch. VIII.)
Conflict of Interest Resulting from Campaign Contributions Gov. Code, § 84308	✓ Is there a proceeding involving a license, permit or entitlement for use? ✓ Is the proceeding being conducted by a board or commission? ✓ Were the board members appointed, rather than elected, to office? ✓ Has any board member received campaign contributions of more than

	$250 from the applicant or any other person who would be affected by the decision: (1) during the proceeding; (2) within the previous 12 months prior to the proceeding; (3) within 3 months following a final decision in the proceeding? • If the answer to any of these questions is yes, the board member may have to disqualify himself or herself from participating in the decision. (See Ch. IV.)
Appearance of Financial Conflict of Interest Common Law	• Court-made law, based on avoiding actual impropriety or the appearance of impropriety in the conduct of government affairs, may require government officials to disqualify themselves from participating in decisions in which there is an appearance of a financial conflict of interest. (See Ch. XIII.)
Receipt of Direct Monetary Gain or Loss Gov. Code, § 8920	✓ Will a state officer, not an employee, receive a direct monetary gain or loss as a result of official action? • If an officer expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity, the officer should disqualify himself or herself from the decision. • However, a conflict does not exist if an officer accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member. (See Ch. XIV.)
Public Reporting of Financial Interests Political Reform Act Gov. Code, §§ 87200-87313	✓ Is the official a state or local officer or employee who participates in the making of government decisions?

	• If so, the official may be required to file a public report disclosing investments, real property, income and gifts. (See Ch. II and Ch. III)
Incompatible Activities Gov. Code, § 1125 et seq. (local officials); Gov. Code, § 19990 (state officials)	✓ Is an official using his or her government position or government information, property, or resources for other than an official purpose? ✓ Has the official's agency or appointing authority adopted an incompatible activities statement? • If the activity has been prohibited by an incompatible activities statement, the official can be ordered to stop the practice and may be disciplined. (See Ch. X regarding local officials, and Ch. XI regarding state officials.)
Incompatible Offices Gov. Code, § 1099 codifying the Common Law prohibition	✓ Does a single official hold two offices simultaneously? (This doctrine applies only to public "officers" as opposed to "employees.") ✓ Do the offices overlap in jurisdiction, such that the official's loyalty would be divided between the two offices? • If the answer to each of these questions is yes, the holding of the two offices may be incompatible and the first assumed office may have been forfeited by operation of law. (See Ch. XII.)
Transportation, Gifts or Discounts Cal. Const., art. XII, § 7	✓ Has a state or local officer, not an employee, received a gift or discount in the price of transportation from a transportation company? (The prohibition covers inter and intrastate transportation in connection with both governmental or personal business.)

	• If the answer to this question is yes, the officer may have forfeited his or her office. (See Ch. IX.)
Former State Officials and Their Contracts Pub. Contract Code, § 10411	✓ Is a former state official contracting with his or her former agency to provide goods and services? • If the answer to this question is yes, a prohibited activity may have occurred. (See Ch. VIII, sec. C.)

I. CONFLICT-OF-INTEREST AND DISQUALIFICATION PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87100 et seq.[1]

A. Overview

The people of the State of California enacted the Political Reform Act of 1974 ("the Act"), by an initiative measure in June 1974. It is the starting point in any consideration of conflict-of-interest laws in California. Chapter 7 of the Act (§§ 87100-87500) deals exclusively with conflict-of-interest situations. The Act also limits the receipt of specified gifts and honoraria, which is addressed in Chapter II of this Guide.

One of the declarations at the outset of the Act forms the foundation of the conflict-of-interest provisions: "[p]ublic officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (§ 81001, subd. (b).) Further, the Act sets up a mechanism whereby "[a]ssets and income of public officials which may be materially affected by their official actions . . . [are] disclosed and in appropriate circumstances the officials . . . [are] disqualified from acting in order that conflicts of interest may be avoided." (§ 81002, subd. (c).)

The Fair Political Practices Commission ("FPPC") is the agency primarily charged with the responsibility of advising officials, informing the public, and enforcing the Act.

B. The Basic Prohibition

Under the Act, public officials are disqualified from participating in government decisions in which they have a financial interest. The Act does not prevent officials from owning or acquiring financial interests that conflict with their official duties, nor does the mere possession of such interests require officials to resign from office.

The Act's disqualification requirement hinges on the effect a decision will have on a public official's financial interests. When a decision has the requisite effect, the official is disqualified from making, participating in making, or using his or her official position to influence the making of that decision at any stage of the decision-making process.

By establishing a broad, objective disqualification standard, the Act attempts to cover both actual and apparent conflict-of-interest situations between a public official's private interests and his or her public duties. It is not necessary to show actual bias on the part of the official and it is not even necessary to show that an official's assets or the amount of his or her income will be affected by a decision in order to trigger disqualification. Other more attenuated effects may also bring about an official's disqualification. However, even though this is a broad

[1] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

disqualification requirement, it is by no means all-inclusive. Conflicts arising out of matters other than a financial interest, such as friendship, family, or general sympathy for a particular viewpoint, are outside the purview of the Act.

To determine whether a conflict of interest exists under the Act, the FPPC applies the following eight-step process.

STEP 1: Is the individual a public official? (See Section C of this Chapter.)

STEP 2: Is the public official making, participating in making, or influencing a governmental decision? (See Section D of this Chapter.)

STEP 3: Does the public official have one of the qualifying types of economic interest? (See Section E of this Chapter.)

STEP 4: Is the economic interest directly or indirectly involved in the governmental decision? (See Section F of this Chapter.)

STEP 5: Will the governmental decision have a material financial effect on the public official's economic interests? (See Section G of this Chapter.)

STEP 6: Is it reasonably foreseeable that the economic interest will be materially affected? (See Section H of this Chapter.)

STEP 7: Is the potential effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public? (See Section I of this Chapter.)

STEP 8: Despite a disqualifying conflict of interest, is the public official's participation legally required? (See Section J of this Chapter.)

The answers to these questions will assist you in determining whether a conflict of interest exists. If it does, and no exceptions apply, disqualification is required.

The Act deals with conflict-of-interest situations on a transactional, or case-by-case, basis. This means that situations must be assessed for possible conflicts of interest in the light of their individual facts. The Act demands continual attention on the part of officials. They must examine each transaction to determine if a conflict of interest that triggers disqualification exists.

C. Step 1: Is a Public Official Involved?

The Act applies to "public officials." (§ 87100.) As that term is used in the Act, it encompasses not only elected and appointed officials in the ordinary sense of the word, but also any "member, officer, employee or consultant of a state or local government agency," including "other public officials who manage public investments." (§ 82048; Regulation, § 18701, subd. (b)(1).)[2]

Virtually all officers and employees at every level of state and local government are covered, including officials of all special purpose districts in the state. The definition of "public official" also encompasses non-employees who are "consultants" because they perform certain duties much like employees. (Regulation, § 18701, subd. (a)(2).) However, judges and certain other judicial officials and the State Bar are expressly excluded from the disqualification provisions of the Act, although economic disclosure provisions are applicable to judges and court commissioners. (§§ 82048 & 87200; see Chapter III for additional information on the economic disclosure requirements.)

The terms "officer" or "employee" have their ordinary meaning under state law, but the FPPC has specifically defined the terms "member" and "consultant."

Board and Commission Members as Public Officials

As to "members," the FPPC has interpreted the Act to apply to the members of all boards or commissions with decision-making authority. (Regulation, § 18701, subd. (a)(1).) It makes no difference whether such board members are salaried or unsalaried. (*Com. on Cal. State Gov. Org. & Econ. v. Fair Political Practices Com.* (1977) 75 Cal.App.3d 716.) For example, unsalaried "public members" on boards and commissions are subject to the provisions of the Act, so long as they possess the requisite decision-making authority. (Cal.Atty.Gen., Indexed Letter, No. IL 75-58 (April 8, 1975).) A board or commission possesses decision-making authority whenever any of the following circumstances are present.

1. It may make a final governmental decision. (Regulation, § 18701, subd. (a)(1)(A)(i); *In re Maloney* (1977) 3 FPPC Ops. 69; *In re Rotman* (1987) 10 FPPC Ops. 1; and *In re Vonk* (1981) 6 FPPC Ops. 1.) But, a body that solely prepares a report for submission to another body that possesses decision-making power has not itself made a final decision. (Regulation, § 18701, subd. (a)(1)(B).)

2. It may compel or prevent the making of a governmental decision by its action or inaction. (Regulation, § 18701, subd. (a)(1)(A)(ii).)

[2] All references to regulations in this Chapter are to Title 2 of the California Code of Regulations unless otherwise indicated.

3. Its recommendations are regularly approved without significant modification (Regulation, § 18701, subd. (a)(1)(A)(iii); *In re Rotman* (1987) 10 FPPC Ops. 1.) This third prong covers some bodies that are technically advisory, but they are covered because their recommendations are regularly followed by the decision maker. (Regulation, § 18701, subd. (a)(1)(A)(iii).) This standard involves determining whether the board or commission in question has established a track record of having its recommendations regularly approved. (See *Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Com.* (1977) 75 Cal.App.3d 716; see also *In re Rotman* (1987) 10 FPPC Ops. 1 [discussing redevelopment project area committees].)

Consultants as Public Officials

The definition of "public official" also encompasses non-employees who are "consultants" when they perform certain duties much like employees. (Regulation, § 18701, subd. (a)(2).) To qualify as a consultant, an individual must be:

- delegated specified decision-making authority; or,

- while acting in a "staff capacity," either participate in the making of a decision or perform the duties of an officer or employee of a government agency.

Examples of the type of delegated decision-making authority that may make a consultant a public official under the Act include the power to approve a rule or regulation; adopt or enforce a law; issue, deny, or suspend a permit, license or entitlement; or grant agency approval to a contract, plan, or report. (Regulation, § 18701, subd. (a)(2)(A).)

The phrase "staff capacity" is a term of art. (*Dresser* Advice Letter, No. I-02-022; *Thomas* Advice Letter, No. A-98-185; *Cronin* Advice Letter, No. I-98-155; *Ferber* Advice Letter, No. A-98-118.) Factors to consider in determining whether a person is working in a staff capacity include: whether the duties involve general advice or assistance, as opposed to a single or limited number of projects; whether the duties will be completed within a year; and, whether the duties are sporadic or on-demand, as opposed to ongoing. (*Dresser* Advice Letter, No. I-02-022.)

Individuals who contract to provide services or advice to a government agency that do not satisfy the criteria set forth in the regulation are not consultants and, therefore, not public officials for purposes of the Act.

<u>If an individual is not a public official, no further inquiry is necessary as to the remaining seven steps.</u>

D. Step 2: Is the Official Making, Participating in the Making of, or Using his or her Official Position to Influence the Making of a Governmental Decision?

Once it has been determined an individual is a public official, the next step is to determine if the official's actions are covered. The official's actions are covered if the official is: (1) making, (2) participating in the making of, or (3) influencing or attempting to influence a governmental decision.

Actually Making a Decision

Making a decision includes voting on a matter, appointing a person to a position, obligating one's agency to a course of action on an issue, or entering into a contract for the agency. (Regulation, § 18702.1, subds. (a)(1)-(4).) Determining not to act in any of those ways is also "making a decision" under the Act. (*Id.*, subd. (a)(5).)

Participation in Decision Making

The proscriptions of the Act encompass a broad range of activities beyond the most obvious actions such as voting or contracting, since the language "participate in making . . . a governmental decision" is included in the general prohibition. (§ 87100.) "Participation" includes (1) negotiations without significant substantive review and (2) advice by way of research, investigations, or preparation of reports or analyses for the decision maker, if these functions are performed without significant intervening substantive review. (Regulation, § 18702.2.) As a general rule, an employee that has direct access to a decision maker, either through written or oral communications, has participated in the governmental decision. (See, e.g., *Johnson* Advice Letter, No. A-09-221 [concluding that preparation of a staff recommendation to the Coastal Commission regarding its ultimate decision on a specific property constituted participating in making a governmental decision].)

Three areas of activity that would otherwise fall within the literal definition of participating in the making of a decision have been expressly excluded. First, participation does not include actions that are solely ministerial, secretarial, manual, or clerical. (Regulation, § 18702.4, subd. (a)(1).) These functions are excluded from the definition of participation because they do not involve policy-making judgment or discretion. Because the official performing these activities has no substantive role in the decision, there is no fear that the decision will be affected as a result of his or her financial interests. Accordingly, there is no purpose in disqualifying the official from performing these functions.

Second, a public official may appear before his or her own public agency for the purpose of representing his or her personal interests. (Regulation, § 18702.4, subds. (a)(2) and (b)(1).) The purpose of this exclusion is to allow citizens to exercise their constitutional rights to communicate with their government. However, the exclusion is limited in that it applies to situations in which the decision will solely affect the official's personal interests (e.g., real property or business solely owned by the official or members of his or her immediate family).

To the extent that there are other persons who have the same interest (e.g., other stockholders in a corporation) the official with the conflict is disqualified from addressing his or her agency in any way on that issue.

Third, by necessity, "participation" also does not include actions by a public official with regard to his or her compensation for services or the terms or conditions of his or her employment or contract. (Regulation, § 18702.4, subd. (a)(3).)

Influencing Decision Making

The Act prohibits a public official from "in any way attempting to use his or her official position to influence a governmental decision" when the official has a financial interest. (§ 87100.) This final category of prohibited activity ensures that public officials do not act indirectly to affect their private economic interests by utilizing their official status or activities. It specifically includes attempting to affect any decision within the official's own agency or any agency appointed by, or subject to, the budgetary control of his or her agency. (Regulation, § 18702.3, subd. (a).) Contacts with agency personnel or other attempts to influence on behalf of an official's business entity, clients or customers are also prohibited. (Regulation, § 18702.3, subd. (a).)

However, oral or written communications by an official, made as any other member of the general public, solely to represent his or her personal interests are specifically exempted. Personal interests include an interest in real property, a business entity that is wholly owned by the official or members of his or her immediate family, or a business entity over which the official or the official and his or her spouse exercise sole control. (Regulation, § 18702.4, subds. (b)(1)(A)-(C).) Communications with the media or general public, negotiation with one's own agency regarding compensation, and specific written and oral architectural presentations also are exempt from coverage. (Regulation, § 18702.4, subds. (b)(2)-(5).)

When a decision is not before the official's own agency, nor an agency over which the official's agency has budgetary control, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official purports to act on behalf of his or her agency in communications with any official of another agency. This includes the use of official stationery. (Regulation, § 18702.3, subd. (b).)

In addition to the general provisions of the Act, there is a special prohibition for state officials, including members of all state advisory bodies. (§87104). Specifically, it provides that no state official: (1) shall for compensation act as agent or attorney for any other person; (2) before his or her state agency; (3) if the appearance or communication is made for the purpose of influencing a contract, grant, loan, license, permit or other entitlement for use.

Section 87104 is not applicable to local government officials unless they serve on a state body or state advisory body. However, the disqualification requirement contained in section 87100 generally would achieve the same result since local public officials may not make,

participate in making, or use their official position to influence the making of government decisions that materially affect their sources of income. (Note that section 87104 covers all state advisory bodies, whereas section 87100 covers only those advisory bodies with decision-making authority.) (See Regulation, § 18701, subd. (a)(1)(C).)

E. Step 3: Does the Public Official have one of the Qualifying Types of Economic Interest?

The Act addresses several kinds of economic interests: (1) investments in or positions with business entities, (2) interests in real property, (3) sources of income, (4) sources of gifts and their agents or intermediaries, and (5) the personal finances of the official and the official's immediate family. (§ 87103, subds. (a)-(e).) In the case of each economic interest except for positions with business entities, the Act specifies the minimum amount of holdings, income or gifts that must exist before a disqualifying interest is created. An official with a holding, income or gift that is less than the threshold, need not be concerned with the Act's disqualification provisions because such property or income does not constitute an "interest" under the Act. But a holding, income or gift equal to or greater than the minimum value, as well as a position with a business entity such as an officer or employee, creates the potential for a "material financial effect" on the official's economic interest. Following is a discussion of each of the economic interests.

1. Investments in or positions with business entities

Direct and Indirect Investments in Business Entities

Any direct or indirect investment of $2,000 or more in a "business entity" creates an "interest" for the official. (§ 87103, subd. (a).) "Business entity" essentially means an organization that is operated for profit. (§ 82005.) Business entities include corporations, partnerships, joint ventures, sole proprietorships, and any other type of enterprise operated for a profit. Investments do not include bank accounts, interests in mutual funds, money market funds or insurance policies, or government bonds or securities. (§ 82034.)

The FPPC has defined the investment relationship between limited and general partners. (*In re Nord* (1983) 8 FPPC Ops. 6.) If the limited partnership is "closely held," as defined by statute, a limited partner is deemed to have an "investment" in his or her general partner. When the limited partner has such an investment, he or she must disqualify with respect to decisions affecting the general partner personally or through business entities controlled by the general partner. However, limited partners do not have an investment in other limited partners.

The FPPC also has defined the economic relationship between parents, subsidiaries and otherwise related business entities. An official who has an economic interest in one such entity is also deemed to have an interest in all the other related entities. A parent corporation is one that has a 50 percent or greater ownership interest in a subsidiary corporation. (Regulation, § 18703.1, subd. (d)(1).) One business entity is related to another business entity, if the one business entity or its controlling owner is a controlling owner of the other business entity, or if management and control is shared between the entities. (Regulation, § 18703.1, subd. (d)(2).)

"Indirect investment" includes investments owned by an official's spouse (as either separate or community property), by dependent children, or by someone else on behalf of the official (e.g., a trust arrangement). (§§ 82034 & 87103; Regulation, §§ 18234 & 18235; see also *In re Biondo* (1975) 1 FPPC Ops. 54.) "Indirect investment" also includes any investments held by a business entity in which the official, his or her spouse, and their dependent children collectively have a 10 percent or greater interest. (§ 82034.)

Positions with Business Entities

An official has an economic interest in any business entity in which he or she is an officer, director, employee, or holds any business position, irrespective of whether he or she has an investment in or receives income from the entity. (§ 87103, subd. (d).)

2. Interests in real property

An official has an "interest in real property" when the official, or his or her spouse or dependent children have a direct or indirect equity, option, or leasehold interest of $2,000 or more in a parcel of property (e.g., ownership, mortgages, deeds of trusts, options to buy, or joint tenancies) located in, or within two miles of, the geographical jurisdiction of the official's agency (e.g., within two miles of city boundaries for city officials). (§§ 82033 & 82035.) The $2,000 threshold applies to the value of the official's interest, based upon the fair market value of the property itself. There are special provisions for the disclosure of, or disqualification in connection with, leasehold interests. (See § 82033; Regulation, §§ 18233, 18707.9, subd. (b) & 18729; *In re Overstreet* (1981) 6 FPPC Ops. 12.)

3. Source of income

A public official has an economic interest in any source of income that is either received by or promised to the official and totals $500 or more in the 12 months prior to the decision in question. A conflict of interest results whenever either the amount or the source of an official's income is affected by a decision. (Regulation, §§ 18703.3, subd. (a), 18705.3, 18704.5 & 18705.5, subd. (a)); see also *Witt v. Morrow* (1977) 70 Cal.App.3d 817.) For example, a decision that foreseeably will materially affect an official's employer would necessitate disqualification even if the amount of income to be received by the official were not affected. (*In re Sankey* (1976) 2 FPPC Ops. 157.) (See discussion post, regarding effects on an official's personal finances.) Detrimental, as well as positive effects, on the amount or source of income can create a conflict of interest.

Income generally includes earned income such as salary or wages; gifts; reimbursements of expenses; proceeds from sales, regardless of whether a profit was made; certain loans; and monetary or nonmonetary benefits, whether tangible or intangible. (§ 82030, subd. (a).) Income also includes the official's community property interest in his or her spouse's income (the official would meet the $500 threshold if the spouse received $1,000 of income), but does not include dependent children's income. (*In re Cory* (1976) 2 FPPC Ops. 48.) (Note: This differs from treatment of dependent children's interests in a business entity or in real property as

previously discussed.) A formal separate property agreement that pre-dates receipt of the income at issue can eliminate the economic interest in a spouse's income. But, such an agreement does not eliminate economic interests in a spouse's investment and real estate holdings. (*Marks* Advice Letter, No. A-08-190.)

"Income" includes loans, other than loans from commercial lending institutions in the ordinary course of business made on terms available to the general public. (§ 87103, subd. (c).) But an elected officer may not accept personal loans of $500 or more unless the officer complies with specified requirements set forth in section 87461. (See also § 87460 [prohibiting certain high-level public officials from receiving personal loans from persons who contract with or are employed by the official's agency].)

Common exclusions from the definition of income include: campaign contributions; government salaries and benefits; certain types of payments from nonprofit organizations; inheritances; interest received on time deposits; dividends or premiums from savings accounts; and, dividends from securities registered with the Securities and Exchange Commission. (§ 82030, subd. (b).) With the exception of gifts, the definition of income does not include payments from a source located outside of the official's jurisdiction that does not do business in the jurisdiction, does not plan to do so, and has not done so within the past two years. (§ 82030, subd. (a).)

The exception for governmental salaries and benefits is frequently applicable. (See, e.g., Cal.Atty.Gen., Indexed Letter, No. IL 75-249 (November 10, 1975).) However, this exemption does not apply to a decision to hire, fire, promote, demote or discipline the official's spouse, or to set a salary for the spouse that is different from salaries paid to other employees in the same job classification or position. (Regulation, § 18705.5, subd. (b).)

For purposes of disqualification, income from a former employer does not create a conflict of interest if: (1) the income was accrued or received in its entirety before the official assumed his or her public position; (2) it was received in the normal course of employment; and (3) there was no expectation on the official's part that the official would resume employment with the same employer. (Regulation, § 18703.3, subd. (b).)

4. Source of gifts

Although gifts are included in the definition of income, there is also a separate disqualification provision for gifts. (§ 87103, subd. (e).) A public official has a financial interest in the donor of gifts aggregating $250 or more in the 12 months prior to the decision in question. However, the $250 threshold is adjusted on a biennial basis to correspond with the gift limit established in section 89503. For the years 2009 and 2010 the disqualification threshold is $420. (Regulation, § 18940.2.) In addition to donors, this section also applies to persons who act as agents or intermediaries in the making of gifts. (See Chapter II of this Guide for a discussion of the definition of a gift, the valuation of gifts, and limitations on the receipt of gifts and honoraria.)

5. Personal financial effect

An official has an economic interest in his or her own finances and those of his or her immediate family (spouse and dependent children). (§§ 87103 & 82029; Regulation, § 18703.5.) If it is reasonably foreseeable that a decision will have a financial effect on the official or a member of his or her immediate family that is distinguishable from the decision's effect on the public generally, then disqualification is required whenever the magnitude of the effect will be "material." (§ 87103; Regulation, § 18703.5.) If the decision will result in an increase or decrease of the personal expenses, income, assets, or liabilities of the official or members of the official's immediate family of $250 or more in a 12-month period, the effect is material. (Regulation, § 18703.5.) This does not include effects on the official's real property interests or investment interests, because those interests are covered separately as discussed above. Nor does it include an official's governmental salary, per diem, or benefits, unless the decision is to hire, fire, promote, demote, suspend without pay or other disciplinary action against the official or his or her immediate family member, or to set salary for the official or an immediate family member that is different from salaries paid to other employees of the same agency in the same job classification. (Regulation, § 18705.5.)

F. Step 4: Is The Economic Interest Directly Or Indirectly Involved In The Governmental Decision?

The standard applied to determine whether a decision will have a material financial effect on the public official's interest depends upon whether the interest is directly or indirectly involved. If the interests are directly involved, materiality is generally presumed and the public official usually will have to disqualify himself or herself from the decision. If the interests are only indirectly involved, generally a graduated set of monetary thresholds will be applied to determine the material financial effect. (Regulation, § 18704.1, subd. (b).)

1. Direct involvement

A person or business entity is directly involved in a decision before an official's agency if the person or entity is (1) named as a party to the proceeding conducted by the official's agency, (2) initiates the proceeding by filing an application, claim, appeal or similar request, or (3) is otherwise the subject of a proceeding. (Regulation, § 18704.1, subd. (a).)

Disqualification is generally required when a source of income or gifts to the official, or a business entity in which the official has an investment or holds a position, is directly involved in a governmental decision before the official's agency. (Regulation, § 18704.1, subd. (b).) However, there is an exception for public officials who hold an investment worth $25,000 or less in a Fortune 500 company, or in a company qualified for listing on the New York Stock Exchange. Public officials with such interests may apply the standards for indirectly involved interests even though the interest in question is in fact directly involved. (Regulation, § 18705.1, subd. (b)(2).)

Nexus Test

In addition, the regulations apply the "direct involvement" standard to decisions in which there is a "nexus" between the purpose for which the official receives income and the governmental decision. (Regulation, § 18705.3, subd. (c).) If a person is paid to promote or advocate the policies or position of an individual or group, the official may not then participate in a governmental decision that involves that policy or position. A "nexus" exists if the official receives income in his or her private capacity to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the governmental decision. (Regulation, § 18705.3, subd. (c).) For example, the executive director of an organization, who as a part of his or her duties advocates pro-growth positions endorsed by his or her organization, is disqualified from participating in any decisions in his or her capacity as a member of a board that would advance or inhibit the accomplishment of the organization's goals. (*Best Advice Letter*, No. A-81-032.)

Real Property

The regulations also clarify when a governmental decision directly involves a public official's interest in real property. A public official is directly involved if the property in which the official has the interest is the subject of the decision that is before the official's agency or if the official's property is located within a 500-foot radius of the subject property. This includes the situation where the decision involves the zoning, annexation, sale, lease, actual or permitted use of, or taxes or fees imposed on the property in which the official has an interest. (Regulation, § 18704.2, subd. (a).) It also includes major redevelopment decisions involving establishment or amendment of the redevelopment plan where the official owns property in the redevelopment area. (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.)

An official is also directly involved in a governmental decision that involves the construction of or improvements to public facilities such as water, sewer or streets, which will result in the property receiving new or substantially improved services. (Regulation, § 18704.2, subd. (a)(6).)

When leasehold property in which a public official has an interest is directly involved in the governmental decision, it is presumed that the decision will have a material financial effect upon the official's interests. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have an effect on any of the various factors affecting the value of the leasehold. (Regulation, § 18705.2, subd. (a)(2).)

Personal Financial Effect

Whenever a decision will affect the expenses, income, assets or liabilities of the official or his or her immediate family <u>by any amount</u> the official's personal finances are directly involved in the decision. (Regulation, § 18704.5.)

Exception to Direct Involvement

Finally, there is one overriding exception to the disqualification requirement where a public official's economic interests are directly involved. The official need not disqualify himself or herself if it can be shown that the governmental decision will have no financial effect on the official or his or her economic interests. (Regulation, §§ 18705, subd. (c), & 18705.1-18705.5.)

To recap, the issue of direct versus indirect involvement will determine the materiality standard to be applied. When the interests of the public official are directly involved, materiality is generally presumed and disqualification required unless the official can demonstrate that the decision will have no financial effect on the official or his or her interests. If the public official's interests are indirectly involved, materiality is not presumed, but rather is frequently measured by a set of graduated thresholds. For business entities, the thresholds are primarily tied to the financial size of the entity affected.

2. Indirect involvement

Interests that are indirectly involved must be evaluated in accordance with step 5 discussed below.

G. Step 5: Will The Governmental Decision Have A Material Financial Effect On The Public Official's Economic Interests?

1. Directly involved interests

As discussed in Step 4 above, materiality generally is presumed when the public official's economic interests are directly involved in the governmental decision unless the official can demonstrate that the decision will have no financial effect on the official or his or her interests. (Regulation, § 18705, subd. (a).)

However, in the case of a personal financial effect on the finances of the official or a member of the official's immediate family, even if the official's interest is directly involved in the decision the effect must be at least $250 in a 12-month period to be considered "material" and require the official to disqualify. (Regulation, §§ 18704.5, 18705, subd. (a)(5) & 18705.5, subd. (a).)

2. Indirectly involved interests

When an interest is indirectly involved, there is no presumption of materiality; rather, the public official must find and apply the applicable materiality regulation with its graduated thresholds to the governmental decision in question. (Regulation, §§ 18705-18705.5.)

Business Entities

Materiality is present if the decision will (1) have the specified effects on the gross revenues, assets, or liabilities of the business entity in which the investment is held, or (2) permit the business entity to avoid the expenditure of a designated amount of funds. (Regulation, § 18705.1.)

Whether an effect on a business entity will be considered material depends on the financial size of the business entity. (Regulation, § 18705.1, subd. (c).) For example, an effect of only $20,000 on the gross revenues or assets is material to a small business, while an effect of less than $10 million on the gross revenues or assets may not be material on a Fortune 500 company. (Regulation, §§18705.1, subd. (c)(1) & (c)(4).)

Real Property

As previously noted when the decision involves another's real property located within a 500-foot radius of the official's property, the official's interest is presumed to be directly involved in the decision. Thus, a material financial effect is presumed unless the decision will have no financial effect on the official's property. (Regulation, §§ 18704.2, subd. (a) & 18705.2, subd. (a)(1).)

However, when a decision affects another's property that is more than 500 feet from the official's property, the official's interest is only indirectly involved in the decision. When the official's interest is indirectly involved, the regulation provides that the effect of the decision is presumed not to be material. This presumption may be overturned if it can be shown that the official's property will be materially affected. Factors leading to such a conclusion include, among others, circumstances where the decision affects: (1) the development potential of the property; (2) use of the property; and (3) character of the neighborhood. (Regulation, § 18705.2, subd. (b)(1).)

A public official's leasehold interests that are indirectly involved in a governmental decision are presumed not to be material. However, where specified factors are present, the presumption may be rebutted. (Regulation, § 18705.2, subd. (b)(2).) The decision may be deemed material if it affects: (1) the legally allowable use where the tenant has the right to sublease; (2) the use or enjoyment of the property; (3) the rent by more than 5 percent; or (4) the termination date of the lease. (*Id.*)

Nonprofit Entity

The regulations define materiality in the context of a nonprofit entity that is indirectly affected by a decision. Like the regulation governing effects on business entities, there are a series of criteria based upon the monetary size of the nonprofit entity. (See Regulation, § 18705.3, subd. (b)(2).)

Individuals Who are Sources of Income

The regulations also establish a materiality standard of $1,000 for determining when a governmental decision will have a material effect on an individual who is indirectly involved and who is a source of income or gift to an official. (§ 18705.3, subd. (b)(3).) Also, to determine whether the governmental decision will materially affect the real property of the source of income to the official, one should consult Regulation section 18705.2, subdivision (b).

H. Step 6: Is It Reasonably Foreseeable That The Economic Interest Will Be Materially Affected?

An official is not required to disqualify from participating in a decision unless the effects of the decision that give rise to the conflict of interest are reasonably foreseeable under all of the circumstances at the time the decision is made. The concept of foreseeability hinges on the specific facts of each individual case. For the effect of a decision to be foreseeable, it need not be either certain or direct. However, the possibility that the contemplated effects will in fact occur must be more than merely conceivable. It must appear that there is a substantial likelihood, based on all the facts available to the official at the time of the decision that the effects that would bring about the conflict of interest will occur. (Regulation, § 18706; *Smith v. Superior Court of Contra Costa County* (1994) 31 Cal.App.4th 205; *Downey Cares v. Downey Community Development Com.* (1987)196 Cal.App.3d 983; *Witt v. Morrow* (1977) 70 Cal.App.3d 817; see also *In re Gillmor* (1977) 3 FPPC Ops. 38; *In re Thorner* (1975) 1 FPPC Ops. 198.)

The FPPC has set forth guidelines to assist in determining whether a particular decision's effects are "reasonably foreseeable." The following factors should be considered in making the determination: (1) the extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction; (2) the market share held by the official or the official's source of income in the jurisdiction; (3) the extent to which the official or the official's source of income has competition for business in the jurisdiction; (4) the scope of the governmental decision in question; and, (5) the extent to which the occurrence of the material financial effect is contingent upon intervening events (not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency). (Regulation, § 18706.)

Also, the regulation expressly provides that possession of a real estate sales or brokerage license, or any other professional license, without regard to the official's business activity or likely business activity, does not in itself make a material financial effect on the official's economic interest reasonably foreseeable. (*Id.*)

I. Step 7: Is The Effect Of The Governmental Decision On The Public Official's Economic Interests Distinguishable From Its Effect On The General Public?

If an official has a financial interest within the meaning of the Act and it is foreseeable that the governmental decision in question will have a material effect on that interest, the official still may not be disqualified from participating in the decision. One last variable must be considered, which is whether the decision will affect the official's economic interest differently than it does those of the "public generally." (§ 87103.) If the official is participating in a decision on an issue that will affect the general public's financial interests in the same manner as it does the official's own, the fact that it is affecting materially the official's interest does not create a conflict of interest for the official.

The policy supporting this provision is that an official probably is not reacting to his or her financial interests to the detriment of the community when the official's interests are in harmony with those of the general public or a significant segment of it. Thus, there is no "conflict" when there is a harmony or confluence of interests with a significant segment of the members in the jurisdiction.

Recognizing that no decision will affect every member of the public in the same way, the regulation defines "public generally" to mean a significant segment of the public. (Regulation, §§ 18707 & 18707.1.) For a conflict of interest to be avoided, the official's interest must be affected in substantially the same manner as the interests of all members of the group that is determined to constitute a significant segment. If the interests of some members of the significant segment will be affected differently from the interests of others, the official may not avoid disqualification.

In general, a group of people must be large in number and heterogeneous in nature for it to qualify as a significant segment of the public. (*In re Overstreet* (1981) 6 FPPC Ops. 12; *In re Ferraro* (1978) 4 FPPC Ops. 62.) To the extent it appears to be a narrow, special interest group, it generally would not qualify as a significant segment. (Cal.Atty.Gen., Indexed Letter, No. IL 75-58 (April 8, 1975); *In re Brown* (1978) 4 FPPC Ops. 19; *In re Legan* (1985) 9 FPPC Ops. 1.) The FPPC has established specific percentage and numerical thresholds for determining when a group of people constitute a significant segment of the general public, depending on the type of economic interest at issue. (For the specific thresholds and rules, see Regulation, §§ 18707.1 & 18707.7.)

Members of Specified Boards and Commissions

Under limited circumstances, a member of a board or commission may be appointed to represent the interests of a specific economic group or interest. In those circumstances, the group or interest constitutes a significant segment of the general public. (Regulation, § 18707.4.) Accordingly, so long as the official's interests are affected in substantially the same manner as those of the group or interest in question, the conflict of interest is vitiated and the official may participate in making the decision. (For the specific requirements to utilize this exception, see Regulation, § 18707.4.)

If the statute creating the board or commission does not expressly require that the member represents the industry, trade or profession and holds the economic interest, it may be inferred that the legislative body impliedly authorized such representation based upon the language of the enabling provision of law, the nature and purposes of the program, legislative history, and any other relevant circumstances. (Regulation, § 18707.4, subd. (b).)

Other Exceptional Circumstances

There are also special rules interpreting the "public generally exception" in connection with states of emergency (Regulation, § 18707.6) and rate making decisions, including those by landowner/water districts (Regulation, § 18707.2). In addition, notwithstanding the specific thresholds established in the regulation, exceptional circumstances may nevertheless justify application of the "public generally exception." (Regulation, § 18707.1, subd. (b)(1)(E).) Also, there is a special interpretation of the "public generally exception" that addresses specific problems concerning retailers in small communities. (§ 87103.5; see Regulation, § 18707.5, subd. (b).)

To summarize, if a public official's financial interests will be affected in substantially the same manner as all members of the public generally, or a significant segment thereof, no conflict of interest exists.

J. Step 8: Despite A Disqualifying Conflict Of Interest, Is The Public Official's Participation Legally Required?

There is an exception in the Act to the general prohibition against an official's participation in decision making when a financial conflict of interest exists. The exception applies when the individual public official must act so that a decision can be made or an official action be taken. Under such circumstances, and because of the necessity that government continue to function, the official may proceed despite the conflict, after following certain prescribed procedures. (Regulation, § 18708.) However, the legally-required-participation provision should be narrowly construed. (See 58 Ops.Cal.Atty.Gen. 670 (1975) [stating exception applies, only when the official is faced with the isolated, nonrecurring situation involving a conflict of interest].)

The regulations detail several steps to be taken by officials who wish to exercise the exception. (Regulation, § 18708, subd. (b).) Initially, the official must disclose the existence and nature of the conflicting personal financial interest in the outcome of the particular action involved and make it a matter of public record. The official is prohibited from using his or her official position to influence any other public official with regard to the matter. Also, the official must state for the record exactly why there is no alternative route by which action can be taken. And finally, the official must limit his or her participation to action that is legally required. (Regulation, § 18708, subds. (b) and (c).) For the action to be valid, these steps must be closely adhered to. (See *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511.)

The exception does not include the situation in which the official's vote is merely needed to break a tie. (§ 87101.) Also, once a member of a body is disqualified, that member may be legally required to participate only if an insufficient number of members remain to constitute a quorum. If a sufficient number of disinterested members exist to form a quorum, their mere absence does not make participation by the disqualified member legally required. (Regulation, § 18708, subd. (c).)

In *In re Hudson* (1978) 4 FPPC Ops. 13, the FPPC outlined its interpretation of the legally-required-participation exception when multiple members of a body are disqualified. The FPPC concluded that if a quorum was still available to participate in the making of the decision, the disqualifications must stand. If the disqualifications leave less than a quorum of the board's membership available to act, the legally-required-participation exception is triggered. However, unlike the common law rule of necessity, all disqualified members do not return to voting and participating status; rather, only the number of members needed to constitute a quorum are brought back to participate. (See also *In re Brown* (1978) 4 FPPC Ops. 19, 25, fn. 4; *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050.) The process by which disqualified members may return for this limited role may be accomplished by a random drawing. (Regulation, § 18708, subd. (c)(3).)

Also, in *In re Hopkins* (1977) 3 FPPC Ops. 107, the FPPC concluded that the legally-required-participation exception could not be used to rehabilitate board members who were disqualified by virtue of the acceptance of gifts. In issuing this opinion, the FPPC was concerned that a person appearing before a board or commission could make lavish disqualifying gifts to all members of the board and still be able to gain a favorable decision when a quorum of the board members was rehabilitated. The prospect of rendering one's public agency helpless to act was intended to be a strong deterrent against the acceptance of disqualifying gifts.

K. Requirement To Announce Conflict And Leave Meeting

Once a public official determines that he or she has a financial interest in a decision that necessitates disqualification under the Act, questions arise about the appropriate procedures to be followed. While the Act specifies the disqualification procedures for some officials, both the Act and the regulations are silent with respect to the procedures to be followed by officers or employees who are not members of boards and commissions.

Public Officials Covered By Section 87105

For the limited types of public officials who are covered by section 87200 and who also are subject to either the Brown Act or the Bagley-Keene Open Meeting Act, specific statutory disqualification requirements apply. The list of affected officials is as follows: city councils, boards of supervisors, planning commissions, certain retirement investment boards, the Public Utilities Commission, the Fair Political Practices Commission, the Energy Commission, and the Coastal Commission.

Generally, when one of these officials is disqualified from participating in a decision because of a conflict of interest, the official must publically announce the specific financial interest that is the source of the disqualification. (§ 87105, subd. (a); Regulation, § 18702.5, subd. (b)(1).) After announcing the financial interest, the official usually must leave the room during any discussion or deliberations on the matter in question and the official may not participate in the decision or be counted for purposes of a quorum. (§ 87105; Regulation, § 18702.5, subd. (b)(3).)

For a closed session, the disqualified official still must publically declare his or her conflict in general terms, but need not refer to a specific financial interest. (Regulation, § 18702.5, subd. (c).) A disqualified official may not attend a closed session or obtain any confidential information from the closed session. (Regulation, § 18702.5, subd. (c); *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050.)

Public Officials Not Covered By Section 87105

A public official who is not covered by section 87105 (either because the official is not covered by section 87200 or because the official's position is not covered by the Brown Act or the Bagley-Keene Open Meeting Act) is not subject to these same rules. (Regulation, §§ 18702.1, subd. (d) & 18702.5, subd. (a).) Neither the Act nor implementing regulation requires these officials to announce their conflict or leave either the room or the dais. (Regulation, § 18702.1, subds. (a)(5), (b), and (c).) However, nothing in these regulations either authorizes or prohibits an agency by local rule or custom from requiring a disqualified member to step down from the dais and/or leave the meeting room. These disqualified officials still may not attend a closed session or obtain any confidential information from the closed session. (Regulation, § 18702.1, subd. (c).) And, of course, the disqualified public official cannot make or participate in making a decision in which he or she has a conflict of interest.

All of the restrictions discussed above are separate and apart from the official's right to appear in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter that is related to his or her personal interests. (Regulation, § 18702.4.)

L. Restriction on State Administrative Officials Being Interested in a Contract (§ 87450)

In addition to the disqualification requirements previously discussed, "state administrative officials" as defined in section 87400, as distinguished from "public officials," are disqualified from making, participating in, or using their official position to influence governmental decisions that directly relate to any contract where the official knows or has reason to know that any party to the contract is a person with whom the official, or any member of his or her immediate family, has engaged in any business transaction on terms not available to the public, regarding any investment or interest in real property, or the rendering of any goods or services totaling in value $1,000 or more within the prior twelve months. (§ 87450.)

M. Special Rules For Elected State Officers (§ 87102 et seq.)

Elected state officers are specifically exempted from the Act's remedies for violation of the conflict-of-interest provisions. (§ 87102.) However, there are special disqualification prohibitions for these officials. (§§ 87102.5-87102.8.) For legislators, these prohibitions generally are imposed where legislators have specified interests in non-general legislation, i.e., legislation that affects only a small number of persons and does not affect the general public. (§ 87102.6.) Members of the Legislature are also prohibited from participating in, or using their official position to influence state government decisions in which the member has a financial interest, and that do not involve legislation. (§ 87102.8.)

Further, elected state officers are prohibited from participating in decisions of their agency where the decision would affect a lobbyist employer that has provided compensation to that officer for appearing before a local board or agency, and where the decision will not affect the general public. (§§ 87102.5, subds. (a) and (b); § 87102.8, subd. (b).) For legislators, this prohibition also applies to persons who are not lobbyist employers. (§ 87102.5, subd. (a)(7).)

N. Penalties and Enforcement

These provisions are part of the Political Reform Act. For a discussion of penalties and enforcement under the Act, see Chapter VI of this Guide.

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II. RESTRICTIONS AND LIMITATIONS ON GIFTS, TRAVEL AND HONORARIA

Government Code Section 89503, 89506 & 89502[3]

A. Overview

In addition to the conflict-of-interest disqualification provisions discussed in Chapter I, the Political Reform Act of 1974 ("the Act"), regulates the acceptance of gifts and travel, and imposes restrictions on the receipt of honoraria. Chapter 9.5 of the Act outlines these ethical provisions. Although the rules restricting and limiting gifts, honoraria, and travel are found in a separate chapter of the Act, they also implicate the disqualification and disclosure requirements discussed in Chapters I and III of this Guide. For more information on these rules, consult with the Fair Political Practices Commission ("FPPC").

B. Basic Rule

The Act provides a calendar-year monetary limit on gifts received by candidates and public officials. In addition, gifts received by candidates and public officials of $50 or more are reportable on the individual's statement of economic interests. There are specific exceptions and valuation rules regarding receipt of gifts, which are detailed further below. Further, the Act sets forth various rules regarding payments by a third party for an official's travel and related expenses. Unless covered by a particular exception, these payments are generally reportable on the official's statement of economic interests, and may be considered a gift to the official. Finally, the Act generally disallows specified candidates and public officials from receiving payments for giving speeches, publishing articles, or attending conferences or similar events. This is often referred to as the "honorarium ban."

C. Gifts

1. Limits on gifts

The Act limits the amount of gifts that can be received by specified officials and candidates from a single source during a calendar year to $250, adjusted biennially by the FPPC to reflect changes in the Consumer Price Index. (§ 89503, subd. (f); Regulation, § 18940.2[4].) These gift limits are separate from the prohibition against state officials and candidates from receiving gifts totaling $10 or more a month, if provided by or arranged by a lobbyist. (§§ 86203 & 86204.)

[3] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

[4] All references to regulations in this Chapter are to Title 2 of the California Code of Regulations unless otherwise indicated.

The covered officials and candidates, and corresponding gift limitations for 2009-2010 are as follows:

- **Elected State or Local Officer or Candidate:** $420 per source per calendar year. (§ 89503, subds. (a) & (b); Regulation § 18940.2, subd. (a).)

- **State Board Member or State or Local Designated Employee:** $420 per source per calendar year, if the member or designated employee would be required to report income or gifts from that source under his or her agency's Conflict of Interest Code on his or her statement of economic interest. However, there is an exception for part-time members of governing boards of public institutions of higher education, unless that position is an elective office. (§ 89503, subds. (c) & (d); Regulation § 18940.2, subd. (a).) (See Chapter III for further information on designated employees and their reporting obligations.)

2. Definition of gift

A gift is anything of value that provides a personal benefit, either tangible or intangible, to a public official or candidate for which the donor has not received equal or greater consideration. (§ 82028, subd. (a).) Gifts frequently include money, food, transportation, accommodations, tickets, plaques, flowers and articles for household, office, or recreational use. A gift also includes a rebate or discount in the cost of a product or service, unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. (*Id.*) Under specified circumstances, a gift made to an official's or candidate's spouse or children also may constitute a gift to the official or candidate. (Regulation, § 18944.)

Generally, the recipient of the benefit has the burden of demonstrating that any consideration paid was of equal or greater value than the benefit received. A gift is received when the recipient takes possession of the gift or exercises some direction or control over it. (Regulation, § 18941, subd. (a).) However, for purposes of the disqualification requirement, when there is a promise to make a gift, the gift is received on the date when it is offered, so long as the recipient knows of the offer and ultimately receives the gift or exercises some direction or control over it. (Regulation, § 18941, subd. (b); see also Chapter I, section K for further information on disqualification.)

Under specified circumstances, a gift may be made to a public agency rather than to an individual. (Regulation, §§ 18944.1, 18944.2; see subsection 6 of this section.)

3. Reporting requirements for gifts

Gifts aggregating $50 or more in a calendar year from a single source generally must be reported. (§ 87207.) Both the source of a gift and any intermediary in the making of a gift must be disclosed. (§§ 87210, 87313; Regulation, § 18945.3.) The gifts of an individual donor are aggregated with any gift by an entity in which the donor is more than a 50 percent owner. (Regulation, § 18945.1.) When a gift is made by multiple donors, the group of donors must be generally identified, and any individual donors of $50 or more must be named. (Regulation, § 18945.4.)

4. Gift exceptions

There are a number of exceptions from the basic definition of a gift. And items that are exempt from the gift definition are likewise exempt from any reporting or limitations placed on gifts. These exceptions are quite technical and complex. Below is a summary of the major gift exceptions.

Returned Unused; Reimbursed (§ 82028(b)(2); Regulation, § 18943.)	A gift that the official returns unused to the donor, or for which the official reimburses the donor, within 30 days of receipt is exempt. But, a recipient generally may not negate the receipt of a gift by turning the item over to another person or discarding it. (Regulation, § 18941(a)(3); see also Regulation, § 18943(b) [outlining specific procedures for returning gifts to avoid disqualification].)
Donate to Charity (§ 82028(b)(2); Regulation, § 18943(a).)	Unused gifts donated to a government agency or nonprofit, tax-exempt entity (501(c)(3) organization) within 30 days of receipt without claiming a tax deduction are exempt.
Informational Material (§ 82028(b)(1); Regulation, § 18942.1(b) &(c).)	Informational material, such as books, reports, pamphlets, calendars, or periodicals that serve primarily to convey information, and are provided to assist the official or candidate in the performance of his or her official duties is exempt. Informational material may also include scale models, pictorial representations, and maps, but if the item's fair market value is more than the current gift limit, the official bears the burden of demonstrating that the item is informational. Generally, travel is not informational material, but on-site tours or visits designed specifically to assist in the performance of an official's public duties are informational material. However, transportation to and from the site is not deemed informational material unless there are no commercial or other normal means of travel to the site (such as by private auto).
Relatives (§ 82028(b)(3); Regulation, § 18942(a)(3).)	Gifts from close family relatives (e.g., spouse, children, parents, siblings, grandparents, aunts and uncles) are exempt.
Campaign Contributions (§ 82028(b)(4); Regulation, § 18942(a)(4).)	Bona fide campaign contributions are exempt. But, campaign contributions must be reported under the campaign disclosure provisions of the Act.

Plaques or Awards (§ 82028(b)(6); Regulation, § 18942(a)(6).)	A plaque or trophy that is personalized, for the recipient in question, and that has a value of less than $250 is exempt.
Home Hospitality (Regulation, § 18942(a)(7).)	Hospitality provided by an individual in his or her home is not a gift when the donor is present, subject to certain exceptions.
Exchange of Gifts (Regulation, § 18942(a)(8).)	Gifts exchanged between an official or candidate and another individual, other than a lobbyist, in connection with birthdays, Christmas, other holidays or similar events are exempt, so long as the gifts exchanged are not substantially disproportionate in value.
Devise or Inheritance (§ 82028(b)(5); Regulation, § 18942(a)(5).)	Property acquired by an official through devise or inheritance is not a gift.

5. Valuation of gifts

Gifts are valued as of the date they are received or promised to the recipient. (Regulation, §§ 18941, subd. (a) &18946, subd. (a).) The value is the fair market value of the gift on that date. If a gift is unique, the value of the gift is the cost to the donor if the cost is known or ascertainable to the recipient. In the absence of such knowledge, the recipient must exercise his or her best judgment in reaching a reasonable approximation of the gift's value. (Regulation, § 18946, subd. (b).)

Passes and Tickets

A ticket providing a single admission to an event or facility, such as a game or theater performance, is valued at the face value of the pass or ticket, if the face value is a price that was, or otherwise would have been offered to the public. However, the pass or ticket has no value unless it is either used or transferred to another. (Regulation, § 18946.1, subd. (a); but see Regulation, § 18946.1, subd. (b) [listing the criteria for passes or series of tickets that permit repeated admissions to events or facilities].)

Testimonial Dinners

When an official or candidate is honored at a testimonial dinner or similar event, other than a campaign event, the recipient is deemed to have received a gift in the amount of the pro rata share of the cost of the event plus the value of any specific tangible gifts received by the individual. (Regulation, § 18946.2.)

Wedding Gifts

Wedding gifts are not subject to limit, but are reportable and may trigger disqualification. (Regulation, § 18942, subd. (b)(2).). Generally, wedding gifts are considered to be made to both spouses equally. Therefore, one-half of the gift is attributable to each spouse. If a wedding gift is particularly adaptable to one spouse or intended exclusively for the use of one spouse the gift is allocated entirely to that spouse. (Regulation, § 18946.3.) Moreover, this exemption does not negate the $10 lobbyist gift limit. (§ 89503, subds. (e)(2) and (g).)

Tickets to Political and Nonprofit Fundraisers

A single ticket given to an official and used by that official to a California political committee's fundraiser or to a fundraiser conducted by a nonprofit, tax-exempt organization (501(c)(3) entity) generally has no value. The value of tickets to other nonprofit, tax exempt organization fundraisers is the face value minus the value of any donations stated on the ticket, or where no such donation is set forth, the value is the pro rata share of the cost of food, beverage, or other tangible benefits provided to attendees at the event. (Regulation, § 18946.4.)

Prizes and Awards

Generally, prizes and awards are valued at their fair market value. However, a prize or award won in a bona fide competition unrelated to the recipient's status as an official or candidate is not a gift, but is income and may be reportable, depending upon the source and amount. (Regulation, § 18946.5.)

6. Gift to agencies

Ordinarily, the receipt of property or services by a public official without the payment of equal consideration constitutes a gift to the public official. However, under limited circumstances, a gift may be made to a public agency rather than to a public official. (Regulation, § 18944.2.)

A gift is considered a gift to the agency, as opposed to a specific official, when it satisfies three conditions. First, the agency controls the use of the payment. Specifically, the agency head, or a designee, determines or controls the agency's use of the payment, including which individual will use it. The donor may identify a purpose for the payment, but cannot specify the particular individual, title or classification that may use the payment. Second, the payment must be used for official agency business. Third, the agency must report specified information on a standard form (FPPC Form 801) and post the report on the agency's website within 30 days after use of the payment. Travel payments, including transportation, lodging and meals for any elected officer and for any official listed in section 87200 do not qualify as gifts to an agency, nor do reimbursement payments for travel, meals, and lodging that exceed the rates authorized for use by the agency or those authorized by the Internal Revenue Service. (Regulation, § 18944.2.)

Specific exceptions from the general gift requirements address the issue of donations to public colleges and universities, and to grants, reimbursements, or funds provided by the federal government to a state or local agency. (Regulation, § 18944.2, subds. (e) and (f).) In addition, special procedures have been adopted concerning the receipt by an agency of passes or tickets for events. (Regulation, § 18944.1.)

In addition to the requirements imposed by the FPPC, the Department of Finance has established procedures that state agencies must follow when accepting gifts. (77 Ops.Cal.Atty.Gen. 70 (1994).)

D. Travel

The Act and regulations provide exceptions to the rules on gifts and honoraria for certain payments for travel. "Travel payment" includes payments, advances, or reimbursements for travel, including actual transportation and related lodging and subsistence. (§ 89506, subd. (a).) Certain travel payments are nonetheless reportable by candidates and officials on their statements of economic interests. (§ 87207, subd. (c); Regulation, 18950.1, subd. (a)(2)(B); see also Chapter III of this Guide.)

A variety of special rules apply to the receipt of travel expenses. Depending on the surrounding circumstances, such expenses may be prohibited, limited, reportable, or exempt from coverage under the Act.

Totally Exempt

The following travel payments are exempt from the rules on gifts and honoraria.

1. Free admission to an event at which the official makes speech, participates on a panel, or makes a substantive formal presentation. Also, the transportation and necessary lodging, food or beverages, and non-cash benefits for the event are exempt so long as: (1) the speech is for official agency business and the official is representing his or her government agency in the course and scope of his or her official duties, and (2) the payment is a lawful expenditure made only by a federal, state, or local government agency for purposes related to conducting that agency's official business. (Regulation, § 18950.3.) Lodging, food, and beverages are "necessary" only when provided on the day immediately preceding, the day(s) of, and the day immediately following the speech, panel, seminar, or similar service. (Regulation, § 18950.3, subd. (a)(2).) This exception does not apply to state or local elected officers or other officials enumerated in Government Code section 87200. (*Id.*, subd. (b)(3).)

2. Travel expenses paid from campaign funds, so long as they are expressly authorized by the campaign provisions of the Act. (§ 89506, subd. (d)(1); Regulation, §§ 18950.1, subd. (c) & 18950.4.)

3. Travel expenses paid for by an official's public agency. (§ 89506, subd. (d)(2); Regulation, § 18950.1, subd. (d).)

Reportable, But Not Limited

The travel expenses discussed below are not subject to the Act's gift and honoraria limits. However, such travel expenses may trigger the basic disqualification requirement contained in section 87100. (See Chapter I of this Guide.) In addition, the payments may be reportable on the official or candidate's statement of economic interests. (See Chapter III of this Guide.)

1. Travel expenses that are provided to a principal or employee of a business and which are reasonably necessary in connection with the operation of a bona fide business, trade or profession, that would qualify for a business deduction under the federal income tax laws are not honoraria or gifts unless the predominant activity of the business is making speeches. (§ 89506, subd. (d)(3); Regulation, § 18950.1, subd. (e).) However, such payments may be reportable income on the official's statement of economic interests. (See Chapter III of this Guide.)

2. Travel <u>within the United States</u> that is reasonably related to a legislative or governmental purpose, or to an issue of public policy in connection with an event in which the official gives a speech, participates in a panel or seminar, or provides a similar service. Lodging and subsistence are limited to the day before, the day of, and the day after the speech. (§ 89506, subd. (a)(1).) Although not subject to the limit, these payments are reportable by the official and can subject the official to disqualification.

3. Travel <u>not</u> in connection with giving a speech, participating in a panel or seminar, or providing a similar service, but which is reasonably related to a legislative or governmental purpose, or to an issue of public policy, and is paid for by any of the following: a government agency (foreign or domestic), an educational institution under Internal Revenue Code section 203, a nonprofit organization that is tax exempt under Internal Revenue Code section 501, subdivision (c)(3), or a foreign organization that substantially satisfies the requirements for tax exempt status under the Internal Revenue Code. (§ 89506, subd. (a); Regulation, § 18950.1.) Although not subject to the limit, these payments are reportable by the official and can subject the official to disqualification.

Both Reportable and Limited

To the extent that travel expenses are not exempt as described above, they are subject to both the disclosure requirement and the gift and honoraria limitations.

E. Prohibition on Honoraria

The Act prohibits elected state and local officers and candidates and persons specified in section 87200 from receiving payments for making speeches, writing articles, and attending meetings. (§ 89502, subds. (a) & (b).) This is often referred to as the ban on honoraria. Also, members of state boards and state or local designated employees are prohibited from receiving honoraria from any source of income that is required to be reported on the official's statement of economic interests. (§ 89502, subd. (c).) The prohibition does not apply to judges or non-elected, part-time members of governing boards of institutions of higher education. (§ 89502, subd. (d).) The prohibition does, however, apply to judicial candidates. (§ 89502, subd. (b).)

1. Definition of honoraria

Generally, an honorarium is a payment made in consideration for any speech given, article published, or attendance at a public or private conference, convention, meeting, social event, meal, or similar gathering. (§ 89501.) However, the definition excludes certain travel-related payments. (§ 89501, subd. (c).) (For information concerning limitations on travel-related payments, see Government Code section 89506 and Section D of this Chapter.)

A "speech" includes virtually any type of oral presentation, including participation as a panel member. Comedic, dramatic, musical, or artistic performances do not constitute the making of a speech under the honoraria limitation, but may be reportable income to the official. (Regulation, § 18931.1.)

An "article published" refers to a non-fiction written work that is published in a periodical, newsletter, or similar document. An article published in connection with a bona fide business, trade, or profession is exempt from the prohibition. Further, a book, play, or screenplay is not an "article" covered by this prohibition, but payments received for that activity may be reportable income to the official. (Regulation, § 18931.2; see also Regulation, § 18932.1 [defining bona fide business].) An individual is deemed to have received payment in connection with a published article if he or she receives payment for drafting any portion of the article, or is identified as an author or contributor to the work. (Regulation, § 18931.2.)

2. Exceptions to the honoraria restriction

The following five types of payments are not prohibited and not required to be disclosed on the official's Form 700.

1. Any unused honorarium that is returned to the donor within 30 days after receipt. (§ 89501, subd. (b)(1).)

2. Any unused honorarium that is delivered to the State Controller for donation to the General Fund, or for a local public official is delivered to the local agency for donation to an equivalent fund, without claiming an income tax deduction. (*Id.*) If the honorarium is not a payment of money, and cannot be contributed to the government, the recipient may reimburse the donor for the value or use of the honorarium. (Regulation, § 18933, subd. (a)(3).)

3. A payment that is made directly to a bona fide charitable, educational, civic, religious, or tax-exempt organization and not delivered to the official. However, for this exception to apply all of the following must also be true: (1) the public official does not make the donation a condition for his or her speech, article, or attendance; (2) the public official does not claim the donation as an income tax deduction; (3) the donation will not have any reasonably foreseeable financial effect on the public official or any member of his or her immediate family; and, (4) the public official is not indentified to the recipient charity in connection with the donation. (Regulation, § 18932.5.)

4. A payment received from specified relatives, as long as that person is not acting as an agent or intermediary for another person. (Regulation, § 18932.4, subd. (b).)

5. Certain benefits that are also excluded from the definition of "gift," including informational materials, campaign contributions, personalized plaques and trophies valued at less than $250, and admission, refreshments, and similar non-cash nominal benefits provided to a speaker at certain events under specified conditions. (Regulation, § 18932.4, subd. (a), (c) – (e).)

The following payments are not considered honoraria, but may be reportable and subject the official to disqualification.

Earned Income

Honorarium does not include earned income for personal services if both of the following apply. First, the services are provided in connection with an individual's business or practice of or employment in a bona fide business, trade, or profession (such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting). (§ 89501, subd. (b); Regulation, § 18932, subd. (a)(1).) Second, the services are customarily rendered as a part of the business. (*Id.* subd. (a)(2).) A nonprofit entity may be a "business" under this exception. (*Id.*, subd. (b).) But, for this exception to apply, the sole or predominant activity of the business cannot be speechmaking. (§ 89501, subd. (b)(1); see also Regulation, § 18932.3.)

An individual is presumed to be participating in the profession of teaching if he or she is under contract or employed to teach at an accredited school, college, or university, is paid to teach a continuing education course, or is paid for teaching individuals enrolled in an examination preparation program, such as a State Bar examination review course. (Regulation, § 18932.2, subd. (a) – (c).)

Gifts

Honorarium does not include free admission, food, beverages, and other non-cash nominal benefits provided to an official at any public or private conference, meeting, social event, or similar gathering, when the official does not provide any substantive service. However, these items may be reportable gifts subject to the gift limit. (Regulation, § 18932.4, subd. (f); for additional information on gifts see Section C of this Chapter.)

Travel

Specified payments for transportation, lodging, and subsistence are not honoraria, but may be reportable and subject to limit. (§ 89501, subd. (c); Regulation, § 18932.4, subd. (g); for additional information on travel payments see Section D of this Chapter.)

F. Penalties and Enforcement

These provisions are part of the Political Reform Act. For a discussion of penalties and enforcement under the Act, see Chapter VI of this Guide.

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III. ECONOMIC DISCLOSURE PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87200 et seq.[5]

A. Overview

In addition to the requirement that public officials disqualify themselves from conflict-of-interest situations, public officials whose decisions could affect their economic interests are required by the Political Reform Act of 1974 ("the Act") to file economic interest disclosure statements, which are public records. Disclosure serves the two-fold purpose of making assets and income of public officials a matter of public record and reminding those public officials of their economic interests. By focusing their attention on their interests, officials are able to identify conflict-of-interest situations and disqualify themselves from participating in decisions when appropriate. Moreover, questions from the media and interested citizens often aid in the public discussion of conflict-of-interest issues and assist in their resolution.

Although these disclosure requirements have been challenged as unconstitutionally overbroad and as violating privacy rights, courts have upheld them by finding that any infringements on an official's right to privacy or associational freedom is justified by the limited disclosure needed to prevent a conflict of interest. (*Hays v. Wood* (1979) 25 Cal.3d 772; see also *Fair Political Practices Com. v. Super. Ct.* (1979) 25 Cal.3d 33; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662.)

B. Persons Covered

The Act provides that all state and local officials, who foreseeably may materially affect private economic interests through the exercise of their public duties, must disclose such interests. Some persons are required to file disclosure statements because of the positions they hold and others are required to file because of their job duties. The disclosure requirements for constitutional officers, members of the Legislature, county supervisors, city council members, mayors, judges, and other high ranking officials are set forth in Government Code sections 87200-87210. These individuals are sometimes referred to as "87200 Filers." All other officials who make or participate in making decisions are covered by Conflict of Interest Codes adopted pursuant to Government Code sections 87300-87313. (The promulgation and administration of Conflict of Interest Codes is discussed in Section F of this Chapter.) Under section 87200 et seq., high ranking state and local officials must disclose all income, gifts, interests in real property, and investments located in or doing business in their jurisdiction. The disclosure requirements for all other officials depend upon the individual's power to affect financial interests through his or her official position.

[5] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

C. Statements of Economic Interests

Public officials disclose their private economic interests in a document entitled "Statement of Economic Interests" or the "Form 700." There are three basic types of statements of economic interests: assuming office, annual, and leaving office. As the names of these statements suggest, public officials must report their economic interests when they begin their public position, annually thereafter, and when they leave their public position. In addition, candidates for elective offices (other than appellate or supreme court justices), must file candidate statements. (§§ 87201 & 87302.3.) The requirements for filing candidate statements are set forth in the Act. (*Id.*)

D. Content of Statements

In general, an official's statement of economic interests discloses the types of interests in real property, investments, business positions, and sources of income and gifts which the public official potentially could affect in his or her official capacity. (For a brief discussion of these economic interests, see Chapter I, Section E. For specific instructions, see the disclosure forms and FPPC manual or contact the FPPC directly.) Except for the disclosure of gifts, officials need not disclose the specific amount of their economic interests. They are merely required to mark the appropriate value range applicable to their economic interests, e.g., less than $2,000, $2,000 to $10,000, $10,000 to $100,000, or $100,000 or more.

If income is received or an interest in real property or investment is held at any time during the period covered by the statement, it must be disclosed. Officials are required to report all interests in real property and investments held by their spouses, registered domestic partners, and dependent children and their community property interest in the income of their spouses or registered domestic partners. (§§ 82030, 82033 & 82034.) Officials who own a 10 percent or greater interest in a business entity must disclose the sources of income to, and the interests in real property and investments held by, the business entity if the applicable prorated dollar thresholds are satisfied. (§§ 82030, 82033 & 82034.) Similar disclosure provisions exist for trusts. (See Regulation, § 18234.)[6] However, assets held by a truly blind trust that meets the regulatory standards are not disclosable. (See Regulation, § 18235.)

Except for gifts, the disclosure of income, interests in real property, business positions and investments need not be reported if there is not a sufficient connection between the official's economic interest and the jurisdiction of the official's office or agency. Thus, an interest in real property must be disclosed only if it is within the official's jurisdiction or within two miles of it. (§§ 82033 & 82035.) Similarly, a source of income, or a business entity in which an official has an investment or holds a business position, must be reported only if the source or entity is located in the jurisdiction, is doing business in the jurisdiction, is planning to do business in the jurisdiction, or has done business within the jurisdiction during the past two years. (§§ 82030, 82034 & 82035.) Once again, the purpose for this limitation is to protect the official's privacy in financial affairs that are beyond the official's power to affect. (*See City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259.)

[6] All citations to regulations in this Chapter are to Title 2 of the California Code of Regulations.

Further, in reporting income, the appropriate value range is determined by the gross amount received, rather than the net. (*Wentland* Advice Letter, No. I-98-050; see also *In re Carey* (1977) 3 FPPC Ops. 99.) Therefore, an official may have reportable income even when he or she sells a car, land, or an investment at a loss.

E. Public Access to Statements of Economic Interests

Every official covered by section 87200 or a Conflict of Interest Code must file a statement of economic interests with his or her agency unless another filing officer is specifically designated. Statements of certain officials are forwarded to the FPPC by their respective agencies. These include constitutional officers, members of the Legislature, county supervisors, mayors, city council members, planning commissioners, city managers, city attorneys, and judges.

All statements of economic interests are available for public inspection during regular business hours. Persons wishing to examine statements may not be required to identify themselves and may only be charged a maximum of ten cents ($0.10) per page for copies of statements. For a statement five or more years old, a $5.00 retrieval fee may be added. (§ 81008.)

F. Contents and Promulgation of Conflict of Interest Codes

Every agency taking actions that foreseeably may materially affect economic interests must adopt a Conflict of Interest Code for its employees. (§ 87300.) A Conflict of Interest Code lists those employees or officers who are required to file a statement of economic interests ("designated employees") and prescribes the types of interests which must be disclosed by such officials ("disclosure categories").

For purposes of this Guide, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions that foreseeably could have a material financial effect on any of his or her economic interests. Such persons are covered by the disqualification prohibitions and should be included in the agency's Conflict of Interest Code. Employees who perform merely ministerial or manual tasks, or members of advisory non-decision making boards, as defined by the regulations, are not subject to a Conflict of Interest Code. (Regulation, §§ 18702.4, subd. (a)(1) & 18701, subd. (a)(1).)

The public is entitled to participate in the code adoption process as provided for in the Act and the applicable open meeting law. (See § 87311; see also § 54950 et seq. [enumerating The Brown Act open meeting requirements for local agencies; § 11120 et seq. [enumerating The Bagley Keene Open Meeting Act for state agencies]). You may consult the web site for the Office of the Attorney General at www.ag.ca.gov/open_meetings/ for information on the applicable open meeting law. For more information about the promulgation and contents of Conflict of Interest Codes, contact the FPPC. The FPPC can provide sample lists of designated employees, model disclosure categories, and other aids.

A new state or local agency is required to adopt a Conflict of Interest Code within six months after it comes into existence. (§ 87303.) However, a member of a board or commission of a newly created agency that has not yet adopted a Conflict of Interest Code is required to file a statement of economic interests at the same time and in the same manner as those individuals required to file under section 87200. (§ 87302.6.) Once the agency adopts the new Conflict of Interest Code, the board or commission member must file his or her statement as required under the agency's Conflict of Interest Code.

When a Conflict of Interest Code is adopted by an agency, it must be submitted to the "code reviewing body" for approval. (§ 87303.) As a general rule, the code reviewing body is an agency independent of the promulgating agency, e.g., FPPC for state departments, or city council for city departments. Once the Conflict of Interest Code is approved by the code reviewing body, it must be reviewed periodically to determine whether changed circumstances necessitate its amendment. (§ 87306, subd. (a).) A review must occur at least once every two years. (§§ 87306, subd. (b) & 87306.5.) In particular, the list of designated employees and the disclosure categories should be reflective of the agency's current organization and ability to affect economic interests. (§ 87306, subd. (a).) If the agency fails to adopt a Conflict of Interest Code or to initiate necessary amendments, a resident of the jurisdiction can compel such amendments through a judicial action. (§§ 87305 & 87308.)

G. Penalties and Enforcement

These provisions are a part of the Political Reform Act. For a discussion of penalties and enforcement under the Act, see Chapter VI of this Guide.

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IV. CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS

Government Code Section 84308[7]

A. Overview

As noted in Chapter I, in the Political Reform Act of 1974 ("the Act") campaign contributions are not an economic interest under the conflict-of-interest provisions of section 87100. (§§ 82028, subd. (b)(4); 82030, subd. (b)(1); *Woodland Hills Residents Assoc. v. City Council of the City of Los Angeles* (1980) 26 Cal.3d 938.) However, because of increased concern about the link between campaign contributions and alleged conflict-of-interest situations, the Legislature enacted section 84308 in 1982 specifically to address issues raised by the receipt of campaign contributions.

B. The Basic Prohibition

Briefly stated, Government Code section 84308 provides the following.

(1) The law applies to proceedings on licenses, permits, and other entitlements for use pending before certain state and local boards and agencies.

(2) Covered officials are prohibited from receiving or soliciting campaign contributions of more than $250 from parties or other financially interested persons during the pendency of the proceeding and for three months after its conclusion. But note that local laws may impose limits on campaign contributions that are lower than $250. (§ 85703 et seq.)

(3) Covered officials must disqualify themselves from participating in the proceeding if they have received contributions of more than $250 during the previous 12 months from a party or a person who is financially interested in the outcome of the proceeding.

(4) At the time parties initiate proceedings, they must list all contributions to covered officials within the previous 12 months.

(5) The law expressly exempts directly elected state and local officials except when they serve in a capacity other than that for which they were directly elected.

C. Persons Covered

The law applies to two types of individuals: covered officials and interested persons.

"Covered officials" typically include state and local agency heads and members of boards and commissions. (§§ 84308, subd. (a)(3) and 84308, subd. (a)(4); Regulation 2, § 18438.1.)[8]

[7] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.
[8] All references to regulations in this Chapter are to Title 2 of the California Code of Regulations unless otherwise indicated.

Alternates to elected or appointed board members and candidates for elective office in an agency also are covered. (§ 84308, subd. (a)(4); Regulation, § 18438.1, subd. (c).) Covered officials do not include city councils, county boards of supervisors, the Legislature, constitutional officers, the Board of Equalization, judges and directly elected boards and commissions. However, these officials are not exempt from coverage when they sit as appointed members of other boards or bodies (e.g., joint powers agencies, regional government bodies). (§ 84308, subd. (a)(3) - (a)(4); Regulation, § 18438.1.)

"Interested persons" refers to persons who are financially interested in the outcome of specified proceedings, including "parties" and "participants." Parties (e.g., applicants or subjects of the proceeding) are always presumed to be financially interested in the outcome. In addition, persons or entities that satisfy both of the following criteria are financially interested and are called "participants": (1) they foreseeably would be materially financially affected by the outcome of the decision as those terms are defined in section 87100 et seq.; and (2) they have acted to influence the decision through direct contacts with the officials or their staffs. (§ 84308, subds. (a)(1), (a)(2), (b) and (c); Regulation, § 18438.4.) When a closely held corporation is a party or participant in a proceeding, the requirements of the law apply to the majority shareholder. (§ 84308, subd. (d).)

D. Agents

Agents of parties and participants are subject to the same prohibitions and requirements as their principals. (§ 84308, subds. (b) & (c).) A person is an agent if he or she represents an interested person in connection with the covered proceeding. (Regulation, § 18438.3, subd. (a).) If an individual acting as an agent is also acting as an employee or member of a law, architectural, engineering, or consulting firm, both the individual and the firm are considered agents. (Regulation, § 18438.3, subd. (a).)

To determine whether the threshold of more than $250 for triggering the contribution prohibition or disqualification requirement has been reached, contributions made within the preceding 12 months from parties or participants are aggregated with those of their agents. Contributions from an individual agent include contributions from that agent's firm, but do not include contributions from other individual partners or members of the firm unless such contributions are reimbursed by the firm. (Regulation, § 18438.3, subd. (b).)

E. Proceedings Covered

The law covers proceedings involving a license, permit, or other entitlement for use. These terms include all business, professional, trade and land use licenses and permits, and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises. (§ 84308, subd. (a)(5).) The law covers conditional use permits, zoning variances, rezoning decisions, tentative subdivision and parcel maps, and consulting contracts, but does not apply to general land use plans or general building and development standards. (*City of Agoura Hills v. Local Agency Formation Com.* (1988) 198 Cal.App.3d 480; *In re Curiel* (1983) 8 FPPC Ops. 1.) Ministerial decisions also are not covered. (Regulation, § 18438.2, subd. (b)(3).)

F. Required Conduct

Covered officials, parties, and participants involved in specified proceedings are subject to various requirements in connection with the making or receipt of campaign contributions. As used in section 84308, the term "contribution" refers to money, goods or services provided in connection with federal, state, or local political campaigns. (§ 84308, subd. (a)(6).)

Disclosure

At the time parties initiate proceedings, they must disclose on the record of the proceeding all covered officials to whom they, or their agents, made contributions of more than $250 during the previous 12 months and, for parties who are business entities, the names of their parent organizations, subsidiaries or otherwise related business entities who have made a contribution to any officer of the agency. (§ 84308, subd. (d); Regulation, § 18438.8, subd. (b).) The contributions of parent and subsidiaries of the party, and those businesses otherwise related to the party, must be aggregated with those of the party. (Regulation, § 18438.5.)

Similarly, officials must, at the beginning of the hearing, disclose on the record of the proceeding any party or participant who has contributed more than $250 during the previous 12 months. (§ 84308, subd. (c); Regulation, § 18438.8, subd. (a).) If there is no public hearing, the disclosure must be entered on the written record of the proceeding. (Regulation, § 18438.8.) As will be discussed subsequently, receipt of such contributions may necessitate the disqualification of the official from the decision-making process.

Prohibition on Contributions

During the pendency of the proceeding involving the license, permit, or entitlement for use, and for a period of three months thereafter, parties and participants are prohibited from making contributions of more than $250 to covered officials involved in the proceedings. (§ 84308, subd. (d).) Likewise, covered officials are prohibited from soliciting or receiving such contributions from parties or from participants who they know, or have reason to know, are financially interested in the outcome of the proceeding. (§ 84308, subd. (b).) Covered officials also are prohibited from soliciting, receiving, or directing contributions on behalf of another person or on behalf of a committee. (§ 84308, subd. (b); but see Regulation, § 18438.6 for exceptions.)

Disqualification

If, prior to making a decision in a covered proceeding, more than $250 in contributions has been willfully or knowingly received by an official from a party or their agent during the previous 12 months, the official must disqualify himself or herself from participating in the proceeding. (§ 84308, subd. (c).) A similar prohibition exists for contributions received from a participant, or his or her agent, if the official knows or has reason to know that the participant is financially interested in the outcome of the proceeding. (§ 84308, subd. (c); Regulation, § 18438.7.) If an official returns the contribution (or that portion which is over $250) within 30 days from the time he or she knows or has reason to know of the contribution and the proceeding, disqualification is not required. (§ 84308, subd. (c).)

Knowledge

For the contribution prohibition and disqualification requirement to apply, the covered official must have the requisite knowledge of both the contribution and the fact that the source of the contribution is financially interested in the proceeding. The knowledge requirement is satisfied with respect to the contribution when either the covered official has actual knowledge of it, or it has been disclosed on the record of the proceeding. (Regulation, § 18438.7, subd. (c).) Parties are conclusively presumed to be financially interested. (§ 84308, subds. (a)(1), (b), (c); Regulation, § 18438.7, subd. (a)(1).) With respect to participants, the covered official's knowledge requirement is satisfied if the participant reveals facts to the agency that make his or her financial interest apparent. (§ 84308, subds. (a)(2), (b), (c); Regulation, § 18438.7, subd. (a)(2).)

G. Penalties and Enforcement

Section 84308 is a part of the Political Reform Act. For a discussion of penalties and enforcement provisions under the Act, see Chapter VI of this Guide.

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V. LIMITATIONS ON POST-GOVERNMENTAL EMPLOYMENT

Government Code Section 87400 et seq.[9]

A. Overview

Historically, there has been a regular flow of personnel between government and the private sector. The Political Reform Act of 1974 (the "Act") restricts the post-governmental employment activities of specified public officials. (§ 87400 et seq.) These prohibitions are commonly known as the "Revolving Door Prohibitions." In addition, the Act prohibits public officials anticipating leaving governmental service from participating in government decisions relating to any person with whom the official is negotiating future employment. (§ 87407.)

B. Limitations on Former State Officials Appearing before State Agencies

The Act includes two separate post-employment restrictions on state officers and employees. First, the lifetime restriction permanently prohibits former state officials from being paid to appear in a proceeding involving specific parties (e.g., a lawsuit, an administrative hearing, or a state contract) in which the official previously participated. (§§ 87400 – 87405.) Second, the one-year prohibition restricts specified state officials, for one year after leaving state service, from being paid to represent others before their former agency for the purpose of influencing the agency's decisions in specified proceedings. (§ 87406; see also Pub. Contract Code, § 10411 [listing additional specific prohibitions] & Gov. Code, § 1090 [prohibiting a former official from benefitting from a contract where the official participated in the making of the contract prior to leaving government service].)

1. Lifetime restriction on "switching sides"

The Basic Prohibition

The basic prohibition provides that: (1) no former state administrative official; (2) shall for compensation act as agent or attorney for, or otherwise represent, any person other than the State of California; (3) before any court or state administrative agency; (4) in a judicial or quasi-judicial proceeding; (5) if previously the official personally and substantially participated in the proceeding in his or her official capacity. (§ 87401; see also *In re Lucas* (2000) 14 FPPC Ops. 15.)

Persons Covered

The prohibition applies to any "state administrative official" including every member, officer, employee, or consultant of a state administrative agency who, as part of his or her official responsibilities, engages in any judicial, quasi-judicial, or other proceeding in other than

[9] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

a purely clerical, secretarial, or ministerial capacity. (§ 87400, subd. (b).) State administrative agencies include every office, department, division, bureau, board, and commission of state government, but do not include the Legislature, the courts, or any agency in the judicial branch. (§ 87400, subd. (a).)

Prohibited Acts

If all the elements of the prohibition are present, the prohibition permanently bans a former state administrative official from representing a person for compensation in a covered proceeding. It prohibits any formal or informal appearance or any written or oral communication with the intent to influence the covered proceeding. The prohibition on representation applies only to proceedings in which the State of California is a party or in which it has a direct or substantial interest. (§ 87401, subds. (a) and (b); Regulation, § 18741.1, subd. (a)(3)[10].) In addition, the statute prohibits former administrative officials from aiding or assisting another to represent a person for compensation in a covered proceeding. (§ 87402; Regulation, § 18741.1, subd. (a)(2).) Thus, if a former administrative official would be prohibited from personally acting as the client's representative, he or she is also prohibited, for compensation, from aiding or assisting another in representing the client.

Covered Proceedings

The statute applies only to judicial, quasi-judicial, or other proceedings involving specific parties before a court or administrative agency. (§ 87400, subd. (c); *Xander* Advice Letter, No. A-86-162; *Berrigan* Advice Letter, No. A-86-045.) Thus, quasi-legislative proceedings of an agency to adopt general regulations do not trigger the prohibition. (*Nutter* Advice Letter, No. A-86-042; *Swoap* Advice Letter, No. A-86-199.) Participation in a lawsuit, an administrative enforcement action under section 11500, or application proceedings are specifically covered proceedings. (§ 87400, subd. (c).) Any other proceeding that involves a controversy or ruling concerning specific parties also is covered. (§ 87400, subd. (c).)

Required Participation

Once it has been determined that a former administrative official is prepared to represent another party in a covered proceeding, one must determine whether the former official participated in the proceeding during his or her official tenure. (*In re Lucas, supra,* 14 FPPC Ops. 15; *Anderson* Advice Letter, No. A-86-324; *Petrillo* Advice Letter, No. A-85-255.) A former administrative official is deemed to have participated in a proceeding only if he or she was personally and substantially involved in some aspect of the decision-making process. (§ 87400, subd. (d); *In re Lucas, supra*, 14 FPPC Ops. 15; *Brown* Advice Letter, No. A-91-033.) The statute specifically covers personal and substantial participation in a decision, the approval or disapproval of a decision, the making of a formal recommendation, and the rendering of

[10] All references to regulations in this Chapter are to Title 2 of the California Code of Regulations unless otherwise indicated.

substantial advice. In addition, involvement in an investigation or the use of confidential information qualifies as participation. (§ 87400, subd. (d).) However, the statute specifically exempts the rendering of legal advice to departmental or agency staff which does not involve specific parties. (*Id.*)

Exceptions

There are limited exceptions to the lifetime restrictions.

- The statute does not prevent a former administrative official from making a statement that is based on his or her own special knowledge of the area provided that the official does not receive any compensation other than witness fees as set forth by law or regulation. (§ 87403, subd. (a).)

- The statute also exempts communications made solely for the purpose of providing information, if the court or administrative agency to which the communication is directed, finds that the former official has outstanding and otherwise unavailable qualifications, that the proceeding in question requires such qualifications, and that the public interest would be served by participation of the former official. (§ 87403, subd. (b).)

- Lastly, where a court or administrative agency has made a final decision but has retained jurisdiction over the matter, it may permit an appearance or communication from the former official, if the agency of former employment determines that the former official left office at least five years previously and the public interest would not be harmed.

Additionally, the prohibition extends only to former state administrative officials who, *for compensation*, act as an agent or attorney, or otherwise represent any person other than the state of California. (§§ 87401 & 87402.) Former officials who provide representation without compensation are not covered by the prohibition. (Regulation, § 18741.1, subd. (a)(2).)

Enforcement and Disqualification

Upon petition of any interested person, or party, the court or administrative agency may act to enforce the terms of the prohibition. After notice to the former administrative official, the court or administrative agency may exclude him or her from further participation, or from assisting or counseling any other participant. (§ 87404.) In addition, the administrative, civil and criminal sanctions available for enforcement of the Act apply to these provisions. (See Chapter VI of this Guide.)

2. One-year "revolving door" prohibition

The Basic Prohibition

The "revolving door" prohibition restricts specified state officials, for one year after leaving state service, from accepting compensation to act as the agent, attorney, or representative of another person for purposes of influencing their former agency in specified governmental proceedings through oral or written communications. (§ 87406.)

Covered Persons

The one-year prohibition applies to the following: (1) members of the Legislature; (2) all elected state officers; (3) members of state boards and commissions; and (4) designated employees of a state administrative agency and any other officers, employees, or consultants of the agency who make or participate in making governmental decisions affecting a financial interest. (*Id.*; Regulation, § 18746.1, subd. (a).) (For a discussion of designated employees, see Chapter III, Section F.)

Period Covered

The prohibition is effective for one year, starting when the official permanently leaves state service, or when official is on temporary leave from state service. (Regulation, § 18746.1, subd. (b)(1).) An official is deemed to have permanently left state service when he or she is no longer authorized to perform the duties of the job and stops performing those duties, even if the official is still receiving compensation for accrued leave credits. (*Coler* Advice Letter, No. I-07-089.)

Prohibited Acts

A former member of the Legislature may not for compensation communicate with members of the Legislature, members of any legislative committee or subcommittee, or any officer or employee of the Legislature for the purpose of influencing a legislative action during the one-year period. (§ 87406, subd. (b).)

A former elected state officer (excluding legislators) may not for compensation communicate with any state administrative agency for the purpose of influencing an administrative action or any action or proceeding concerning a permit, license, grant or contract, or the sale or purchase of goods or property during the one-year period. (§ 87406, subd. (c).)

A former non-elected state officer or employee subject to the ban may not for compensation communicate with any state administrative agency, for which the official worked or appeared as a representative during the twelve months before leaving office or employment, for the purpose of influencing an administrative action, a legislative action, or any action or proceeding concerning a permit, license, grant or contract; or the sale or purchase of goods or property. (§ 87406, subd. (d)(1).) Additionally, a non-elected state officer or employee subject

to the ban may not communicate with any state administrative agency where the budget, personnel, and other operations are subject to the direction and control of the agency for which the official worked or appeared as a representative. (Regulation, § 18746.1, subd. (b)(6)(C).)

Administrative or Legislative Action Defined

"Administrative action" means the proposal, drafting, development, consideration, amendment, enactment, or defeat of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding. (§ 82002.)

"Legislative action" means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination, or other matter by the Legislature or by either house or any committee thereof, or by a member or employee of the Legislature acting in his or her official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill. (§ 82037.)

Exceptions

The one-year "revolving door" prohibition does not apply to the following:

- When the official is representing his or her own personal interests before the agency (see Regulation, § 18702.4, subd. (b)(1), [defining "personal interests"]);

- When the official receives no compensation for making the appearance or communication, or when the official is only compensated for a voluntary appearance or communication with the payment of his or her necessary travel, meals, and accommodation (Regulation, § 18746.1, subd. (b)(3));

- To officials who transfer between state agencies (§ 87406, subd. (e)(1); Regulation, § 18741.1, subd. (a)(2)), designated employees of the Legislature (§§ 87406, subd. (d) and 87400, subd. (a)), and former state officials who hold a local elective office when the appearance or communication is made on behalf of the local agency (§ 87406, subd. (e)(2)).

- Appearances before a court, a state administrative law judge, or the Workers Compensation Appeals Board. (§87406.)

C. Limitations on Former Local Officials Appearing before Local Government Agencies

1. Overview

The Act prohibits high-ranking local officials, for one year after leaving their office or employment, from being paid to represent others before their former agency for the purpose of influencing the agency's decisions in specified proceedings. (§ 87406.3.) Members, officers, and employees of air pollution control and air quality management districts are also subject to a ban, similar to the one-year prohibition for state officers and employees described above. (§§ 87406.1.)

In addition to the Act's requirements, former local government officials should consult local laws and rules to determine if there are other local limitations on their activities.

2. General one-year prohibition under section 87406.3

The Basic Prohibition

The basic prohibition provides that: (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. (§ 87406.3; Regulation, §§ 18746.2 & 18746.3.)

Covered Persons

The prohibition applies to officials who have left the following positions with a local government agency: local elective office, county chief administrative officer, city manager or chief administrator of a city, and general manager or chief administrator of a special district. (§§ 87406.3 & 82041; Regulation, § 18746.3.)

Period Covered

The prohibition is effective for one year, starting when the official permanently leaves his or her local agency, or when official is on temporary leave from work at the agency. (Regulation, § 18746.3, subd. (b)(1).)

Prohibited Acts

The official, during the one-year period, 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 following:

- An "administrative action" of the former agency. This includes the proposal, drafting, development, consideration, amendment, enactment, or defeat of any matter, including any rule, regulation, or other action in any regulatory proceeding. "Administrative action" 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. (§ 87406.3; Regulation, § 18746.3, subd. (b)(5)(A) - (C).)

- A "legislative action" of the former agency. This includes the drafting, introduction, modification, enactment, defeat, approval, or veto of any ordinance, amendment, resolution, report, nomination, or other matter by the agency's legislative body. (§ 87406.3; Regulation, § 18746.3, subd. (b)(5)(D).)

- Discretionary acts involving permits, licenses, grants, contracts, or the sale or purchase of goods or property. (§ 87406.3; Regulation, § 18746.3, subd. (b)(5).)

Former Agency

An official's "former agency" includes not only the local government agency for which he or she served as an officer or employee, but also any local government agency whose budget, personnel, or other operations were subject to the direction and control of the official's agency. (§ 87406.3; Regulation, § 18746.4, subd. (b)(6)(B).)

Exceptions

The prohibition in section 87406.3 does not apply when the 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 (see Regulation, § 18702.4, subd. (b)(1) [defining "personal interests"]);

- Receives no compensation for making the appearance or communication, or when the official is only compensated for a voluntary appearance or communication with the payment of his or her necessary travel, meals, and accommodation (Regulation, § 18746.3, subd. (b)(3); and,

- Is appearing or communicating with his or her former agency in the capacity of officer or employee of another government agency and is acting for that new agency. (Regulation, § 18746.3, subd. (c).)

3. One-year prohibition for former officials of air pollution control and air quality management districts

There is also a one-year prohibition, similar to the one-year prohibition for state officers or employees described above, applicable to former board members and specified officers and employees of air pollution control and air quality management districts. (§ 87406.1.)

D. Job Seeking by Government Officials

Prior to leaving government office or employment, the Act prohibits all public 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. (§ 87407; Regulation, § 18747.) This prohibition applies to all public officials, including both state and local officials.

E. Penalties and Enforcement

These provisions are part of the Political Reform Act. For a discussion of penalties and enforcement under the Act, see Chapter VI of this Guide.

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VI. PENALTIES, ENFORCEMENT AND PROSPECTIVE ADVICE UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Sections 83114-83123 and 91000 et seq.[11]

A. Penalties and Enforcement

There are administrative, civil, and criminal penalties for violations of the Political Reform Act of 1974 ("the Act"). The Fair Political Practices Commission ("FPPC") and local district attorneys have brought numerous enforcement actions that have resulted in millions of dollars of fines. If you have a question about a potential violation of the Act, you should contact the FPPC's enforcement division (428 J Street, 7th Floor, Sacramento, CA 95814, (916) 322-5660 or, toll free, 1-866-ASK-FPPC) or your local district attorney. The FPPC's website (www.fppc.ca.gov) is also very helpful.

Administrative Penalties

The FPPC may levy administrative penalties for violations of the Act after a hearing or stipulation. (§ 83116.) Administrative penalties include a $5,000 fine per violation, cease and desist orders, and orders to file reports, etc. (§ 83116.) The FPPC has the authority to bring administrative actions against both state and local officials. (§§ 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].) 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. (§ 83116.5; *People v. Snyder* (2000) 22 Cal.4th 304.) But there are specific exceptions for government and private attorneys who provide advice to persons with filing responsibilities under the Act. (Regulation, § 18316.5.)[12]

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. (§§ 87102.5-87102.8.)

The statute of limitations for administrative actions brought by the FPPC is five years from the date of violation. (§ 91000.5.)

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[11] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

[12] All references to regulations in this Chapter are to Title 2 of the California Code of Regulations unless otherwise indicated.

Civil Prosecution

Depending on the circumstances, various persons, including residents of the jurisdiction, may pursue civil prosecution for violations of the Act. (§ 91001 et seq.) Further, injunctive relief may be sought by the civil prosecutor or any person residing in the official's jurisdiction. (§ 91003, subd. (a).) The court, in its own discretion, may require a plaintiff to file a complaint with the FPPC prior to seeking injunctive relief. In the event an action would not have been taken but for a conflict of interest, the court is empowered to void the decision. (§ 91003, subd. (b); *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.) The civil prosecutor or any resident of the jurisdiction also may seek civil damages for violations of the Act. (§§ 91004 & 91005.)

A plaintiff who prevails in a civil action may receive attorney's fees. (§ 91012.) Such fees are awarded under Code of Civil Procedure section 1021.5, and include the potential use of a multiplier. (*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.) A prevailing defendant, however, may be awarded attorney's fees only if the plaintiff's suit is frivolous, unreasonable or without foundation. (*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.)

The statute of limitations for civil enforcement actions is four years from the date of violation. (§ 91011, subd. (b).)

Criminal Prosecution

The Act also provides misdemeanor criminal sanctions for knowing or willful violations, including fines of up to the greater of $10,000 or three times the amount involved. (§ 91000.) Generally, a person convicted of violating the Act cannot be a candidate for elective office nor act as a lobbyist for four years after the conviction. (§ 91002.)

The statute of limitations for criminal enforcement actions is four years from the date of violation. (§ 91000, subd. (c).)

Violations of Gift and Honoraria Rules

Persons who violate the gift or honoraria rules in section 89500 et seq. are subject to a civil action brought by the FPPC for up to three times the amount of the unlawful gift or honoraria. (§ 89521.) 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. (§ 89520.)

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).

ENFORCEMENT AUTHORITY FOR THE POLITICAL REFORM ACT

Type of Enforcement Action	Actions Against State Officials	Actions Against Local Officials
Administrative (§ 83115 et seq.)	The FPPC may impose administrative sanctions.	The FPPC may impose administrative sanctions.
Civil (§§ 91001, subd. (b), 91001.5, 91003 et seq.)	The FPPC is the civil prosecutor of state officials. The Attorney General is the civil prosecutor of the FPPC and its employees. If the civil prosecutor fails to act, individual residents may file suit.	The District Attorney is the civil prosecutor. The elected city attorney of a charter city may act as a civil prosecutor of violations occurring within the city. If the civil prosecutor fails to act, individual residents may file a civil suit. The District Attorney may authorize the FPPC to file a civil suit whenever an individual resident could file suit.
Criminal (§§ 91001, subd. (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.

B. Prospective Advice

The FPPC provides verbal and written advice on the Political Reform Act to assist officials in avoiding prospective violations of the law.

Formal Opinions (§ 83114, subd. (a))

The FPPC may adopt formal published opinions. (§ 83114, subd. (a); Regulation, § 18320 – 18327.) The Executive Director determines whether the FPPC will grant or deny an opinion request, and the FPPC will notify the requestor whether it will issue an opinion on a particular request. (Regulation, § 18320, subds. (d) & (e).) These opinions usually require two commission hearings and two to six months to adopt. Formal opinions provide the requester with complete immunity from the enforcement provisions of the Act, so long as the requester provides the FPPC with all material facts and the official follows the FPPC's advice in good faith. (§ 83114, subd. (a).)

Written Advice (§ 83114, subd (b))

The FPPC also issues formal written advice on an individual's duties under the Act. Written advice can usually be obtained within 21 working days, but the response time may be extended for good cause. (§ 83114, subd. (b); Regulation, § 18329.) Reliance on such advice is a complete defense in an administrative proceeding brought by the FPPC, and is evidence of good faith conduct in any civil or criminal proceeding, if the person requested the advice in good faith, disclosed all material facts, and committed the acts complained of either in reliance on the FPPC's advice or because the FPPC did not provide timely advice. (§ 83114, subd. (b).) Written advice is not a formal opinion, nor a declaration of FPPC policy. Therefore, it may provide only "guidance," but not immunity, to persons other than the requestor. (Regulation, § 18329, subd. (b)(7).)

Informal Assistance

The FPPC will also provide informal assistance without unnecessary delay and in sufficient time to facilitate compliance with the Act. (§ 18329, subd. (c).) Informal assistance may be requested and rendered verbally or in writing. (*Id.*, subd. (c)(2).) Informal assistance, as opposed to a formal opinion or written advice (discussed above), rendered by the FPPC does not provide the requestor with the immunity set forth in section 83114. (*Id.*, subd. (c)(3).)

You may contact the FPPC in writing at 428 J Street, Sacramento, California 95814; by phone at (916) 322-5660 or (866) ASK-FPPC; and online via the FPPC's website at www.fppc.ca.gov.

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VII. CONFLICTS OF INTEREST IN CONTRACTS

Government Code Section 1090 et seq.[13]

A. Overview

The common law prohibition against "self-dealing" has long been established in California law. (*City of Oakland v. California Const. Co.* (1940) 15 Cal.2d 573, 576.) The present Government Code section 1090, which codifies the common law prohibition as to contracts, can be traced back to an act passed in 1851. (Stats. 1851, ch. 136, § 1, p. 522.) Frequently amended in its details, the basic prohibition has remained unchanged. And, this office and the courts often refer to very early cases when discussing this fundamental precept of conflict-of-interest law. (See, e.g., *Berka v. Woodward* (1899) 125 Cal. 119.)

Section 1090 essentially prohibits a public official from being financially interested in a contract in both the official's public and private capacities. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1073.) As the California Supreme Court has stated, the purpose of section 1090 is to make certain that "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 officials with a strong incentive to avoid conflict-of-interest situations scrupulously." (*Thomson v. Call* (1985) 38 Cal.3d 633, 650.) Eliminating temptation for public officials, avoiding the perception of impropriety, and obtaining their undivided loyalty have been deemed as extremely important public policy goals in California. (*Id.* at p. 648.) Because these goals are of the upmost importance, it is of no import whether actual fraud or dishonesty is involved in the contract process, whether the contract is fair to the public agency, or whether the public agency loses money from the contract.

Importantly, the Political Reform Act (Gov. Code section 81000 et seq.) enacted by initiative in 1974, did not repeal section 1090. Rather, in analyzing whether a conflict of interest exists, one must consider both the Political Reform Act and section 1090. Even if a contract is permissible under section 1090, it may be prohibited by the Political Reform Act. (See *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1092 [discussing relationship between Section 1090 and the Political Reform Act]; 59 Ops.Cal.Atty.Gen. 604 (1976); see also Chapter I of this Guide for a discussion of the conflict-of-interest provisions in the Political Reform Act.)

B. The Basic Analysis

Section 1090 provides that an officer or employee may not make a contract in which he or she is financially interested. Following is a brief outline of the analysis one should undertake to determine whether section 1090 is implicated in a particular governmental decision.

[13] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

1. Who is the individual with the potential conflict of interest?
(See Section C of this Chapter)

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed, at both the state and local level. It also applies to certain consultants and independent contractors.

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.

However, when an employee, as opposed to a board member, is financially interested in a contract, the employee's agency may still enter into the contract, as long as the employee plays no role whatsoever in the contracting process.

2. Does the decision at issue involve a contract and is that contract ultimately executed?
(See Section D of this Chapter)

If no contract is involved, or if a contract in which an officer or employee has a financial interest is not ultimately executed, no violation exists.

3. Is the individual making or participating in making the contract?
(See Section E of this Chapter)

Any participation by a financially interested officer or employee in the process by which such a contract is developed, negotiated, and executed is a violation of section 1090.

4. Does the official have a financial interest in the contract?
(See Section F of this Chapter)

Section 1090 does not define when an official is financially interested in a contract. However, the courts have applied the prohibition to include a broad range of interests.

5. If the official is a board member, does a remote interest exception apply?
(See Section H of this Chapter)

The remote interest exceptions in section 1091 enumerate specific interests that trigger abstention for board members, but that do not prevent the board from making a contract.

6. For all officials, does a non-interest exception apply?
(See Section I of this Chapter)

The interests in section 1091.5 are deemed "non-interests" in that, once disclosed, they do not prevent an officer, employee, or board member from participating in a contract.

7. Can the limited "rule of necessity" be applied?
(See Section K of this Chapter)

There is a limited "rule of necessity" to the application of section 1090 where the contract is for essential services and no other source is available or where the official or board is the only one authorized to act.

8. If a contract has been made in violation of section 1090, what are the consequences?
(See Section M of this Chapter)

Generally, any contract made in violation of section 1090 is void and cannot be enforced. In addition, an official who willfully commits a violation may be subject to criminal sanctions.

C. Persons Covered

Virtually all board members, officers, and employees are public officials within the meaning of section 1090. (See, e.g., *Thomson v. Call* (1985) 38 Cal.3d 633 [council member]; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [council member]; *People v. Vallerga* (1977) 67 Cal.App.3d 847 [county employee]; *People v. Sobel* (1974) 40 Cal.App.3d 1046 [county employee]; *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533 [contract city attorney]; 70 Ops.Cal.Atty.Gen. 271 (1987) [contract city attorney].) Beginning in 1986, section 1090 became applicable to school boards under Education Code section 35233. Section 1090 also applies to members of advisory bodies, if they participate in the making of a contract through their advisory function. (*City Council v. McKinley, supra*, 80 Cal.App.3d 204; 82 Ops.Cal.Atty.Gen. 126 (1999).)

Independent Contractors

Courts have concluded that independent contractors, who serve in advisory positions that are frequently held by officers and employees, are subject to section 1090. Specifically, "independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency's contracts." (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; see also *California Housing Financing Agency v. Hanover* (2007) 148 Cal.App.4th 682 [concluding that an independent contractor who performed a public function by participating in the making of contracts was an "employee" for purposes of inclusion under section 1090]; *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533; *People v. Gnass* (2002) 101 Cal.App.4th 1271; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206-207; 70 Ops.Cal.Atty.Gen. 271 (1987).) As this office stated "[i]t seems clear that the Legislature in later amending section 1090 to include 'employees' intended to apply the policy of the conflicts of interest law . . . to independent contractors who perform a public function and to require those who serve the public temporarily the same fealty expected from permanent officers and employees." (46 Ops.Cal.Atty.Gen 74 (1965).)

However, the holding in *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469 is worth noting on this point. In that decision the court addressed whether a would-be contractor could participate in a conspiracy to violate section 1090. The court concluded that because a would-be contractor could not make a government contract, he could not violate section 1090, and therefore could not conspire to do so. But the *Klistoff* court did not address the circumstances under which a contractor would be subject to the prohibitions of section 1090.

D. Contract Defined

To determine whether a decision involves a contract, one should refer to general contract principles. (See 89 Ops.Cal.Atty.Gen. 258, 260 (2006); 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) However, the provisions of section 1090 may not be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (See *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1333; *People v. Honig* (1996) 48 Cal.App.4th 289, 314; see also *People v. Gnass* (2002) 101 Cal.App.4th 1271.) Several situations involving potential contracts under section 1090 that may not be readily apparent are described below.

Development Agreements and Subdivision Improvement Agreements

Development agreements between a city and a developer are contracts for purposes of section 1090. (78 Ops.Cal.Atty.Gen. 230 (1995); see also 85 Ops.Cal.Atty.Gen. 34 (2002).) Similarly, a subdivision improvement agreement constitutes a contract under section 1090. (See 81 Ops.Cal.Atty.Gen. 373 (1998); 89 Ops.Cal.Atty.Gen. 193 (2006); 89 Ops.Cal.Atty.Gen. 278 (2006); but see § 1091.1 [special exemption from section 1090 for public officials who must deal with government entities regarding the subdivision of land they own or in which they have an interest].)

Grants and Donations

Grants and donations generally are contracts. (See *People v. Honig* (1996) 48 Cal.App.4th 289 [rejecting a claim that a grant was not a contract within the meaning of section 1090].) The benefit to the public from an expenditure of funds for a public purpose is in the nature of consideration, and the funds expended are therefore not a gift. This office has concluded that section 1090 applied to a donation of city funds to a nonprofit entity where the executive director was the spouse of a member of the city council. (89 Ops.Cal.Atty.Gen. 258 (2006).) Likewise, this office opined that a city's future grant of public funds to a nonprofit corporation would be subject to section 1090 because the corporation's executive director was a newly-elected member of the city council. (85 Ops.Cal.Atty.Gen. 176 (2002); but see §§ 1091, subd. (b)(1) and 1091.5, subd. (a)(8) for possible exceptions.)

Payment of Spousal Expenses

Payment of spousal expenses involves the making of a contract. For example, section 1090 prohibits a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. The board member has a financial interest in the payment of his or her spouse's expenses and that the payment itself constitutes a contract. (75 Ops.Cal.Atty.Gen. 20 (1992).)

Civil Service Appointment

A civil service appointment is an employment contract. (See 59 Ops.Cal.Atty.Gen. 223 (1960).)

Certificate of Public Convenience and Necessity

A certificate of public convenience and necessity generally is not a contract. This office has concluded that a certificate of public convenience and necessity from a city to operate an ambulance service is not a contract, but rather is in the nature of a license that is regulatory in nature. The same analysis applies to the rate schedule that regulates the prices that the ambulance company can charge its riders. (84 Ops.Cal.Atty.Gen. 34 (2001).)

Modification, Extension or Renegotiation of Existing Contract

A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of section 1090].) Further, where an existing contract requires periodic renegotiation of payment terms, the modification of such terms constitutes the making of a contract. (81 Ops.Cal.Atty.Gen. 134 (1998).) Likewise, sending the payment issue to arbitration or merely allowing the existing terms to continue untouched and intact also constitutes the making of a contract. (89 Ops.Cal.Atty.Gen. 49 (2006); 81 Ops.Cal.Atty.Gen. 134 (1998)). Similarly, modification of a collective bargaining agreement by a school district is making a contract. (65 Ops.Cal.Atty.Gen. 305, 307 (1982); 89 Ops.Cal.Atty.Gen 217 (2006).)

E. Making or Participating in Making a Contract

Having determined that a contract is involved, the next issue is whether the contract was "made" in his or her official capacity. Importantly, the use of the term "made" in the statute indicates that a contract must be finalized before a violation of section 1090 can occur.

Participating in Making a Contract

Significantly, section 1090 reaches beyond the officials who actually execute the contract. Officials who participate in any way in the making of the contract are also covered by section 1090. The courts have established a broad standard for an official's involvement or participation in the making of a contract in section 1090:

> The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of 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 interests.

(*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.)

Participation Is Presumed for Board Members

When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).) *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, exemplifies constructive participation in the making of a contract. There the court held that a member of the board of a special district who applied for and was offered the position of district manager while still serving on the board violated section 1090. (See also 84 Ops.Cal.Atty.Gen. 126 (2001) [section 1090 prohibited a community college board of trustees from contracting with a board member to serve as a part-time or substitute instructor]; see also Cal.Atty.Gen., Indexed Letter, No. IL 91-210 (February 28, 1991) [interpreting section 1090 to prohibit a contract between the school district and a member of its governing board to serve as a substitute school teacher]; § 53227 [prohibiting an employee of a local agency from simultaneously serving on the legislative body of the local agency]; Ed. Code, §§ 35107, subd. (b) and 72103, subd. (b) [applying the same prohibition to school and community college employees].)

This absolute prohibition applies regardless of whether the contract is found to be fair and equitable. (*Thomson v. Call* (1985) 38 Cal.3d 633; *People v. Sobel* (1974) 40 Cal.App.3d 1046). Also, a board may not avoid a section 1090 conflict by delegating decision-making authority to another individual or body. (87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).)

However, where the contract is not under the jurisdiction of the board member, the contract is not automatically prohibited by section 1090. (See 81 Ops.Cal.Atty.Gen. 274 (1998) [contracts of County Housing Authority Commission were independent from the county board of supervisors and consequently could employ a member of the board of supervisors as its executive director]; 85 Ops.Cal.Atty.Gen. 87 (2002) [city council member could contract with joint powers authority because it was independent of its city council members]; 21 Ops.Cal.Atty.Gen. 90 (1953) [contracts of the City Treasurer were not under the supervision or control of the city council]; 3 Ops.Cal.Atty.Gen. 188 (1944) [a head court house gardener who owned a private nursery was not disqualified from selling nursery supplies to the county of which he was an employee because of the discretion vested in the county purchasing agent];

17 Ops.Cal.Atty.Gen. 44 (1951) [county supervisor not precluded from contracting for construction work with a school district since the contracts for school buildings or school construction are entered into by Boards of School Trustees without control or supervision of the County Board of Supervisors].)

Where one agency's decision to contract is subject to review and modification by another agency, both agencies are participating in the making of the contract. (See 77 Ops.Cal.Atty.Gen. 112 (1994) [concluding that although a city airport commission had the power to award a contract for the construction of a new airport terminal, the contract could not be awarded to an architectural firm where a member of the firm simultaneously was a member of the city's art commission, because pursuant to the city charter the design of the terminal also had to be approved by the art commission; see also 87 Ops.Cal.Atty.Gen. 92 (2004) [member of health care district could not lease space in a hospital because a health care district was required to approve all leases of hospital property].)

Participation by Employees

When an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract only if the employee was involved in the contract-making process. Therefore, as long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997) [firefighters 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]; 63 Ops.Cal.Atty.Gen. 868 (1980) [real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal]; but see Pub. Contract Code, § 10410 [prohibiting contracts between state employees and state agencies]; see also Chapter VIII of this Guide.)

Persons in Advisory Capacities

The section 1090 prohibition also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley* (1978) 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. However, because advisory boards do not actually enter into contracts, members with a financial interest in a contract may avoid a conflict by disqualifying themselves from any participation in connection with the contract. (82 Ops.Cal.Atty.Gen. 126 (1999).)

F. Presence of Requisite Financial Interest

For section 1090 to apply, the public official in question must have a financial interest in the contract in question. Although the statute does not specifically define "financial interest," an examination of case law and the statutory exceptions to the basic prohibition indicate that the

term is to be liberally interpreted. (See *People v. Deysher* (1934) 2 Cal.2d 141, 146, [stating "[h]owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void."].) Further, "the certainty of financial gain is not necessary to create a conflict of interest . . . . The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty." (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

The definitions of the remote and non-interest exceptions contained in sections 1091 and 1091.5 should be consulted for guidance to determine what falls within the scope of the term "financial interest" as used in section 1090. (See 85 Ops.Cal.Atty.Gen. 34 (2002).) Financial interest includes both direct and indirect interests in a contract. (See *Thomson v. Call* (1985) 38 Cal.3d 633, 645, citing *Moody v. Shuffleton* (1928) 203 Cal. 100.) Also, an official may have a financial interest in a contracting party even though he or she will not derive a personal benefit. For example, a public official who is a supplier of goods or services to the contracting party may have a financial interest in that party even though the supplier will not receive any business under the contract in question. (See also § 1091, subd. (b)(6) [remote interest exception for specified individuals when they receive no income under the contract].)

Prior to 1963, section 1090 applied to all interests, not merely financial ones. But in 1963, the Legislature amended section 1090 to limit its coverage to a financial interest in a contract. However, since most reported cases prior to 1963 involved financial interests, these older cases still represent viable interpretations of the law. Even where these cases do not involve a financial interest, they are still instructive on the issue of whether there is a sufficient connection between the contract and the interest held by the official to bring the transaction under section 1090. Therefore, when conducting research on whether an official is financially interested in a contract under section 1090, earlier cases and opinions may be helpful.

Although special statutory exemptions may negate the full effect of the section 1090 prohibition, the following economic relationships generally constitute a financial interest: employee, attorney, agent, or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; and, officer or employee of a nonprofit corporation that is a contracting party. Below is a discussion of several decisions and opinions in which the public officials in question have possessed the requisite financial interest.

Complex Multi-Party Transaction

In *Thomson v. Call* (1985) 38 Cal.3d 633, the Court found that a complex multi-party transaction involving the sale of property from a city council member through an intermediary corporation to the city constituted a violation of section 1090. The corporation obtained the land to convey to the city for use as a park and the corporation was to be issued a use permit for construction of a high-rise building on adjacent property. If the corporation failed to obtain the council member's property, the corporation was to pay to the city a sum of money with which it could acquire the land through eminent domain. Had there been no discussions between the city and the corporation regarding the property to be acquired for the park prior to the corporation's acquisition of the council member's property, the section 1090 prohibition might not have been

invoked. However, in *Thomson*, the Court found that the purchase by the corporation of the council member's land was part of a pre-arranged agreement with the city. And under these circumstances, the Court concluded that the city council member was financially interested in the contract that conveyed the land to the city.

Primary Shareholder in Contracting Party

In *People v. Sobel* (1974) 40 Cal.App.3d 1046, section 1090 was applied to remedy a classic self-dealing situation. There, a city employee, involved in purchasing books, awarded contracts to a corporation in which, unknown to the city, he and his wife were the primary shareholders.

Shareholder Insulated from Contract Payments

In *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, the court concluded that a public official, who was a shareholder in an insurance brokerage firm, had a financial interest in the firm despite the creation of a financial arrangement which would assure that payments under an insurance contract with a county would not be used to pay the shareholder's compensation or the business expenses of the brokerage firm. The court concluded that the volume of business to the firm affected the value of the interested official's investment in the firm. Thus, to the extent that the firm benefitted by increased business, so did the official, despite the fact that the benefit was in some way indirect.

In 84 Ops.Cal.Atty.Gen. 158 (2001), this office reached a similar conclusion. There, a city councilman owned 48 percent of the shares of an architectural corporation, with the remaining shares owned by three other licensed architects. This office concluded that one of the other three architects could not establish a separate firm for the purpose of contracting with the city to provide architectural services utilizing the corporation's resources even if the corporation would bill the firm for its pro rata share of the resources, and the new corporation would not share in the profits of the firm from the city's contracts. Under these circumstances, the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts and the original corporation would likely benefit indirectly from the city's business.

Pro Bono Legal Services

In 86 Ops.Cal.Atty.Gen. 138 (2003), this office considered whether it would violate section 1090 for a city council to enter into a contract with a law firm, of which a city council member is a partner, to represent the city in a lawsuit. Under the proposed agreement, the law firm would receive no legal fees and would bear all litigation expenses normally borne by the client. Nonetheless, the opinion concluded that the council member had a financial interest in the contract and that such an arrangement would violate section 1090 because success in the litigation could be financially advantageous to the law firm and inure to the councilmember's personal benefit by enhancing the value of his interest in the firm.

Contingent Payment

In *People v. Vallerga* (1977) 67 Cal.App.3d 847, the court found that a county employee had a financial interest in a contract where his private consulting contract was contingent upon the execution of the county's contract with the city. The court found that the requisite financial interest existed where the contracting entity is in a position to render actual or potential pecuniary gain to the official by virtue of the award of the contract.

Creditor-Debtor Relationship

In *People v. Watson* (1971) 15 Cal.App.3d 28, the court concluded that a creditor-debtor relationship constituted a financial interest within the meaning of section 1090. (See also *Moody v. Shuffleton* (1928) 203 Cal. 100.) The defendant was a harbor commissioner whose corporation had loaned money to a corporation which subsequently was attempting to negotiate a lease with the commission. While the loan was still outstanding, defendant voted as a commissioner to approve the proposed lease, thereby violating section 1090.

Spousal Property and Employment

An official also has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).) For example, a city employee has a financial interest in her husband's private sector employment because the financial success of the husband's firm and his continued employment and compensation affect the city employee. (85 Ops.Cal.Atty.Gen. 34 (2002).) The reach of this financial interest is broad. (See 75 Ops.Cal.Atty.Gen. 20 (1992) [concluding the payment of expenses for a board member's spouse to accompany the board member to a conference was a financial interest covered by section 1090].) But note, since the spouse's property is attributed to the official, exemptions that would be applicable if the official possessed the interest directly also apply to the spouse's property. (See 78 Ops.Cal.Atty.Gen 230 (1995); 81 Ops.Cal.Atty.Gen. 169 (1998); see also Section H and Section I of this Chapter for a discussion of the exemptions.)

Public Officers to Receive Commission

In 66 Ops.Cal.Atty.Gen. 376 (1983), this office concluded that the terms of the compensation package for the city attorney and other city personnel made them financially interested in all land development contracts to which the city was a party. Compensation for these officials was tied to increases in land value, based on the approval of land developments. The opinion pointed out that in approving land developments, a number of policy issues, aside from land value, must be considered, e.g., the ratio between commercial and residential development, density factors, etc. In basing compensation solely on land values, there was an incentive to consider only land value factors.

Employee of Contract Provider

In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that a local mental health director was in violation of section 1090 where he also was employed by the contract provider of mental health services to the county. In his official position, he was required to advise the county board of supervisors regarding contracts for mental health services, and in his private capacity he received a fixed yearly salary from the contract provider. Thus, he was interested in the county's contracts for mental health services in both his public and private capacities.

Extortion in the Awarding of a Contract

Under *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, an official who extorts payments from a contractor has a financial interest in the contract under section 1090. The presence of such payments means that the motivation for the contract is personal greed, not the best interests of the public.

Campaign Contributions

Campaign contributions generally are not financial interests under section 1090. (See *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1231.) However, when a governmental decision is made because of a campaign contribution and the contribution is made in anticipation of, or as a result of, the decision, a there is a prohibited financial interest. (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186, Cal.App.4th 1114 [finding that the specific facts presented gave "rise to the inference that the campaign contributions [at issue] constituted prohibited financial interests" under section 1090].)

G. Temporal Relationship between Financial Interest and the Contract

The essence of the section 1090 prohibition is to prevent self-dealing in the making of public contracts. In determining whether self-dealing has occurred, the timing of events may be crucial. Factors such as the date that the official assumed or resigned from office, the date the contract was executed and the duration of the contract are important and may prove to be dispositive.

Contract Executed Before Official is Elected or Appointed May Be Permissible

An official who has contracted in his or her private capacity with the government agency before the official is elected or appointed does not violate the section, and the official may continue in his or her position as the contracting party for the duration of that contract. The official's election or appointment does not void it. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops.Cal.Atty.Gen. 176 (2002); 84 Ops.Cal.Atty.Gen. 34 (2001).) However, if the contract is extended, amended, or renegotiated, the prospect of a section 1090 violation is once again present.

Because Participation is Defined Broadly, Later Resignation May Not Be Sufficient

As discussed previously, participation in the making of a contract is defined very broadly. Simply resigning a public post may not cure a conflict in all situations. Timing is essential. Therefore, although an official or employee may resign from his or her position, that resignation may not be sufficient to avoid a section 1090 violation when the person has been involved in the contracting process. In *Stigall v. City of Taft* (1962) 58 Cal.2d 565, the Court concluded that where a council member had been involved in the preliminary stages of the planning and negotiating process, but had resigned from the council prior to its vote on the contract, the council member had been involved in the making of the contract. In *City Council v. McKinley* (1978) 80 Cal.App.3d 204, the court followed this reasoning and stated:

> If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit nor the intent of the law which precludes an officer from involving himself in the making of a contract.

(*Id.* at p. 212; 81 Ops.Cal.Atty.Gen. 317 (1998) [council member could not participate in the establishment of a loan program and then leave office and apply for a loan]; 66 Ops.Cal.Atty.Gen. 156 (1983) [county employees could not propose agreement for consultant services, then resign, and provide such consulting services].)

Since board members are conclusively presumed to have made all contracts under their jurisdiction, it is possible that a court could 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. In the case of a financially-interested board member, the official generally cannot avoid the conflict by disqualification; rather he or she must resign from office or eliminate the private interest to avoid the proscription of section 1090. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572.) Further, a new contract between the board member and the public agency that the board member represents may not be executed. (See also Pub. Contract Code, §§ 10410, 10411 [regarding state employees discussed in Chapter VIII of this Guide].)

In the case of an employee, a 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. When 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. However, in the absence of special circumstances, the fact that a contract city attorney's advice to initiate or

defend litigation would increase the amount of payments under an existing contract, generally would not violate section 1090, so long as the services are contemplated in the original executed contract.

In 86 Ops.Cal.Atty.Gen. 187 (2003), this office concluded that there was no "reach-back period" (such as the 12-month period for income under the Political Reform Act) within the context of section 1090. The opinion concluded that only during the pendency of the business relationship was there a financial interest from which the official might benefit directly or indirectly. However, if the business relationship is not terminated in a manner that removes "the possibility of any personal influence, either directly or indirectly" the prohibition of section 1090 would remain in effect. (See, e.g., 89 Ops.Cal.Atty.Gen. 69 (2006).)

H. Remote Interests of Members of Boards and Commissions (§ 1091.)

The remote interest exception applies only to members of multi-member bodies; it does not apply to individual decision makers or employees. When a board member has a remote interest, the board member may disqualify himself or herself from any participation in the making of the contract and permit the remainder of the body to decide all issues involved in its making. If a member of a board has an interest that is not either a remote interest or a non-interest (see post Section I of this Chapter), the contract may not be made unless it is subject to the rule of necessity. (See Section K of this Chapter.)

The "remote interest" always refers to the private interest an official has in the contract. The official's public interest either exists or does not. An official whose interest falls into one of the "remote interest" categories must do the following: (1) disclose the official's interest to his or her agency, board, or body, and (2) have the interest noted in the official records of that body. (§ 1091, subd. (a).) Further, the interested official must completely disqualify himself or herself, and must not influence or attempt to influence the other board members. (§ 1091, subd. (c); see also 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 87 Ops.Cal.Atty.Gen. 23, 25-26 (2004); 83 Ops.Cal.Atty.Gen. 246, 248 (2000); 78 Ops.Cal.Atty.Gen. 230, 237-238 (1995).)

An official who intentionally fails to disclose the existence of a remote interest before action is taken on the contract in question would violate section 1090 and would be subject to criminal prosecution. However, such a violation would not void the contract unless the private contracting party knew of the official's remote interest at the time of contracting. (§ 1091, subd. (d).) If an official with a remote interest in a contract fails to disqualify himself or herself, or if the official influences or attempts to influence a colleague's vote on the matter, the official may not enjoy the benefit of the remote interest exception. (§ 1091, subd. (c).)

When an official has a remote interest, the board or agency may take action on the contract, if it acts in good faith and if the vote to approve the contract is sufficient without counting the vote or votes of those with remote interests. And, any officials with the requisite financial interest cannot participate at any stage of the contracting process.

The Remote Interests

The term "remote interest" has a special statutory meaning in section 1090. It is a term of art having an assigned meaning that is not always consistent with its "common" meaning. Below is a brief summary and elaboration of the remote interest exceptions.

1. **Officer or Employee of a Nonprofit Corporation or 501(c)(3) Entity** – An officer or employee of a nonprofit corporation or Internal Revenue Code section 501(c)(3) entity has only a remote interest in the contracts, purchases, and sales of that nonprofit entity. (§ 1091, subd. (b)(1).) Such a contract might involve the provision of services or the making of a grant to the nonprofit. (85 Ops.Cal.Atty.Gen. 176 (2002); cf. § 1091.5, subd. (a)(8) [concerning "noncompensated officers" of specified tax-exempt corporations].)

2. **Employee or Agent of a Private Contracting Party** – An employee or agent of a private contracting party has a remote interest when all of the following factors are present:

   (1) the private contracting party has 10 or more other employees;
   (2) the official/employee has been an employee or agent of that party for at least 3 years prior to the initial term in office;
   (3) the officer owns less than 3 percent of the shares of stock of the contracting party;
   (4) the employee or agent is not an officer or director of the contracting party; and,
   (5) the employee or agent did not directly participate in formulating the bid of the contracting party.

   (§ 1091, subd. (b)(2).) For example, the interest of a council member is remote when the employer has hundreds of employees, the council member had been employed by the company for more than 30 years prior to his election to the city council, he owned less than 3 percent of the company's stock, and he was neither an officer nor a director of the company. (89 Ops.Cal.Atty.Gen. 49 (2006); see also 88 Ops.Cal.Atty.Gen. 106 (2005).)

   The statute allows some latitude in computing the three-year period, to permit an employee of a business that has gone through a reorganization, to count time employed before the change, as long as the "real or ultimate ownership of the contracting party" remains substantially unchanged. "Real or ultimate ownership" is defined to include the

   "stockholders, bondholders, partners, or other persons holding an interest."
   (§ 1091, subd. (b)(2).)

   Also, note that a person is an agent of the contracting party only if an agency relationship has been created authorizing the person to represent the principal in specified contexts. (See Civ. Code, § 2295; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 85 Ops.Cal.Atty.Gen. 176 (2002).)

3. **Employees or Agents; Special Exception** – An official of a local agency in a county with a population of 4,000,000 or less who is also an employee or agent of the contracting party has a remote interest if specified statutory conditions are satisfied. (§ 1091, subd. (b)(3).) The following conditions must be present: (1) the official must be an officer in the local agency located in a county with a population of 4,000,000 or less; (2) the contract must be competitively bid [and not for personal services], and the contracting party must be the lowest bidder; (3) the official must not hold a primary management position with or ownership interest in the contracting party, and must not be an officer or director of the contracting party; (4) the official may not have directly participated in formulating the bid of the contracting party; and, (5) the contracting party must have at least 10 other employees.

4. **Parent** – Parents have only a remote interest in the earnings of their minor children for personal services. (§ 1091, subd. (b)(4).) However, an official does not automatically have a financial interest in the contracts of his or her adult children under section 1090, rather a specific financial interest must be found in the transactions between the adult child and the parent. (92 Ops.Cal.Atty.Gen. 19 (2009); see also 88 Ops.Cal.Atty.Gen. 222 (2005); but see Chapter XIII of this Guide because the common law prohibition may require disqualification in these circumstances.)

5. **Landlord or Tenant** – A public official who is a landlord or tenant of a contracting party has a remote interest in the contracts of that party. (§ 1091, subd. (b)(5); see also 89 Ops.Cal.Atty.Gen. 193 (2006).)

6. **Attorney, Stockbroker, Insurance, or Real Estate Broker/Agent** – A board member who is an attorney for a contracting party, or an agent/broker of a contracting party may have a remote interest in the contract. (§ 1091, subd. (b)(6).)

   This remote interest exception applies to the attorney of a contracting party, or an owner, officer, employee, or agent of a firm that renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker. The remote interest exception applies when the individual has a 10 percent or greater interest in the law practice, or firm, stock brokerage firm, insurance firm, or real estate firm, but only if the individual will receive no remuneration, consideration, or commission as a result of the contract. (*Id.*) But, attorneys and agent/brokers who have less than a 10 percent ownership interest in their firm and receive no compensation have a non-interest. (See § 1091.5, subdivision (a)(10).)

   Utilizing this exception, this office found that a city council member only had a remote interest in the client of a law firm in which his spouse was a partner, because the law firm would receive no remuneration from the contract as its representation concerned matters unrelated to the contract. (78 Ops.Cal.Atty.Gen. 230 (1995).) This opinion was issued prior to the addition of the 10 percent ownership provision in subdivision (b)(6), so the opinion does not address that criteria.

7. **Corporation Formed to Sell Agricultural Products or to Supply Water** – A member of a nonprofit corporation formed under the Food and Agricultural Code or Corporations Code has a special remote interest designation for the sole purpose of selling agricultural products or supplying water. (§ 1091, subd. (b)(7).)

8. **Supplier of Goods and Services** – An official has only a remote interest in a party that seeks to contract with the official's government agency when the official has been a supplier of goods or services to the contracting party for at least five years prior to the official's election or appointment to office. (§ 1091, subd. (b)(8); see also 86 Ops.Cal.Atty.Gen. 118 (2003).)

   The five year requirement has been discussed and analyzed. For example, in 85 Ops.Cal.Atty.Gen. 176 (2002), this office opined on a situation in which a council member had provided services in connection with a single project for more than five years, but for less than five years with the current contracting party. It concluded that the five-year requirement for this exemption may not be met by totaling the time the council member has provided subcontracting services on the project; rather, the official must have provided goods or services to the contracting party in question for at least five years. (See also *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 217-218.) Additionally, the five-year period runs from the board member's most recent term, as opposed to the initial term. (86 Ops.Cal.Atty.Gen. 187 (2003); cf.§ 1091, subd. (b)(2) [referring to a 3 year period from the "initial" term.)

9. **Party to a Land Conservation Contract** – An official who enters into a contract or agreement under the California Land Conservation Act of 1965 has only a remote interest in that contract. (§ 1091, subd. (b)(9).) (But note Cal.Atty.Gen., Indexed Letter, No. IL 73-197 (November 9, 1973) [concluding county supervisors who had previously made land conservation contracts could not vote to abolish future use of the Land Conservation Act in their county because of the common law prohibition against conflicts of interest].)

10. **Director or 10-Percent Owner of Bank or Savings and Loan** – A board member who is a director, or holds a 10 percent ownership interest or greater in a bank or savings and loan has only a remote interest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091, subd. (b)(10).)

    It is important to understand that this exception addresses the circumstance wherein a customer of a bank is preparing to enter into contract with a government agency, and a director or 10 percent owner of the bank is a member of a government board. This exception does not address the circumstance in which the bank itself wishes to contract with a government agency. (For officers, employees and persons holding less than a 10-percent ownership interest, see section 1091.5, subd. (a)(11); for competitively bid banking contracts, see section 1091.5, subd. (b).)

11. **Employee of Consulting, Engineering, or Architectural Firm** – An engineer, geologist, or architect who provides services to a consulting, engineering, or architectural firm has a remote interest in the firm so long as he or she does not serve as an officer,

director, or in a primary management capacity. (§ 1091, subd. (b)(11).) Although there are no cases or opinions on point, this exception would appear to provide a remote interest exception for the employee if the firm were contracting directly with the body or were indirectly involved as a supplier of goods or services to a contracting party.

12. **Housing Assistance Contracts** – There is a limited exception that provides that an elected officer has a remote interest in a specific housing assistance contracts. (§ 1090, subd. (b)(12).)

13. **Salary or Payments from Another Government Entity** – When a board member receives salary, per diem, or reimbursement for expenses from another government entity, the board member has a remote interest in contracts between the two agencies if the contract involves the department that employs the board member. (§ 1090, subd. (b)(13); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081 [stating "[i]f the contract involves no financial gain, but is with or affects the official's own department, the official's interest is remote"].)

However, when the contract does not involve the department that employs the board member, the board member has a non-interest under section 1091.5, subdivision (a)(9). (See Section I, subsection 9 of this Chapter.) Also, this exception cannot be used to permit a board member to enter into a contract with his or her own board. (89 Ops.Cal.Atty.Gen. 217, 221 (2006); 85 Ops.Cal.Atty.Gen. 6, 7 (2002); 83 Ops.Cal.Atty.Gen. 246, 249 (2000).)

Applying this exception, this office concluded that a city council, one member of which is a deputy sheriff, may enter into a contract with the sheriff to provide police services to the city, so long as the deputy sheriff discloses the interest to the city council which is noted in its official records, and the deputy sheriff completely abstains from any participation in the matter. (83 Ops.Cal.Atty.Gen. 246 (2000).)

14. **Shares of a Corporation When the Shares Derived from Former Employment** – An official owning less than three percent of the shares of a contracting party that is a for-profit corporation, has a remote interest in the corporation provided that the ownership of the shares derived from the person's former employment with the corporation. (§ 1091, subd. (b)(14); see also 88 Ops.Cal.Atty.Gen. 106, 110 (2005).)

15. **Settlement of Litigation** – A board member who is a party to litigation involving his or her body or board has a remote interest in connection with a settlement agreement if specified conditions are satisfied. (§ 1091, subd. (b)(15).) This remote interest exception was enacted subsequent to this office's opinions in 86 Ops.Cal.Atty.Gen. 142 (2003) and 91 Ops.Cal.Atty.Gen. 1 (2008), and, therefore, supersedes those opinions to the extent they conflict with the exception.

16. **Investor-Owned Utilities** – An officer or employee of an investor-owned utility that is regulated by the Public Utilities Commission has a remote interest in a contract between the utility and enumerated governmental entities if specified conditions are satisfied. (§ 1091, subd. (b)(16).)

I. Non-Interests (§ 1091.5.)

Section 1091.5 delineates situations that might technically create a conflict of interest under section 1090, but which the Legislature has decided as a matter of policy are exempt from its operation. Unlike the "remote interest" exceptions, a non-interest exemption does not require abstention or, except in very limited circumstances, disclosure.

However, an interest that is a non-interest under section 1091.5 might still create a disqualifying interest for an official under the Political Reform Act. That Act's provisions must be consulted before proceeding with any transaction in which an official may have conflicts of interest since the Political Reform Act supersedes other conflict-of-interest laws where inconsistencies exist. (§ 81013.)

The non-interests that fall into the section 1091.5 exception are as follows.

1. **Corporate Ownership And Income** – An official has a non-interest in a business corporation, in which he or she owns less than 3 percent of its shares, as long as the official's total annual income from dividends and stock dividends from the corporation amounts to less than 5 percent of his or her total annual income and any other income he or she receives from the corporation also amounts to less than 5 percent of his or her total annual income. The official who fails any of the three parts cannot qualify for the non-interest exemption with regard to that corporation. (§ 1091.5, subd. (a)(1).) This exemption does not apply to an ownership interest in a limited partnership, because the Legislature expressly limited the exemptions to for-profit corporations and specified nonprofit organizations. (89 Ops.Cal.Atty.Gen. 69, 74-75 (2006).)

2. **Reimbursement of Expenses** – An official has a non-interest in reimbursement for his or her actual and necessary expenses incurred in the performance of his or her official duties. (§ 1091.5, subd. (a)(2); but see 75 Ops.Cal.Atty.Gen. 20 (1992 [concluding this exception does not include payments for the expenses of an official's spouse].)

3. **Public Services** – An official has a non-interest in the receipt of public services provided by his or her agency or board as long as he or she receives them in the same manner as if he or she were not a public official. (§ 1091.5, subd. (a)(3).)

The California Supreme Court has read this exception to establish the following rule:

> If the financial interest arises in the context of the affected official's or employee's role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated,

> rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

(*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1092.) Thus, the Court held that "where retirement board trustees approve contracts in which their only financial interest is an interest in benefits shared generally with their constituency at large," this exception applies and such actions are excluded from Section 1090.

The exception applies to "public utilities such as water, gas, and electricity, and the renting of hangar space in a municipal airport on a first come, first served basis. The furnishing of such public services would not involve the exercise of judgment or discretion by public agency officials. Rather, the rates and charges for the services would be previously established and administered uniformly to all members of the public." (81 Ops.Cal.Atty.Gen. 317 (1998).) Therefore, obtaining a government loan was not a public service within the meaning of this exemption because it involved the exercise of discretion to determine the recipient of the service. (*Id.* at p. 320; see also 80 Ops.Cal.Atty.Gen. 335 (1997) [concluding that the public service in question actually amounted to private construction services for a member of the governing board on unique terms and, therefore, did not qualify under the exemption].)

Further, this office has concluded that the placement of advertising in a city newsletter constituted a public service subject to this exemption. (88 Ops.Cal.Atty.Gen. 122 (2005).) The decisions at issue did not involve discretionary or highly customized services benefitting one or more council members. And the advertising was available to anyone at a predetermined rate based solely upon the size and duration of the advertisement. Therefore, this exemption applied. (*Ibid.*)

Public agencies provide many kinds of "public services" that only a limited portion of the public needs or can use. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 515 [reclaimed water provided to wholesale purveyors]; 89 Ops.Cal.Atty.Gen. 121 (2006) [limited airport hangar space provided to public based on square footage and residency status].) However, the critical issue for this exception is that the services are directed at the community, and not a specific individual. (88 Ops.Cal.Atty.Gen. 122 (2005); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1088 ["[w]hat matters is not the breadth of the actual recipient class, but that the service has not been intentionally designed to limit that class and is broadly available to all those potentially within it."].)

4. **Landlords and Tenants of Government** – Public officials who are landlords or tenants of governmental entities have a non-interest in the government entities' contracts, unless the subject matter of the contract is the very land for which the official is either the landlord or tenant. In the latter case, the official has a remote interest rather than a non-interest, and the provisions of section 1091 control. (§ 1091.5, subd. (a)(4).)

5. **Public Housing Tenants** – A tenant in a public housing authority has a non-interest in agreements regarding that housing if he or she is serving as a member of a board of commissioners, or of a community development commission. (§ 1091.5, subd. (a)(5).)

6. **Spouses** – A non-interest exists when both spouses in a family are public officials. One spouse has a non-interest in the other's employment or holding office if it has existed for at least one year prior to his or her election or appointment to office. (§ 1091.5, subd. (a)(6).)

   In *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, the court narrowly construed the exception to mean that one spouse could retain his or her employment even though the other spouse was a member of a board that participated in the employment contract so long as the terms of the employment did not change. Thus, there could be no promotion or similar change in status.

   Applying this exception, this office concluded that the spouse of a school board member could have his or her teaching contract annually renewed so long as the spouse was not promoted or appointed to a new position. (69 Ops.Cal.Atty.Gen. 255 (1986).) But, the board of trustees of a community college district may not approve a selective reclassification of a classified employee's position, if the employee's spouse is a member of the board of trustees and the reclassification makes the employee eligible for an increase in salary. (84 Ops.Cal.Atty.Gen. 175 (2001).) Similarly, the spouse of a member of a school board may not be hired by the district, whether as a substitute teacher or in any other employment capacity. (80 Ops.Cal.Atty.Gen. 320 (1997).)

   However, this office has concluded that the "rule of necessity" may allow for certain contracts to be made, even when they cannot qualify as a non-interest under this exception. (See 69 Ops.Cal.Atty.Gen. 102 (1986) [concluding a school district may contract on an annual basis with a tenured teacher who was the spouse of a board member, until the board member could qualify for this exemption; 65 Ops.Cal.Atty.Gen. 305 (1982) [finding a superintendent who was interested in his or her spouse's school employment could utilize the rule of necessity].)

7. **Unsalaried Members of Nonprofit Corporations** – A non-interest exists when a public official is an unsalaried member of a nonprofit corporation provided the official's interest is disclosed to the board at the time the contract is first considered and is noted in its official records. (§ 1091.5, subd. (a)(7).)

   The reference to "members" refers to persons who constitute the membership of an organization, rather than to those individuals that serve on its board of directors. (See 65 Ops.Cal.Atty.Gen. 41 (1982) [concluding that a member of a nonprofit was similar to a shareholder of a corporation, as opposed to a member of the board of directors or other corporate officer].) This conclusion is consistent with the legislative history, which reveals the intent to permit members of a council with ties to the Boy Scouts and YMCA to vote on contracts for use of public facilities by such organizations. (See Legislative

History, Stats. 1977, ch. 706 (Sen. Bill No. 711).) For the exception to apply, the person, who is a member of the organization, may not simultaneously hold a salaried position with the organization.

(Note section 1091, subdivision (b)(1) and section 1091.5, subdivision (a)(8) concern "officers" as opposed to "unsalaried members" of nonprofit corporations.)

8. **Non-compensated Officers of Tax-Exempt Corporations** – A noninterest exists when a public official is a non-compensated officer of a nonprofit, tax-exempt corporation which, as a primary purpose, supports the functions of a public body or board, or to which the public body has a legal obligation to give particular consideration. For example, a nonprofit symphony association may be organized to support the publicly operated symphony hall and symphony orchestra. Such interest, if any, must be noted in the official records of the public body. An officer is non-compensated even though he or she receives reimbursement for travel or other actual expenses incurred in performing the duties of his or her office. (§ 1091.5, subd. (a)(8); compare with § 1091, subdivision (b)(1) concerning "officers of nonprofit corporations" and § 1091.5, subdivision (a)(7) concerning "unsalaried members of nonprofit corporations.")

9. **Contracts between Government Agencies** – An officer or employee of one government agency is not interested in the contracts of the other government agency, unless the contract directly involves the department that provides the salary, per diem or reimbursement to the officer or employee in question. The interest must be disclosed to the board when the contract is considered, and the interest must be noted in its official record. (§ 1091.5, subd. (a)(9); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081 [stating this 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"].)

When the official in question is a member of the governing board, and not a member of a "department" of the agency, the official would have a non-interest in the contract between the two agencies. For example, a member of a county board of supervisors who also serves as a member of a children and families commission has a non-interest in contracts between the two agencies because the "department" limitation does not apply.

Applying this exception, this office evaluated whether a deputy county counsel, who was elected to a city council, could participate in negotiations on a contract with the county to provide law enforcement services to the city. This office concluded that the city council member was covered by this exception because the contract between the city and the county did not involve a contract with the County Counsel's Office (i.e. the department that employed the council member). (85 Ops.Cal.Atty.Gen. 115 (2002); see also *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1303-1305.) If the contract had involved the department that employed the council member, the official would have had a remote interest in the contract of the employer pursuant to section 1091, subdivision (b)(13).

10. **Attorney, Stockbroker, Insurance or Real Estate Broker/Agent** – A governmental official has a non-interest when he or she is the attorney of a contracting party, or an owner, officer, employee, or agent of a firm that renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker.

    For the non-interest exception to apply, two conditions must be present. First, these individuals may not receive any remuneration, consideration, or a commission as a result of the contract. Second, these individuals must have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm. (For attorneys and agent/brokers who are board members and have more than a 10 percent ownership interest in their firm, see § 1091, subd. (b)(6).)

11. **Officers, Employees and Owners of Less Than 10 Percent of a Bank or Savings and Loan** – A government official who also is an officer or employee, or who owns less than 10 percent of a bank or savings and loan, has a non-interest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091.5, subd. (a)(11).)

    It is important to understand that this exception addresses when a customer of a bank is preparing to enter into contract with a government agency, and an officer, employee or someone owning less than 10 percent of the bank is a government official. This exception does not address when the bank itself wishes to contract with a government agency. A narrower exemption relating only to competitively bid contracts is set forth in 1091.5, subdivision (b), and appears to be subsumed within the exemption described here. (For directors or persons holding more than a 10-percent ownership interest, see the remote interest exception in section 1091, subdivision (b)(10).)

12. **Nonprofit Organization Supporting Public Resources** – An officer, director, or employee has a non-interest in the contracts of a nonprofit, tax-exempt corporation where the corporation has as one of its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, and where the officer, director or employee is acting on behalf of the corporation pursuant to an agreement between the corporation and a public agency to provide services related to such resources. (§ 1091.5, subd. (a)(12).)

13. **California Housing Finance Authority** – An officer, employee, or member of the Board of Directors of the California Housing Finance Agency has a non-interest in a loan product or program if specified conditions are satisfied. (§ 1091.5, subd. (a)(13).)

J. Special Provisions for Specific Situations

1. **Subdivision of Land Permitted** – There is a special exemption from section 1090 for public officials who must deal with government entities regarding the subdivision of land that they own or in which they have an interest. Such an official may subdivide lands that he or she owns, or has an interest in, without violating section 1090. He or she must,

however, fully disclose the nature of his or her interest in such lands to the body that has jurisdiction over his or her subdivision, and abstain from voting on any matter concerning it. (§ 1091.1.)

2. **Local Workforce Investment Boards** – Section 1090 does not apply to any contract or grant made by local workforce investment boards established by the federal Workforce Investment Act of 1998, unless specified statutory conditions are met. (§ 1091.2.)

3. **County Children and Families Commission** – Section 1090 does not apply to any contract or grant made by a county children and families commission established by the California Children and Families Act of 1998, unless specified statutory conditions are met. (§ 1091.2.)

4. **Landowner Voting Districts** – There is a remote interest exception for board members of a special district that serves a population of less than 5,000 persons, is a landowner voting district, and does not distribute water for any domestic use so long as other specified conditions are satisfied. (§ 1091.4.)

5. **Organizations Potentially Affected by Eminent Domain** – An officer who is also a member of the governing body of an organization that has an interest in, or to which the public agency may transfer an interest in, property that the public agency may acquire by eminent domain is prohibited from voting on any matter affecting that organization. (§ 1091.6.)

K. Limited Rule of Necessity

This office and the courts have applied a limited "rule of necessity" to the application of section 1090 where public policy concerns authorize the contract and to ensure that essential government functions are performed despite the conflict of interest. (See 69 Ops.Cal.Atty.Gen. 102, 109 (1986).) The "rule of necessity" has two facets. (*Ibid.*)

Contracts for Essential Services Where No Other Source is Available

The first facet of the rule of necessity concerns situations where a board must contract for essential services and no source other than that which triggers the conflict is available. For example, a city can obtain nighttime service from a service station owned by a member of the city council, where the town was isolated and his station was the only one open. (4 Ops.Cal.Atty.Gen. 264 (1944); see also 42 Ops.Cal.Atty.Gen. 151, 156 (1963) [concluding a coroner may be able to contract with his or her own mortuary when there are no alternative locations for holding bodies]; 76 Ops.Cal.Atty.Gen. 118, 120-123 (1993) [finding a city council member who had an interest in a local cable franchise may be able to renew a cable contract with the city if there is no other source for this essential service]; but see § 29708 [prohibiting a county officer or employee from presenting a claim to the county for other than his or her official salary].)

Utilizing this facet of the rule of necessity, this office concluded that a health care district can advertise on a local radio station even though a member of the health care district was employed by the station. The opinion concluded that certain physicians and services were available only periodically and were subject to scheduling changes. Radio advertising was the only feasible way to convey information about these services in a timely and efficient manner as there were no local television stations, and the two local newspapers were published weekly. (88 Ops.Cal.Atty.Gen. 106 (2005).)

Where Official or Board is the Only One Authorized to Act

The second facet of the rule of necessity focuses on the performance of official duties, rather than upon the procurement of goods and services. It permits an official to carry out the essential duties of his or her office despite a conflict of interest where he or she is the only one who may legally act. (See 69 Ops.Cal.Atty.Gen. 102, 109 (1986).) For example, a Superintendent of Education can enter into a memorandum of understanding with school employees, despite the fact that he was married to a permanent civil service school employee. (65 Ops.Cal.Atty.Gen. 305 (1982); see also 69 Ops.Cal.Atty.Gen. 102 (1986) [rule of necessity allows a school board to enter into a memorandum of understanding with a teachers' association even when a board member is married to a tenured teacher].) Similarly, a community college board can negotiate with its faculty for salary and benefits even though a board member is a retired faculty member whose health benefits are tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).) Also, a city council member who has an interest in a local cable franchise can use the rule of necessity to dispose of his interest where the council is required to approve such disposition. (76 Ops.Cal.Atty.Gen. 118, 123-125 (1993).)

Practical Effect of Utilizing the Rule of Necessity

When the rule of necessity is applied to a member of a multi-member board, as opposed to a single official or employee, this office has concluded that the interested board member must abstain from any participation in the decision. In other words, the effect of the rule of necessity is to permit the board with an interested member to make a contract, even though the interested board member must disqualify himself or herself from participating in its making. In the case of a single official or employee, application of the rule of necessity permits the official or employee to participate in the making of the contract. (See 89 Ops.Cal.Atty.Gen. 217 (2006) [board member abstention; 88 Ops.Cal.Atty.Gen. 106, 112 (2005) [board member abstention]; 69 Ops.Cal.Atty.Gen. 102, 112 (1986) [school board trustee abstention]; 67 Ops.Cal.Atty.Gen. 369, 378 (1984) [board member abstention]; 65 Ops.Cal.Atty.Gen. 305, 310 (1982) [superintendent of schools permitted to participate].)

L. Effect of Special Statutes

Some statutes may contain special provisions that alter or eliminate the general rule in section 1090 in a specific situation. For example, Education Code section 35239 provides that governing board members of school districts with an average daily attendance of 70 or less may contract with their districts under specified circumstances.

Also, financially interested members of Project Area Committees do not violate section 1090 by making recommendations to the redevelopment agency because the Legislature specifically envisioned their participation in the redevelopment process in Health and Safety Code section 33000 et seq. (82 Ops.Cal.Atty.Gen. 126, 130 (1999); see also 51 Ops.Cal.Atty.Gen. 30, 30-31 (1968).) For special rules concerning hospitals and health care districts, see Health and Safety code section 37625 (municipal hospitals), Health and Safety Code section 1441.5 (county hospitals), and Health and Safety Code section 32111 (health care districts).

However, note that such special statutes may not take precedence over the Political Reform Act unless they are adopted in accordance with the procedures set forth in section 81013.

M. Consequences for Violations of Section 1090

1. A contract made in violation of section 1090 is void and unenforceable.

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. (But see § 1092.5 [exception concerning 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 has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable. (*Thomson v. Call (1985)* 38 Cal.3d 633; *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323; *People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931.) A contract can be void even if made without the participation of the official with the conflicting interest if he or she is a member of the contracting body. (§ 1092, subd. (a); *Thomson v. Call* (1985) 38 Cal.3d 633.)

Statute of Limitations Is Four Years

In 2007, the Legislature amended section 1092 to provide that legal challenges to contracts made in violation of section 1090 must be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, the violation. (§ 1092, subd. (b).) Thus, although a contract made in violation of section 1090 is void and disgorgement of the contract proceeds is automatic, the passage of time can render such a contract immune from challenge. (*Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350.)

Results in Disgorgement of Contract Benefits

Contracts in violation of section 1090 are contrary to the public policy of California. Therefore, courts have consistently found that no recovery should be had for goods and services provided to the public agency pursuant to a contract that violates section 1090. (*See County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533 [requiring contractor to disgorge profits that ultimately flowed from public official's violation of section 1090].) Further, the "agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract." (*Thomson v. Call* (1985) 38 Cal.3d 633, 646; see also *Finnegan v. Schrader*

(2001) 91 Cal.App.4th 572, 583.) The disgorgement remedy is automatic. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1336.) And it applies without regard to the willfulness of the violation. "A person who violates section 1090, regardless of whether the violation is intentional, forfeits any rights or interests flowing from the illegal contract." (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 538 [city attorney required to forfeit to his public agency a finder's fee received in return for steering a contract to a private law firm].)

In addition to the contract being void under section 1092, section 1095 provides that payment of any warrant or other evidence of indebtedness against the state, city, or county that has been purchased, sold, received, or transferred contrary to section 1090 is specifically disallowed. Therefore, any claim to payment pursuant to a contract made in violation of section 1090, is effectively rendered worthless by this section. (But see § 1092.5 [exception concerning good faith of parties involved in the lease, sale, or encumbrance of real property].)

2. Willful violations by officials are subject to fines and imprisonment.

A willful violation of any of the provisions of section 1090 et seq. is punishable by a fine of not more than $1,000 or imprisonment in state prison. (§ 1097.) For an official to act "willfully," his or her actions concerning the contract must be purposeful and with knowledge of his or her financial interest in the contract. (*People v. Honig* (1996) 48 Cal.App.4th 289, 334-339.) The statute of limitations for section 1090 prosecutions is three years after discovery of the violation. (*Id.* at p. 304, fn. 1; Penal Code, §§ 801, 803, subd. (c).) Additionally, such an individual is forever disqualified from holding any office in this state. (§ 1097.) When a state or local government 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. (§ 1096.)

Officials who rely upon advice from a government lawyer (such as a city attorney) that a proposed transaction does not violate section 1090, may not avoid prosecution based upon the defense of entrapment by estoppel. The California Supreme Court was unwilling to allow an official to escape the rule that a citizen cannot rely on a private lawyer's erroneous advice as a defense to a general intent crime merely because that attorney happened to hold a governmental position. (*People v. Chacon* (2007) 40 Cal.4th 558.) The Court also noted the strong requirement for officials to avoid conflicts of interest, and the problem of an employee subordinate to the official acquiring reliable advice regarding an official's financial interests.

A person who does not possess a financial interest in the contract may not be prosecuted for aiding another to violate section 1090, unless that person acts with the purpose of facilitating the commission of the violation. (*D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861.)

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VIII. CONFLICT-OF-INTEREST LIMITATIONS ON STATE CONTRACTS

Public Contract Code Sections 10365.5 and 10410-10430[14]

A. Overview

The Public Contract Code provides a two-level approach to potential conflict-of-interest situations within the making of state procurement contracts. Section 10410 covers potential conflicts by persons currently holding office and section 10411 concerns potential conflicts by those who have left state service. These sections generally cover all appointed officials, officers, and civil service employees of state government, with few exceptions. For example, the prohibitions do not apply to unsalaried members of part-time boards and commissions who receive payments only in connection with preparing for meetings and per diem for travel and accommodations. (§ 10430, subd. (e).) The Board of Regents for the University of California is also expressly exempted. (§ 10430, subd. (a).) Section 10430 also contains additional limited exceptions. The statute also contains a specific prohibition applicable to consultants involving "follow-on contracts." These provisions of the Public Contract Code form a helpful adjunct to the provisions of Government Code section 1090, which also concern conflicts of interest in the contract-making process.

B. The Basic Prohibition for Current State Officers and Employees (§ 10410)

Reduced to its essentials, the prohibition on current state officers and employees provides that: (1) no state officer or employee (2) shall engage in any employment, activity, or enterprise (3) from which the officer or employee receives compensation, or in which he or she has a financial interest, and (4) which is sponsored or funded, in whole or in part, by any state agency or department through a contract. (§ 10410.) But there is an exception if the employment or enterprise is required as a condition of the individual's regular state employment. Further, covered officials are specifically prohibited from contracting on his or her own behalf with a state agency as an independent contractor to provide goods or services. (*Ibid.*)

This prohibition does not appear to be a transactional disqualification provision, such as that contained in the Political Reform Act. Rather, it is a prohibition against state employees having specified financial interests. It prohibits an individual from engaging in certain activities that are supported, in whole or in part, by a state contract. By prohibiting the "activity," the statute in effect prohibits the making of state contracts in which the individual has the specified interest. Thus, in many instances, the provisions of section 10410 will be duplicative of the provisions of Government Code section 1090. (See Chapter VII of this Guide.) However, the provisions of section 10410 apply only to state contracts and are different than the restrictions in Government Code section 1090 in certain respects.

[14] All further statutory references in this Chapter are to the Public Contract Code unless otherwise indicated.

For example, section 10410 applies to procurement contracts for goods and services, as opposed to grants awarded to advance the public interest even if the grants are made pursuant to an executed contract. (88 Ops.Cal.Atty.Gen. 56 (2005); see also 74 Ops.Cal.Atty.Gen. 10 (1991); 63 Ops.Cal.Atty.Gen. 290 (1980); 58 Ops.Cal.Atty.Gen. 586 (1975).) Additionally, these prohibitions do not generally apply to the spouse of a state officer or employee. The spouse of a state employee may, therefore, contract to provide goods or services to the employee's department if the employee neither participates in the department's decision to enter into the contract nor engages in the spouse's business. (84 Ops.Cal.Atty.Gen. 131 (2001).)

With respect to the prohibition against state officers or employees contracting on their own behalf as independent contractors to provide goods or services, this office has orally advised that state employees who prepare educational film, video, and printed materials as a part of their state employment cannot contract with another department as independent contractors to provide similar services in their off-hours.

C. The Basic Prohibition for Former State Officers and Employees (§ 10411)

The prohibition applicable to former state officials is divided into two parts. (§ 10411.) First, there is a two-year prohibition against participating in a contract with which the official was involved during his or her state service. This prohibition provides that no retired, dismissed, separated or formerly employed state officer or employee may enter into a state contract in which he or she participated in any of the negotiations, transactions, planning, arrangements or any part of the decision-making process while employed in any capacity by an agency or department of state government. (*Id.*, subd. (a).) However, there is a two-year limit on the application of this statutory prohibition commencing on the date the person left state employment. (For application of similar provisions under Government Code section 1090, see *Stigall v. City of Taft* (1962) 58 Cal.2d 565 and 66 Ops.Cal.Atty.Gen. 156 (1983).)

Second, there is a one-year prohibition on former policy making officials contracting with their prior agencies. This prohibition establishes a one-year moratorium on any former state officer or employee, entering into a contract with his or her former agency, if the covered official held a policymaking position with the agency in the same general subject area as the proposed contract within 12 months prior to his or her departure from state government. (§ 10411, subd. (b).) However, the statute expressly exempts contracts for expert witnesses in civil cases and contracts for the continued services of an attorney regarding matters with which the attorney was involved prior to departing state service. (*Id.*)

D. Limitations on Consultants

Consultants are also similarly restricted. Generally, no person or firm that has been awarded a consulting services contract may be awarded a contract for the provision of services, procurement of goods or supplies, or any other related action that is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. (§ 10365.5.) In other words, a contractor may not be hired to conduct a feasibility study or produce a plan, and then be awarded a contract to perform the recommended services. These

contracts are often referred to as "follow-on contracts." The prohibition does not apply to architectural contracts covered by Government Code section 4525, or to specified subcontractors having less than 10 percent of the consulting contract. (§ 10365.5, subds. (b) & (c).) The term "consulting services contract" is defined in section 10335.5.

E. Penalties and Enforcement

Any contract made in violation of these prohibitions is void, unless the violation is technical and non-substantive. (§ 10420.) The state or any person acting on behalf of the state may bring a civil suit in superior court to have the performance of a contract temporarily restrained and ultimately declared void. (§ 10421.) Successful plaintiffs may be awarded costs and attorney's fees, but defendants may not receive either. (*Id.*) A willful violation of the prohibitions is a misdemeanor, and persons involved in the corrupt performance of contracts are subject to felony penalties. (§§ 10422, 10423 & 10425.)

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IX. THE CONSTITUTIONAL PROHIBITION ON THE ACCEPTANCE OF PASSES OR DISCOUNTS FROM TRANSPORTATION COMPANIES

Cal. Const., Art. XII, § 7

A. Overview

The California Constitution prohibits public officers from accepting passes or discounts from transportation companies. The genesis of the prohibition is found in the historical relationship between the railroads and the state government in California. Specifically, the prohibition "was adopted to control the perceived corruptive influences of the railroads upon the legislative process," if public officers were to accept gifts of free transportation. (67 Ops.Cal.Atty.Gen. 81 (1984).)

This prohibition was originally located in article XII, section 19, of the California Constitution. In 1970, the Constitutional Revision Commission proposed that the provision be repealed, but the electorate defeated that proposal. In 1974, the prohibition was moved from section 19 to section 7 of article XII.

B. The Basic Prohibition

The constitutional prohibition on the acceptance of passes or discounts from transportation companies by public officials provides:

> 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.

(Cal. Const., art. XII, § 7.) The term "transportation company" has been construed to encompass businesses that did not exist when the provision was initially adopted, including commercial passenger airlines, bus lines, and express package and freight delivery companies. (See 93 Ops.Cal.Atty.Gen. 44 (2010).) Additionally, if a transportation company offers "its private corporate passenger aircraft to state elected or appointed officials at the 'fair market value' of the flights as determined for gift-reporting purposes under the California Political Reform Act," this prohibition is not violated. (*Id.*; see also Cal. Code Regs., tit. 2, § 18946.6, subd. (b) [detailing process for valuation of air transportation].)

Reduced to its component parts, the prohibition applies in the following manner.

(1) The prohibition applies to public officers, both elected and nonelected, but does not apply to employees.

(2) The prohibition applies to interstate and foreign carriers, as well as domestic carriers, and to transportation received outside of California.

(3) The prohibition applies irrespective of whether the pass or discount was provided in connection with personal or public business.

(4) Violation of the prohibition is punishable by forfeiture of office and a quo warranto proceeding is the appropriate way to enforce the remedy. (See Code Civ. Proc., § 803.)

C. Persons Covered

The prohibition specifically applies to "public officers." Generally an "office" requires the vesting of a portion of the sovereign powers of the state in an individual. (See *Parker v. Riley* (1941) 18 Cal.2d 83, 87.) Therefore, the prohibition applies to any officer, not just those who succeed to office through the electoral process. (See Cal.Atty.Gen., Indexed Letter, No. IL 70-155 (August 7, 1970); Cal.Atty.Gen., Indexed Letter, No. IL 71-159 (August 24, 1971); see also Gov. Code, § 1001 [defining civil executive officers to include "the head of each department and all chiefs of divisions, deputies and secretaries of a department."].)

However, this office has concluded that the prohibition applies only to officers and not employees. (3 Ops.Cal.Atty.Gen. 318 (1944).) This office has also concluded that if a particular individual actually sets or makes policy, he is an officer, if he merely advises policy makers, he is probably not an officer. (Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (March 23, 1975).)

The prohibition, at least in some circumstances, does not apply to the families of public officers. (See Cal.Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964).) Thus, where the spouse of a covered official legitimately earns or receives a free pass or discount on travel from a transportation company, the acceptance of such a pass or discount is not attributed to the officer. However, this conclusion might be different if the circumstances surrounding the pass or discount suggested that it was provided to curry favor or extend a benefit to the officer.

If the pass or discount is provided to the official because of his or her position as a government official, the prohibition applies. (See 76 Ops.Cal.Atty.Gen. 1 (1993) [concluding the prohibition was violated when a mayor received a free first-class airline upgrade as a part of a promotion designed to bestow such upgrades on high profile, prominent individuals in the community].)

If, on the other hand, the pass or discount is provided to the official as a member of a larger group and is not related to the function of his or her office, the prohibition may not be applicable. For example, discounted tickets provided by a transportation company to members of the public in return for a monthly fee would not be a prohibited discount. Further, when a Legislator is the spouse of a flight attendant and as part of the flight attendant's employment package all spouses were offered specified free airline trips, this office concluded the free transportation was offered to the legislator as a member of a larger group under a general policy.

Therefore, the free transportation was not subject to the prohibition. The rationale behind this conclusion is that if "the sole condition for the receipt of the propounded benefit is the spousal relationship, then the element of corruptive influence appears to be lacking, and the application of the constitutional prohibition would fail to serve its intended objective." (67 Ops.Cal.Atty.Gen. 81 (1984); see also 74 Ops.Cal.Atty.Gen. 26 (1991) [concluding that an official who received a free first-class upgrade on his honeymoon did not violate the prohibition because the airline had a policy of providing free first-class upgrades to all honeymooning couples].)

Further, members of the board of directors of a public transit agency can accept passes for free transportation on the agency's buses to perform their duties of monitoring the agency's transportation services. (85 Ops.Cal.Atty.Gen. 40 (2002).) The rationale for this conclusion is that the district has an obligation to provide those transportation services necessary for the members to perform their public duties. Because the agency is responsible for providing the transportation services without cost to the directors, the expenses do not constitute a prohibited gift regardless of whether the district is granting free passes or reimbursing the directors for their expenses. Whether a public transit agency constitutes a "transportation company" for purposes of the constitutional prohibition was beyond the scope of the opinion. The term may possibly refer exclusively to privately-owned and operated transportation companies such as railroads, airlines, and cruise ship companies. (See Cal. Const., art. XII, § 3; *Los Angeles Met. Transit Authority v. Pub. Util. Com.* (1963) 59 Cal.2d 863, 870; *Board of Railroad Commissioners v. Market Street Railway Company* (1901) 132 Cal. 677, 678-680; Webster's 3d New Internat. Dict. (1971) p. 461 [company defined as "a chartered commercial organization"].)

D. Interstate and Intrastate Travel both Covered

This office has interpreted the prohibition against the acceptance of passes or discounts from transportation companies to apply to interstate as well as intrastate carriers and transportation. The prohibition applies to local, national, and international carriers irrespective of whether the officer has any regulatory or other jurisdiction over the carrier. (76 Ops.Cal.Atty.Gen. 1 (1993); see also Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (March 23, 1975), Cal.Atty.Gen., Indexed Letter, No. IL 71-159 (August 24, 1971) & Cal.Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964).)

E. Application to Public and Personal Business

The issue of public versus private business is generally not viewed as relevant to the application of the prohibition. Except for Public Utility Commissioners who are specifically authorized to accept free transportation in connection with the performance of official duties, the prohibition against the acceptance of free passes or discounts for transportation applies equally to acceptance of transportation in connection with one's official duties as it does in connection with one's personal business. Although the focus may be somewhat different, interpreters of the prohibition have concluded that the purpose of guarding against corruption and undue influence from transportation companies can result from the acceptance of free or discounted transportation in either context. (Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (March 23, 1975); Cal.Atty.Gen., Indexed Letter, No. IL 70-155 (August 7, 1970).)

F. Penalties and Enforcement

Article XII, section 7 of the California Constitution specifically provides that the acceptance of a pass or discount by a public officer other than a Public Utilities Commissioner, results in a forfeiture of that office. The appropriate means for enforcing this forfeiture of office is the filing of a suit in quo warranto.

A quo warranto proceeding is a civil action by which title to any public office may be determined. (Code Civ. Proc., § 803; see also *Barendt v. McCarthy* (1911) 160 Cal. 680, 686-687; 53 Cal.Jur.3d (1979) Quo Warranto, § 7.) The action may be commenced only under the authority of the Attorney General in the name of the People. (*People ex rel. Conway v. San Quentin Prison Officials* (1963) 217 Cal.App.2d 182.) Where such a proceeding is brought on the relation of a private individual (relator), the relator does not become a party to the action. The actions of the relator are under the supervision and complete control of the Attorney General. (*People v. Milk Producers Assn.* (1923) 60 Cal.App. 439, 443; *People ex rel. Conway v. San Quentin Prison Officials, supra,* 217 Cal.App.2d 182.)

The Attorney General requires submission of an application for leave to sue on behalf of the People. (Cal. Code Regs., tit. 11, §§ 1-10.) In deciding whether to issue leave to sue by a relator, the basic question is whether a public purpose would be served. (39 Ops.Cal.Atty.Gen. 85, 89 (1962).) This office must determine whether a substantial issue of fact or law exists which should be judicially determined. (*City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 648.) However, it is not the province of the Attorney General to pass upon the issues in controversy because that is the court's role. (35 Ops.Cal.Atty.Gen. 123 (1960).)

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X. INCOMPATIBLE ACTIVITIES OF LOCAL OFFICERS AND EMPLOYEES

Government Code Section 1125 et seq.[15]

A. Overview

There is a prohibition against any officer or employee of a local agency from engaging in any employment or other activity that is in conflict with his or her public duties. A local agency is defined as a "county, city, city and county, political subdivision, district, and municipal corporation." (§ 1125.) Section 1126 contains the basic prohibition, and focuses on the remunerative activities of agency officials. (See also § 1098 [concerning prohibition against disclosure of confidential information, which is punishable as a misdemeanor].)

B. The Basic Prohibition

A local officer or employee shall not engage in any employment, activity or enterprise for compensation that is inconsistent, incompatible, in conflict with, or inimical to his or her official duties or the duties, functions or responsibilities of his or her appointing authority or employing agency. (§ 1126.) This general prohibition usually is not self-executing and agencies must adopt an incompatible activities statement to give their employees notice of prohibited activities. Absent a properly adopted statement, agencies may not impose sanctions on their employees for violating its provisions. Statements should include notice to employees regarding prohibited activities, disciplinary action, and appeal procedures. Agencies have discretion to add prohibitions in addition to those specified in section 1126, so long as the prohibitions are germane to avoiding incompatible activities in the government workplace.

C. Promulgation of an Incompatible Activities Statement

Generally, the statute provides that a local agency officer or employee may not engage in any employment, activity or enterprise for compensation which is "inconsistent, incompatible, in conflict with, or inimical to" his or her public duties. (§ 1126, subd. (a).) But, this prohibition is not self-executing. The appointing power of the local agency's officers and employees, subject to the approval of the local agency, determines which outside activities fall within the prohibition. (*Id.*, subd. (b).) This is often referred to as an "incompatible activities statement." The incompatible activities statement must provide sufficient notice to employees of the prohibited activities and the disciplinary action to be taken for engaging in the prohibited activities. (*Id.,* subd. (c); see also *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141.) The statement must also provide for an appeal process for employees to challenge a determination that a particular activity is incompatible and the application of the prohibitions to specific employees. (§ 1126, subd. (c).) Thus, aside from a narrow exception applicable only to school board members, discussed below, the prohibition is not self-executing.

[15] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

D. Persons Covered

This prohibition applies to officers and employees of local agencies. (§ 1126.) It is also applicable to temporary consultants, such as special counsel hired as independent contractors. (See 70 Ops.Cal.Atty.Gen. 271 (1987); 61 Ops.Cal.Atty.Gen. 18 (1978).) But, this office has concluded that section 1126 does not apply to local elected officials. This conclusion is based on the statutory language. By its terms, section 1126, subdivision (b) provides that the guidelines are to be adopted by the "appointing power." Since elected officials have no appointing authority, this office has concluded that section 1126 is applicable only to local employees, and not to elected officials. (64 Ops.Cal.Atty.Gen. 795 (1981), citing *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141.)

School boards are the exception to this rule, as they are subject to section 1126 by the express language of the Education Code. (Ed. Code, § 35233.) Since school boards also have no appointing authority, this office concluded that the provisions of section 1126 must be self-executing with respect to school boards if Education Code section 35233 was to have any effect. (70 Ops.Cal.Atty.Gen. 157 (1987).) Thus, section 1126 remains inapplicable to elected officials, except for school board members where it is both applicable and self-executing.

E. Prohibited Activities

Generally, a local officer or employee shall not engage in any employment, activity or enterprise for compensation that is inconsistent, incompatible, in conflict with, or inimical to his or her official duties or the duties, functions or responsibilities of his or her appointing authority or employing agency. (§ 1126, subd. (a).)

The statute enumerates a variety of potential incompatible activities. (§1126, subd. (b).) An outside activity that involves the use of the agency's time, resources, uniforms, or prestige may be prohibited. (§ 1126, subd. (b)(1).) If the outside activity involves double remuneration, (i.e., private payment for the performance of an activity that he or she is already required to perform in his or her public capacity) such employment may be prohibited. (§ 1126, subd. (b)(2); see also Pen. Code, § 70.) Also, if the result of this outside activity may be subject to the control or audit or other scrutiny of the official's agency, it may be prohibited. (§ 1126, subd. (b)(3).) Finally, if the outside activity makes such great demands on the official's time that the official is hampered in the performance of his or her public duties, the activity may be forbidden. (§ 1126, subd. (b)(4).) However, off-duty employees (e.g., firefighters, police officers) may accept private employment that is related to and compatible with their public employment. (§ 1127.) To do so, the employee must receive permission from his or her supervisor and must be certified by the appropriate agency.

Further, local governments have broad discretion to limit additional incompatible activities of their employees. (*Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 748.) The enumerated activities in the statute are not the exclusive list of prohibited activities. Rather, the list of enumerated activities is exemplary and does not represent either a floor or a ceiling on the activities that local governments can restrict as incompatible with public employment. (*Id.*)

However, local agencies do not have broad discretion to restrict the political activities. Agencies are prohibited from placing restrictions upon the political activities of their officers or employees, unless the restriction is otherwise authorized by statute, or is necessary to meet federal requirements. (§ 3203.) Authorized restrictions include prohibitions on participating in political activities while in uniform and on engaging in political activity during working hours or on the local agency's premises, if the agency has adopted such rules. (§§ 3206 & 3207.) Also, while employees may solicit funds for ballot measures that may affect the working conditions of their employing agency, the agency may restrict its employees' activities during their working hours. (§ 3209.) Agencies may restrict their employees from using one's office to influence another person's position within the agency, and knowingly soliciting political funds from other agency employees unless the request is made to a "significant segment of the public" that otherwise includes local agency officers or employees. (Restrictions upon the political activities of state officers or employees are discussed in Chapter XI.)

In addition to these provisions, California law also prohibits the misuse of public funds and property for political or personal use. (§ 8314; Penal Code, § 424; see also *Stanson v. Mott* (1976) 17 Cal.3d 206; *League of Women Voters v. Countywide Crim. Justice Coordinating Com.* (1988) 203 Cal.App.3d 529.)

F. Consequences, Penalties and Enforcement

The presence of an incompatible activity generally requires the official to disqualify himself or herself from participating in the relevant governmental activity. However, when the incompatibility is pervasive and continual, disqualification will not resolve the incompatibility, and the official may be required to resign the governmental position or cease the incompatible activity. (70 Ops.Cal.Atty.Gen. 157 (1987) [concluding that a school board member's private, for-profit preschool facility directly competed with the school district, and as such was a pervasive and continual conflict with his duties as a member of the board].)

The statute does not set forth any penalties or remedies for its violation. However, several enforcement vehicles appear to be available. First, with respect to a local government employee, disciplinary action such as a letter of reprimand, suspension, or termination may be available depending upon the gravity of the violation. With respect to an appointed officer, a complaint could be filed with the appointing authority, which may have the power to punish the officer or even terminate the officer's appointment. In addition, a taxpayer or member of the public may have the right to seek judicial relief.

If you have a question about an officer's or employee's outside activities, you should contact the appointing authority or employing agency for a copy of the applicable statement of incompatible activities. A member of the public is entitled to a copy of the statement through the Public Records Act as set forth in sections 6250 et seq.

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XI. INCOMPATIBLE ACTIVITIES OF STATE OFFICERS AND EMPLOYEES

Government Code Section 19990[16]

A. Overview

There are statutory provisions prohibiting state officers and employees from engaging in any activity or enterprise that is in conflict with his or her public duties. (§ 19990.) Those prohibitions are similar to those applicable to local officials under section 1126. (See Chapter X of this Guide). Both create a general prohibition followed by specific areas of conduct that should be covered in an incompatible activities statement adopted by an employee's appointing power.

B. The Basic Prohibition

Generally, state officers and employees are prohibited from engaging in any activity or enterprise that is clearly inconsistent, incompatible, in conflict with, or inimical to their duties as state officers or employees. Each state agency is required to develop, subject to the approval of the Department of Personnel Administration, a statement of incompatible activities for its officers and employees. As discussed below, the statute sets forth several activities that are deemed to be inconsistent, incompatible, or in conflict with the duties of a state officer or employee.

C. Promulgation of an Incompatible Activities Statement

Generally, the statute provides that state officers and employees may not engage in any employment, activity or enterprise which is "clearly inconsistent, incompatible, in conflict with, or inimical to" his or her public duties. (§ 19990.) But, this prohibition is not self-executing. The appointing power of the officers and employees determines which outside activities fall within the prohibition. (*Id*.) This is often referred to as an "incompatible activities statement." The incompatible activities statement must include provisions to provide notice to employees of the determination of prohibited activities and provide for an appeal process for employees to challenge a determination that a particular activity is incompatible and the application of the prohibitions to specific employees. (*Id.,* subd. (g); see also *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141.)

D. Persons Covered

As explained above, section 19990 requires that appointing authorities adopt incompatible activities statements for employees under their jurisdiction. However, an incompatible activities statement adopted by a governing board does not apply to the members of

[16] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

the board. (82 Ops.Cal.Atty.Gen. 120 (1999).) Nonetheless, the Governor's incompatible activities statement applies to all persons appointed to office by the Governor, including board members.

Because of the statutory language, there is some question as to whether section 19990 covers state officers who are outside the state civil service. (See § 19990 [stating "[e]ach appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees" (emphases added)].) In the past, section 19251, the predecessor to section 19990, was interpreted to apply to civil service employees only. (53 Ops.Cal.Atty.Gen. 163 (1970).) This conclusion, in part, was based upon the fact that the prohibition and the remedies were placed in the civil service portions of the Government Code. However, in 1981, section 19251 was repealed and replaced with section 19990, which is contained in the portion of the Government Code applicable to the Department of Personnel Administration. These provisions are applicable to both civil service and non-civil service employees and officers of state government. (§ 19815 et seq.) For the purposes of the Government Code sections under the jurisdiction of the Department of Personnel Administration, the term "employee" is defined to include ". . . all employees of the executive branch of government who are not elected to office." (§ 19815, subd. (d).)

Thus, there are strong indications that section 19990 covers all non-elected, executive branch officers and employees, not just those who are members of the civil service. However, the only remedy for violating an incompatible activities statement continues to appear in section 19572, subdivision (r) as cause for imposing discipline on a civil service employee. In addition, the term "appointing power" is defined as the entity authorized to appoint civil service personnel. (§ 18524.) Nevertheless, these factors do not conclusively bar the application of section 19990 to non-civil service personnel. For example, non-civil service employees could be subject to disciplinary action or removal under the terms of their appointment.

E. Prohibited Activities

Generally, only those outside activities that are clearly incompatible, inconsistent or in conflict with the employee's public duties may be restricted. (§ 19990; see also 73 Ops.Cal.Atty.Gen. 239 (1990); *Keeley v. State Personnel Board* (1975) 53 Cal.App.3d 88 [upholding termination of a prison guard because of his ownership and operation of a liquor store].) Section 19990 specifically states that incompatible activities shall include, but are not limited to, the following enumerated areas of conduct:

- Using the prestige or influence of the state for private gain (§ 19990, subd. (a));
- Using state facilities, time, equipment, or supplies for private gain (*Id.*, subd. (b));
- Using confidential information for private gain (*Id.*, subd. (c); see also section 1098, which prohibits the disclosure of confidential information for pecuniary gain);
- Receiving compensation from other than the state for the performance of state duties (*Id.*, subd. (d));
- Performing private activities which later may be subject to the control, review, inspection, audit, or enforcement by the officer or employee (*Id.*, subd. (e));

- Receiving anything of value from a person regulated by or seeking to do business with the official's agency where the item of value could be reasonably interpreted as having been intended to influence the official (*Id.*, subd. (f)); and,
- Not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her work hours. (*Id.*, subd. (g).)

The enumerated activities in the statute are not the exclusive list of prohibited activities. (§ 19990.) Rather, the list of enumerated activities is exemplary and does not represent either a floor or a ceiling on the activities that state agencies can restrict as incompatible with public employment. For example, state agencies have broad authority to regulate conflict-of-interest situations. (See *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736 [confirming this broad power as to local governments].) But, the private use of expertise acquired during the performance of one's official duties is not necessarily prohibited. (See 73 Ops.Cal.Atty.Gen. 239 (1990) [concluding that under specified circumstances a State Franchise Tax Board employee can teach courses on tax law].)

There is less discretion afforded to agencies with respect to regulating the political activities of state officers or employees. Except as otherwise provided in section 19990, the limitations contained in sections 3201-3209 are the only permissible restrictions on the political activities of state employees. (§ 3208.) (The restrictions on the political activities of local officers and employees are discussed in Chapter X of this Guide.)

In addition to these provisions, California law also prohibits the misuse of public funds and property for political or personal use. (§ 8314; Penal Code, § 424; see also *Stanson v. Mott* (1976) 17 Cal.3d 206; *League of Women Voters v. Countywide Crim. Justice Coordinating Com.* (1988) 203 Cal.App.3d 529.)

F. Procedural Considerations

With respect to civil servants, prior to any determination that an employee has engaged in proscribed activities, the employee must be given notice and subsequently must be afforded an appeal to contest any finding. (See *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141, 154-155.) Since violations of a statement of incompatible activities are a matter of civil service employee discipline under section 19572, subdivision (r), all of the safeguards provided by the Government Code and the State Personnel Board in connection with employee disciplinary hearings are applicable. If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached under section 3517.5, the memorandum of understanding shall be controlling without further legislative action, unless the expenditure of funds is involved, in which case such expenditures must be approved by the Legislature.

G. Penalties And Enforcement

Section 19990 does not set forth any penalties or remedies for its violation. However, several enforcement vehicles are available. First, with respect to state government employees, disciplinary action such as reprimand, suspension, or termination of employment is available

depending upon the gravity of the violation. (§ 19572, subd. (r).) With respect to an appointed officer, a complaint could be filed with the appointing authority, which may have the power to punish the officer or even terminate the officer's appointment in the case of a particularly serious violation. In addition, a taxpayer or member of the public may have the right to seek relief through injunction or mandamus. Further, members of the public may file a complaint with the State Personnel Board requesting that disciplinary action be taken against the state employee. (§ 19583.5.)

If you have a question about an officer's or an employee's outside activities, you should contact the appointing authority or employing agency for a copy of the applicable statement of incompatible activities or memorandum of understanding. A member of the public is entitled to a copy of the statement or memorandum through the Public Records Act as set forth in section 6250 et seq.

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XII. THE PROHIBITION AGAINST HOLDING INCOMPATIBLE OFFICES

Government Code Section 1099 et seq.[17]

A. Overview

The prohibition against holding incompatible offices concerns a potential clash of two public offices held by a single official. Typically, the prohibition manifests itself when one office exercises jurisdiction over the other office. Thus, the prohibition concerns a conflict between potentially overlapping public duties residing in a single officer. This type of conflict is distinguishable from a traditional conflict of interest that involves a potential clash between an official's private interests and his or her public duties. Confusion of these concepts sometimes results from the use of the term "incompatibility" in connection with the doctrine of incompatibility of offices on the one hand and the conflict-of-interest notion of incompatible activities on the other. (55 Ops.Cal.Atty.Gen. 36, 39 (1972).)

The prohibition against holding incompatible offices is in Government Code section 1099. Prior to 2006 when the statute was enacted, the prohibition was a common law doctrine that had been developed and explicated by the courts. The common law doctrine of incompatible offices was announced in the landmark case of *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636. There, a city judge accepted an appointment as city attorney. The court concluded that the two positions in question were public offices and that there was a significant clash in their respective duties and functions. In enacting section 1099, the Legislature expressly stated that it was codifying the common law doctrine and that prior interpretations of the common law doctrine continued to be viable. (See § 1099, subd. (f) and Statutes of 2005, Chapter 254, SB 274 for the uncodified portion of the law.)

B. The Basic Prohibition

The prohibition against holding incompatible offices generally has two elements. First, the official in question must hold two public offices simultaneously. Second, there must be a potential conflict or overlap in the functions or responsibilities of the two offices. When an incompatibility is authorized or compelled by law, the general prohibition is overridden. The prohibition only applies to an incompatibility between two offices held by a single individual; it does not apply to an employment position or an official that exercises only advisory functions. (For special rules governing public attorneys, see the discussion in section G of this Chapter.)

[17] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

C. The General Prohibition may be Abrogated by Statute, Charter or Ordinance

The statute expressly permits abrogation of the general prohibition. It states that an official may not hold incompatible offices "unless simultaneous holding of the particular offices is compelled or expressly authorized by law." (§ 1099, subd. (a).) Thus, the Legislature or other legislative body may expressly authorize the holding of dual offices, notwithstanding that this would otherwise be prohibited by the general prohibition.

For example, this office has concluded that the statutory scheme for joint powers agencies was intended to ensure that the prohibition did not apply to joint powers agencies or their governing boards. Accordingly, a member of a city council is authorized to serve as a member of an airport commission, which is a joint powers agency comprised of the city and other governmental agencies. (78 Ops.Cal.Atty.Gen. 60 (1995).) In addition, this office has concluded that the city council of a general law city may serve as the board of directors for fire protection and water districts in the city because the city council is specifically designated by statute as the "ex-officio board of directors" of such limited powers districts. (81 Ops.Cal.Atty.Gen. 344 (1998); see also § 56078.) The statutory abrogation provision is consistent with the prior common law rule. (See *American Canyon Fire Protection Dist. v. County of Napa* (1983) 141 Cal.App.3d 100, 104, citing *McClain v. County of Alameda* (1962) 209 Cal.App.2d 73, 79 [stating "[t]here is nothing to prevent the Legislature. . . from allowing, and even demanding, that an officer act in a dual capacity."].)

D. Public Office Defined

The prohibition does not apply to an incompatibility between an office and a position of employment, including a civil service position. (§ 1099, subd. (c).) Therefore, to analyze whether the prohibition applies, it is necessary to determine the difference between an "office" and "a position of employment."

Public Office Versus Employment

A public "office" includes "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 public benefit." (*People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 640.) Further, this office has summarized the nature of a public office as: (1) a position in government; (2) that is created or authorized by the Constitution or by law; (3) the tenure of which is continuing and permanent, not occasional or temporary; and, (4) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state. (82 Ops.Cal.Atty.Gen. 83, 84 (1999).)

Therefore, persons holding civil service and other non-officer positions are employees and are not subject to the doctrine. Following is a brief listing of several positions that have been determined to be employment positions rather than offices.

- Assistant city manager was not an officer because neither the position nor the duties were referred to in the city charter or statute. The fact that the assistant city manager performed some of the duties of the city manager did not make the position an office. (80 Ops.Cal.Atty.Gen. 74 (1997).)

- A line officer with the police department does not hold an office. (*Neigel v. Superior Court* (1977) 72 Cal.App.3d 373.)

- A sheriff's deputy chief does not hold an office. (78 Ops.Cal.Atty.Gen. 362 (1995).)

- Fire captain and fire division chief are not offices. (68 Ops.Cal.Atty.Gen. 337 (1985); 74 Ops.Cal.Atty.Gen. 82 (1991).)

- County Veterans Service Officer is a position of employment rather than an office. (87 Ops.Cal.Atty.Gen. 142 (2004).)

- Community development director is not an office. (82 Ops.Cal.Atty.Gen. 83 (1999).)

- A deputy to a principal is not necessarily deemed to be holding the same office as the principal for purposes of the incompatible offices prohibition. Only where the deputy stands in the principal's shoes with respect to policy making decisions will the deputy be deemed to be holding the same office as the principal for purposes of the prohibition. (See 78 Ops.Cal.Atty.Gen. 362 (1995), modifying 63 Ops.Cal.Atty.Gen. 710 (1980).)

Additionally, employment with a public agency that is governed by contract, rather than by law, generally is not an office under the incompatible offices doctrine. (76 Ops.Cal.Atty.Gen. 244 (1993).) However, where the powers and duties to be exercised under the contract are those of an office and are governed by statute, rather than by contract, the contractor may be an officer subject to the incompatible offices prohibition. (68 Ops.Cal.Atty.Gen. 337 (1985).)

Employee May Not Hold Office on His or Her Governing Board

Despite the general rule that the doctrine does not apply to employees, specific statutes may limit certain employees' ability to hold an office. In *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, the court determined that the incompatible offices doctrine did not bar a nurse from holding office as a member of the board of directors of the hospital district that employed her because the position of nurse is employment rather than an office. (*Id.* at p. 319.) However, in response to the *Eldridge* decision and 73 Ops.Cal.Atty.Gen. 191 (1990), the Legislature enacted section 53227 and Education Code section 35107, subdivision (b), which prohibit certain employees from simultaneously holding office as a member of the governing board that employs them.

Members of Advisory Bodies

The prohibition is not applicable to a body that possesses only advisory powers. (§ 1099, subd. (d).) Under the common law, this office opined on several occasions that members of advisory boards and commissions did not hold "offices" for purposes of this doctrine since they do not exercise any of the sovereign powers of the State. (See 83 Ops.Cal.Atty.Gen. 153 (2000); 83 Ops.Cal.Atty.Gen. 50 (2000); 62 Ops.Cal.Atty.Gen. 325, 331 (1979); 57 Ops.Cal.Atty.Gen. 583, 585 (1974); 42 Ops.Cal.Atty.Gen. 93, 94-97 (1963).)

E. Potential Conflict in Duties or Functions

The incompatible offices prohibition does not require proof of an actual class between the two offices in the context of a particular decision. It is enough that there is the potential for a significant clash between the two offices at some point in the future. (See *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 641-642 [stating "[t]wo offices are said to be incompatible when the holder cannot in every instance discharge the duties of each"]; see also 85 Ops.Cal.Atty.Gen. 60 (2002); 84 Ops.Cal.Atty.Gen. 91 (2001); 78 Ops.Cal.Atty.Gen. 316 (1995); 64 Ops.Cal.Atty.Gen. 288, 289 (1981).)

Unless simultaneous holding of the particular offices is compelled or expressly authorized by law, offices are incompatible when any of the following circumstances are present:

(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.

(§ 1099, subd. (a)(1) – (3).)

One of the most basic incompatibilities arises when a single person holds two offices where one office has supervisory authority over the other. (See § 1099, subd. (a)(1).) For example, this office has concluded that a person could not be both the city manager and the police chief because the city manager had budgetary and supervisory authority over the police chief. (81 Ops.Cal.Atty.Gen. 304 (1998); see also 82 Ops.Cal.Atty.Gen. 201 (1999) [city administrator and fire chief are incompatible offices]; 76 Ops.Cal.Atty.Gen. 38 (1993) [city council member, manager and fire chief are incompatible offices].) Further, when two offices held by the same person are consolidated, the incompatible offices prohibition may be violated if one office is made subordinate to the other. (See, e.g., *People ex rel. Deputy Sheriffs' Assn. v. County of Santa Clara* (1996) 49 Cal.App.4th 1471; 89 Ops.Cal.Atty.Gen. 152 (2006) and 88 Ops.Cal.Atty.Gen. 130 (2005).)

Also, two offices are incompatible when based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the two offices. (§ 1099, subd. (a)(2).) For example, this office has concluded that a county supervisor could not simultaneously serve as county supervisor and a member of the Board of Governors of the California Community Colleges. (78 Ops.Cal.Atty.Gen. 316 (1995).) The opinion found an inconsistency in the duties because a county supervisor and a member of the Board of Governors could have divided loyalties over matters concerning the use of college district property and the issuance of district bonds, as well as matters pertaining to funding and fees. Likewise, this office opined that there was significant potential for a conflict between a city council member and a school board member. (65 Ops.Cal.Atty.Gen. 606 (1982).) The opinion discussed six areas of potentially overlapping jurisdiction that could lead to a clash in official loyalties for an individual holding both positions. (*Id.* at p. 607.) The areas of potential conflict ranged from financial and budgetary matters to zoning and development issues.

The relationship between a water district and a school district, some portion of which is within the boundaries of the water district, further serves to illustrate how incompatibility can arise. This office concluded that such a situation presented a significant potential for a clash of duties and loyalties because the water district set the wholesale water rate that was passed on to the school district, determined the need for restrictions on water usage during times of a water shortage, and imposed conditions for providing sanitation services to the school district. (85 Ops.Cal.Atty.Gen. 199 (2002); see also, 85 Ops.Cal.Atty.Gen. 60 (2002); 82 Ops.Cal.Atty.Gen. 74 (1999); 82 Ops.Cal.Atty.Gen. 68 (1990); 73 Ops.Cal.Atty.Gen.183 (1990); 73 Ops.Cal.Atty.Gen. 268 (1990).) For similar reasons, this office also opined that the simultaneous holding of office as a member of the boards of directors of two water districts was incompatible because the actions of one district could affect the interests of the other. (76 Ops.Cal.Atty.Gen. 81 (1993).) On the other hand, an individual may be simultaneously a member of the State Industrial Welfare Commission and the Personnel Commission of the Los Angeles County Superintendent of Schools because neither office is subordinate to the other, nor is there any overlapping jurisdiction or potential clash in loyalties. (71 Ops.Cal.Atty.Gen. 39, 42 (1988.)

Following are additional citations to opinions where the holding of two offices by a single person created an incompatibility:

- city council member and county planning commissioner (63 Ops.Cal.Atty.Gen. 607 (1980));
- city council member and school district trustee (73 Ops.Cal.Atty.Gen. 354 (1990));
- city manager and school district board member (80 Ops.Cal.Atty.Gen. 74 (1997));
- city planning commissioner and county planning commissioner (66 Ops.Cal.Atty.Gen. 293 (1983));
- community college board member and county board of supervisors member (78 Ops.Cal.Atty.Gen. 316 (1995));
- community services district board member and school district board member (75 Ops.Cal.Atty.Gen. 112 (1992));
- county board of supervisors member and fire chief (66 Ops.Cal.Atty.Gen. 176 (1983));

- county planning commissioner and county water district director (64 Ops.Cal.Atty.Gen. 288 (1981));
- fire chief and city council member (76 Ops.Cal.Atty.Gen. 38 (1993));
- public utility district member and county board of supervisors member (64 Ops.Cal.Atty.Gen. 137 (1981));
- school board member and city council member (65 Ops.Cal.Atty.Gen. 606 (1982));
- school district board of trustees member and city planning commission member (84 Ops.Cal.Atty.Gen. 91 (2001); and,
- county superintendent of schools and member of the State Board of Education (74 Ops.Cal.Atty.Gen. 116 (1991).)

F. Penalties and Enforcement

Where a public official holds incompatible offices, section 1099 provides for an automatic vacating of the first office. (§ 1099, subd. (b); see also 66 Ops.Cal.Atty.Gen. 293, 295 (1983); 66 Ops.Cal.Atty.Gen. 176, 178 (1983); 65 Ops.Cal.Atty.Gen. 606, 608 (1982).) The appropriate mechanism for enforcing the vacating of the office is a suit in quo warranto under Code of Civil Procedure section 803. (§ 1099, subd. (b); see Chapter IX, section F of this Guide regarding the quo warranto remedy.) Disqualification or abstention from those decisions where an actual clash of the two offices occurs is not an available remedy under section 1099 or common law. (See 66 Ops.Cal.Atty.Gen. 176, 177-178 (1983); 63 Ops.Cal.Atty.Gen. 710, 715-717 (1980).) However, notwithstanding the legal forfeiture, the person remains in the first position as a de facto member until he or she actually resigns or is removed from office by a quo warranto action or other lawsuit. (74 Ops.Cal.Atty.Gen. 116 (1991).)

G. Special Provisions for Public Attorneys (§§ 1128; 19990.6.)

There is a special statutory provision that allows non-elected, local, public attorneys to also hold another elective or appointive office. (§ 1128.) Section 1128 modified the common law in several respects. (66 Ops.Cal.Atty.Gen. 382 (1983).) First, the statute does not prohibit a non-elected, local, public attorney from holding an appointive or elective office merely because a potential conflict may arise. Second, in the case of an actual conflict, transactional disqualification, rather than forfeiture, is required. Third, 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. (See 74 Ops.Cal.Atty.Gen. 86 (1991) [deputy district attorney may serve on city council]; 67 Ops.Cal.Atty.Gen. 347 (1984) [appointed city attorney may serve on airport commission].)

This office has opined that, when an actual conflict arises between the duties or responsibilities of a non-elective public attorney's two offices, section 1128 does not result in the automatic forfeiture of either office. However, in the event of such a conflict, the public attorney could be held accountable for misconduct in office or a violation of the rules of professional conduct, or could be subject to recall from elective office or subject to disciplinary action by his or her appointing authority. (66 Ops.Cal.Atty.Gen. 382 (1983).)

There is a similar provision for state attorneys and state administrative law judges holding local elective or appointive offices in section 19990.6.

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XIII. THE COMMON LAW DOCTRINE AGAINST CONFLICTS OF INTEREST

A. Overview

In addition to the conflicts-of-interest prohibitions discussed in previous portions of this Guide, there is also a general prohibition against conflicts of interest in the "common law" of the state. The common law is a body of law that has been made by precedential judicial decisions and can be found in the reported California Supreme Court and appellate court cases. This law differs from statutory law, which is created by the Legislature and the Governor. Courts and this office have found conflicts of interest by public officials may violate both the common law and statutory prohibitions.

B. The Basic Prohibition

The common law doctrine requires a public officer "to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51 (citations omitted).) Therefore, actual injury is not required. Rather, "[f]idelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal." (*Ibid.*) Stated another way, "[p]ublic officers are obligated, . . . [by virtue of their office], to discharge their responsibilities with integrity and fidelity." (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 206.) For example, in *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, the court concluded that in an adjudicatory hearing, the common law is violated if a decision maker is tempted by his or her personal or pecuniary interests. In addition, the doctrine applies to situations involving a nonfinancial personal interest. (*Id.* at p. 1171, fn. 18; 92 Ops.Cal.Atty.Gen. 19 (2009).)

The common law may be abrogated by express statutory provisions. (See, e.g., *Cal. Fam. Bioethics Council v. Cal. Inst. for Regenerative Medicine* (2007) 147 Cal.App.4th 1319, 1367; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171, fn. 18.) Where the common law has been abrogated by a statutory enactment, the common law prohibition may not then be applied in a manner inconsistent with the statute. (88 Ops.Cal.Atty.Gen. 32 (2005).)

If a situation arises where a common law conflict of interest exists as to a particular transaction, the official "is disqualified from taking any part in the discussion and vote regarding" the particular matter. (26 Ops.Cal.Atty.Gen. 5, 7 (1955); 70 Ops.Cal.Atty.Gen. 45, 47 (1987).) For example, this office has advised that where an adult child of a board member made an application to the board for a loan, the parent, who also shared a rented apartment with the child, should disqualify herself from any participation in the loan decision under the common law prohibition. (92 Ops.Cal.Atty.Gen. 19 (2009).)

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XIV. CODE OF ETHICS

Government Code Section 8920 et seq.[18]

A. The Basic Prohibition

Government Code section 8920, the Code of Ethics, applies to state elected and appointed officers. It does not apply to civil service employees. The Code of Ethics generally prohibits officers from participating in decisions that will have a direct monetary effect on them.

Specifically, the Code of Ethics prohibits officers from: (1) having any direct or indirect financial interest, or (2) engaging in any business transaction or professional activity, or (3) incurring any financial obligation, which is in substantial conflict with the proper discharge of the official's duties. (§ 8920, subd. (a).)

A substantial conflict arises when an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity. Where the officer will be so affected by a decision, the officer should disqualify himself or herself from the decision. A substantial conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member. (§ 8921.)

B. Special Rules for Legislative Officials

Briefly summarized, the Code of Ethics prohibits legislators and legislative employees from doing the following:

1. Accepting employment that the legislator or legislative employee has reason to believe would impair his or her independent judgment as to official duties or that would induce the legislator or legislative employee to disclose confidential information acquired by him or her in the course of, and by reason of, official duties. (§ 8920, subd. (b)(1).)

2. Willfully and knowingly disclosing confidential information acquired in the course of and by reason of his or her official duties or using that information for pecuniary gain. (§ 8920, subd. (b)(2).)

3. In general, accepting or agreeing to accept, or being in partnership with any person who accepts or agrees to accept, any employment, fee, or other thing of monetary value, in consideration of his or her appearing, agreeing to appear, or taking any action on behalf of another person before any state board or agency. Exceptions to this prohibition include the following: attorney representation before any court; representation before the Workers' Compensation Appeals Board; inquiries on behalf of constituents; advocacy without compensation; intervention on behalf of others to require a state board or agency to perform a

[18] All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

ministerial, non-discretionary act; advocacy on behalf of the legislator or legislative employee himself or herself; and, receipt of partnership or firm compensation, if the legislator or legislative employee does not share either directly or indirectly in any fee, less any expenses attributable to the fee resulting from the transaction. (§ 8920, subd. (b)(3).)

4. Receiving or agreeing to receive anything of value for services in connection with the legislative process. (§ 8920, subd. (b)(4).)

5. Participating, by taking any action, on the floor of either house or in committee or elsewhere, in the passage or defeat of legislation in which a legislator or legislative employee has a personal interest, except as follows:

Disclosure

If the Member files a statement disclosing his or her personal interest to be entered on the journal, and states that he or she is able to cast a fair and objective vote, he or she may vote for the final passage of the legislation.

Nondisclosure

The Member may be excused from disclosing his or her personal interest in legislation and from voting for the final passage of that legislation, without any entry in the journal if the Member believes that he or she should abstain from voting and he or she informs the presiding officer prior to the commencement of the vote. (§ 8920, subd. (b)(5).)

C. Penalties and Enforcement

Knowing and willful violations are punishable as misdemeanors, and any person who conspires to violate these provisions may be guilty of a felony. (§ 8926.)

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XV. CONFLICT-OF-INTEREST STATUTES APPLICABLE TO PARTICULAR OFFICERS OR AGENCIES

In addition to statutes of general applicability (e.g., Political Reform Act of 1974 ("the Act") and Government Code section 1090), there are a multitude of conflict-of-interest statutes that are applicable only to particular officers or agencies. The statutes may be broader and more sweeping than the general statutes discussed in the earlier portions of this Guide. Some may be directed to conflicts that arise on a transactional basis and will permit abstention. Others may be so broad as to constitute a qualification for holding office (i.e., one may not possess specified financial interests and hold office simultaneously). It is beyond the scope of this Guide to set forth all such statutes. However, anyone attempting to determine if a conflict of interest exists in a particular instance must be aware of these special statutes and must, therefore, determine from the specific law establishing a particular office or agency, whether any special conflict-of-interest statutes apply.

These special statutes will, in all probability, have had their origin in legislation that was enacted prior to the Act. As has been noted numerous times throughout this Guide, the Act prevails over any other act of the Legislature in cases of direct conflict. Therefore, the normal rule that a special statute controls a more general statute may have been modified by Government Code section 81013. It is beyond the scope of this discussion to define or point out areas of conflict between the Act and special statutes. Each situation must be analyzed on its particular facts to determine the viability of the special statutory provision.

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Attorney General's Office
Public Inquiry Unit
P.O. Box 944255
Sacramento, CA 94244-2550
1 (800) 952-5225
http://ag.ca.gov