



Navigating and Understanding Conflicts of Interest in the Public Sector

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California has a complex set of ethics laws to guide local officials and public employees. In 1974, California voters approved Proposition 9, a statewide initiative titled “the Political Reform Act” (the “Act” or the “PRA”). The Act passed by an overwhelming majority, and one of its provisions created a new state agency called the Fair Political Practices Commission (“FPPC”). The FPPC was charged with interpreting and enforcing the Act. Since the Act went into effect in 1975, the FPPC has issued new regulations and amendments to existing regulations almost every year.

Under the Political Reform Act, public officials may not make, participate in making, or attempt to use their official positions to influence a governmental decision in which they know or have reason to know that they have a disqualifying financial interest. A public official generally has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect on the official, the official’s immediate family, or on certain financial interests. However, under the “public generally” exception, an official with a financial interest may still participate in a governmental decision if the financial effect on the official’s interest is **indistinguishable** from the decision’s effect on the public generally. The Fair Political Practices Commission (FPPC) recently amended Regulation 18703, which sets

forth the rules for applying the “public generally” exception.

Revised Regulation 18703 amends both the general rule for the “public generally” exception and the specific rules for special circumstances. The general rule for the “public generally” exception requires the official to demonstrate that: (1) the governmental decision affects a **“significant segment”** of the public in the official’s jurisdiction; and (2) the governmental decision’s effect on the official’s financial interest is not unique compared to the effect on the significant segment. The FPPC recently revised the general rule to create a lower “significant segment” threshold of **15 percent** - instead of 25 percent - for residential real property within the official’s jurisdiction if the only interest impacted is the official’s **primary residence**. All other aspects of the general rule remain the same.

Revised Regulation 18703 also amends requirements for the application of the “public generally” exception in some special circumstances, as follows:

- **Public Services and Utilities:** A public official may no longer participate in a decision to impose an assessment, tax, fee, or utility rate, or determine the boundaries of a property or groups of persons subject to an assessment, tax, fee, or utility rate if it is reasonably foreseeable that the decision would have a material impact on the official’s financial interests. However, revised Regulation 18703 clarifies that an official may participate in **setting** or **adjusting** the **amount** of the assessment, tax, fee, or utility rate, so long as such charges are applied equally, proportionally, or by the same percentage to the official’s interest and all others subject to the charges.
- **Limited Neighborhood Effects:** Under this exception, a public official may participate in decisions on specific types of ordinances if the decision affects residential properties in a specific location. The revised Regulation clarifies that in order to

fall into this exception, the decision must affect **over 50 parcels or five percent** of the residential real properties in the official's jurisdiction.

- **Rental Properties:** Finally, revised Regulation 18703 clarifies that the exception for interests in rental properties applies (in certain circumstances) for public officials who are tenants **and landlords**. Officials now may participate in broad rent control decisions and tenant protection measures if: (1) the decision applies to all residential rentals within the official's jurisdiction except those exempted by the Costa-Hawkins Rental Housing Act; (2) the official owns three or fewer residential rental units; and (3) the only interests affected by the decision are the official's interests in the residential property as a landlord or the official's interests in a primary residence (as either a lessee or as the owner of the property).

Under the old regulations, a public official was advised to follow an eight-part test to analyze a potential conflict of interest. The newly revised regulations establish a new four-part test, as stated in Regulation 18700(d). The new FPPC four-part test assumes that an official already has determined whether he or she is a public official within the meaning of the Act. The new test also assumes that the official has identified the financial interests that may be affected by a particular governmental decision. Since these two steps are necessary for a complete analysis, we recommend that public officials follow the seven steps described below, which incorporate these two initial steps as well as the FPPC's new four-part test.

STEP ONE: IS A PUBLIC OFFICIAL INVOLVED?

Determine whether the individual is a public official within the meaning of the Act. The Act applies only to "public officials." Regulation 18700(b). A "public official" is defined to include a "member, officer, employee, or consultant" of a state or local government agency. § 82048; Regulation 18700(c). The regulations define "member" and "consultant" as follows:

- A "member" does not include an individual who performs duties as part of a committee, board, commission, group, or other body that does not have decision-making authority. A board or commission possesses decision-making authority if: (i) it may make a final governmental decision, (ii) it may compel or prevent a governmental decision by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden, or (iii) it makes substantive recommendations, which, over an extended period of time, have been regularly approved without significant amendment or modification by another official or agency. Regulation 18700(c) (2).
- A "consultant" includes an individual who, pursuant to a contract with a state or local government agency, makes specific kinds of governmental decisions or serves in a staff capacity with the agency and either participates in governmental decisions or performs the same or substantially all of the same duties that would otherwise be performed by a person in a position listed in the agency's conflict of interest code. Regulation 18700.3.

STEP TWO: WHAT ARE THE PUBLIC OFFICIAL'S FINANCIAL INTERESTS?

Identify the public official's financial interests. A public official's financial interests include certain business entities, real

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property, sources of income, and donors of gifts (as well as intermediaries and agents of such donors). Regulation 18700(c)(6).

More specifically, a public official has a financial interest in any of the following:

- A business entity in which the official has a direct or indirect investment worth at least \$2,000.¹⁰
- Any real property in which the public official has a direct or indirect interest worth at least \$2,000.¹⁵ Real property interests include all leases except month-to-month leases and leases with terms shorter than a month. Regulation 18233.
- Any “source of income” of at least \$500 that is provided or promised to the public official, or received by the public official within 12 months prior to a governmental decision, not including gifts and loans by banks available to the general public. Regulation 18700(c)(6)(C).
- Any business entity in which the public official is a director, officer, partner, trustee, or employee, or holds any position of management.
- Any donor of gifts, or any intermediary or agent for a donor of gifts, amounting to at least \$520 where that amount is provided to, received by, or promised to the official in the 12 months prior to a governmental decision. Regulation

18700(c)(6)(E).

- The personal finances of the public official and immediate family. This is a sort of “catch-all” provision that is meant to address economic interests of a public official and his or her immediate family that do not qualify as investments, property, or business entities, but are nonetheless potentially affected by government decisions.

STEP THREE: IS IT REASONABLY FORESEEABLE THAT THE GOVERNMENTAL DECISION WILL HAVE A FINANCIAL EFFECT ON ANY OF THE OFFICIAL’S FINANCIAL INTERESTS?

Determine whether the governmental decision will have a reasonably foreseeable financial effect on any of the public official’s financial interests. Regulation 18701 draws a distinction between a financial interest that is “explicitly involved” in a decision, on the one hand, and a financial interest that is not “explicitly involved” in a decision, on the other hand.

Financial interests are considered to be explicitly involved in a decision if the interest is a “named party in, or the subject of, a governmental decision before the official or the official’s agency.” Regulation 18701(a). A financial interest is the “subject” of a proceeding “if the decision involves the issuance,



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renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1) – (6).” Regulation 18701(a). In those cases, the financial effect is presumed to be reasonably foreseeable.

Even if a financial interest is not explicitly involved in a decision, the effect may still be considered reasonably foreseeable. Regulation 18701 states that a financial effect need not be “likely” to be considered “reasonably foreseeable” for purposes of the FPCC’s regulations. If the financial effect can be “recognized as a realistic possibility” and if the effect is “more than hypothetical or theoretical,” it will be considered reasonably foreseeable. Regulation 18701(b). The financial effect will not be considered reasonably foreseeable if the “the financial result cannot be expected absent extraordinary circumstances” that are not subject to the official’s control.

STEP FOUR: WILL THE REASONABLY FORESEEABLE EFFECT BE MATERIAL?

Determine whether the reasonably foreseeable financial effect will be material. If the effect is “nominal, inconsequential, or insignificant,” the financial effect will not be considered material. Regulation 18702(b). Business Entities Regulation

18702.1 provides that the reasonably foreseeable effect of a decision on a business entity in which the official has an investment interest or holds an employment or management position is material whenever the business entity is a named party in, or the subject of, the decision, including any decision in which the entity:

- Initiates the proceeding by filing an application, claim, appeal, or other request for action concerning the entity with the official’s agency;
- Offers to sell a product or service to the official’s agency;
- Bids on or enters into a contract with the official’s agency, or is identified as a subcontractor on a bid or contract with the agency;
- Is the named or intended manufacturer or vendor of any products to be purchased by the official’s agency with an aggregate cost of \$1,000 or more in any 12-month period;
 - Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the official’s agency; Is the subject of any inspection, action, or proceeding under the regulatory authority of the official’s agency; or;
- Is otherwise subject to an action taken by the official’s agency that is directed at the entity.

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The reasonably foreseeable effect of a decision on a business entity in which the official has an investment interest or holds an employment or management position is also material if any of the following criteria are met:

- The decision may result in an increase or decrease of the entity’s annual gross revenues, or the value of the entity’s assets or liabilities, in an amount equal to or more than: \$1,000,000; or five percent of the entity’s annual gross revenues and the increase or decrease is at least \$10,000.
- The decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than: \$250,000; or one percent of the entity’s annual gross revenues and the change in expenses is at least \$2,500.
- The official knows, or has reason to know, that the entity has an interest in real property and: the property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) - (6); or there is clear and convincing evidence the decision would have a substantial effect on the property. There is also a “small shareholder” exception that allows officials to participate in decisions explicitly involving a business entity where the official’s only interest in that business entity is an investment interest worth no more than \$25,000. Regulation 18702.1(b). To qualify for this exception, the interest also must be less than one percent of the business entity’s shares. However, meeting these thresholds does not automatically allow the official to participate in the decision. The official still must analyze the decision’s potential effect on the business entity’s annual gross revenues, assets and liabilities, expenses, and real property interests. Under this rule, even where an

official has only a small investment in a business entity, the impact of a decision might be so significant that the official still has a conflict of interest.

STEP FIVE: DOES THE “PUBLIC GENERALLY” EXCEPTION APPLY?

Determine if the official can demonstrate that the material financial effect on the official’s interest is indistinguishable from the decision’s effect on the public generally. Once it is determined that it is reasonably foreseeable that a decision will have a material financial effect on an official’s financial interest, it is necessary to evaluate whether an exception to the disqualification requirement is applicable. One exception, known as the “public generally” exception, provides that even if a governmental decision will have a reasonably foreseeable material financial effect on the official’s financial interest, disqualification will not be required if the effect on the public official’s financial interest is indistinguishable from the decision’s effect on the financial interests of the public generally. Regulation 18703. In order to use this exception, the official must be able to demonstrate two core elements. First, the governmental decision must affect a “significant segment” of the public in the jurisdiction of the public agency. Second, the governmental decision’s effect on the official’s financial interest must not be unique as compared to the effect on the significant segment. Regulation 18703.

STEP SIX: MAY THE OFFICIAL MAKE OR PARTICIPATE IN MAKING A DECISION?

Determine whether the public official will be making, participating in the making, or using or attempting to use his/her official position to influence a governmental decision. The Act applies when a public official is “making, participating in

making, or using or attempting to use his/her official position to influence a governmental decision.” Regulation 18704. If the official will be called upon to make, participate in making, or use his or her official position to influence a governmental decision in which the official has a financial interest, the official will have a prohibited conflict of interest. The FPPC regulations define each of these actions for purposes of applying the Act:

- A public official “makes” a governmental decision when the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. Regulation 18704(a).19

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- A public official “participates in” a governmental decision when the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review. Regulation 18704(b).
- A public official “uses his or her official position to influence” a decision if the official: (i) contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or (ii) contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact. Regulation 18704(c).

STEP SEVEN: IS THE PUBLIC OFFICIAL’S PARTICIPATION LEGALLY REQUIRED?

Determine if the public official’s participation is legally required despite a conflict of interest. A public official also is permitted to participate in making a governmental decision, despite having a conflict of interest in the decision, if no alternative source of decision exists that would be consistent with the purposes and terms of the statute authorizing the decision. Regulation 18700(e), 18705(a).

This exception is applied when a quorum of a legislative body cannot be convened due to the disqualifying conflicts of interests of its members. In that situation, as many members as are needed to create the minimum number for the quorum may be selected at random to participate. In these situations, stringent disclosure requirements apply, not only regarding the basis of the selected member’s conflict of interest, but also the reason why there is no alternative source of decision-making authority. Regulation 18705(b).

Penalties for Violation Administrative, Civil, and Criminal Penalties Exist for Violations of the Conflict of Interest Provisions of the Act

The FPPC may levy administrative penalties after a hearing and may impose a fine of up to \$5,000 per violation, a cease and desist order, and an order to file reports. § 83116. The FPPC recently adopted regulations providing for streamlined administrative enforcement procedures and specific penalties for various types of violations. Regulations 18360, 18360.1, 18360.2.

Civil penalties include injunctive relief that may be sought by the district attorney or any person residing in the jurisdiction. § 91003. In the event a court finds that the actions would not have been taken but for the action of the official with the conflict of interest, the court is

empowered to void the decision. § 91003.

Misdemeanor criminal penalties are provided in situations where a knowing or willful violation of the act occurs, and generally, persons convicted of violating the Act may not be a candidate for elective office or act as a lobbyist for four years after the conviction. §§ 91000, 91002.

The statute of limitations for civil and criminal enforcement actions is four years from the date of the violation. §§ 91000(c), 91011(b). The statute of limitations for administrative actions brought by the FPPC is five years from the date of the violation. § 91000.5.


It is important to note that only a formal advice letter from the FPPC staff can immunize a public official from potential enforcement by the FPPC or the district attorney in the event the public official participates in a decision and someone subsequently alleges the public official had a prohibited conflict of interest. A formal advice letter usually takes the FPPC staff at least a month to prepare, is only provided if the request relates to prospective acts (as distinguished from past acts), and if it contains sufficient facts upon which the FPPC is able to render a decision. Informal written advice (without immunity from potential enforcement action) may also be requested from the FPPC staff as well as informal telephonic advice through their technical assistance division at 1 866 ASK FPPC (1 866 275 3772). Based on the time frames required to obtain formal or informal written advice from the FPPC, it is important for public officials to consult their city attorney or local agency counsel as early as possible so as to provide adequate time to gather all relevant facts, draft a letter to the FPPC, and respond to the advice once given. 🇺🇸

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