CONFLICTS OF INTERESTS

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CALIFORNIA ATTORNEY GENERAL'S OFFICE

CONFLICTS OF INTERESTS

OFFICE OF THE ATTORNEY GENERAL

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Conflict of interests 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 pamphlet is to assist government officials in complying with California's conflict of interests laws and to assist the public and the news media in understanding these laws so that conflict of interests situations can be monitored.

This pamphlet does not purport to cover all conflict of interests laws. Rather, it focuses on financial conflicts of interests by local and state executive and legislative officials. It does not cover judicial conflicts of interests, the Legislative Code of Ethics, nor the ethical requirements of the state bar.

If you suspect that a government official or a candidate may be involved in a conflict of interests, you can consult this pamphlet to familiarize yourself with the basic requirements of the law and of the enforcement remedies which are available to you. Although this pamphlet will be helpful to both officials and the public, it is no substitute for directly consulting the law in question, or a private or public 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 interests. Through an understanding of these laws, government officials should be able to avoid conflict of interests situations and members of the public will be better able to determine whether a legal conflict of interests exists.

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

Sincerely,

DANIEL E. LUNGREN
Attorney General

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INTRODUCTION

In preparing this pamphlet, we relied on a variety of legal resources. Obviously, California statutes and appellate court cases were consulted and are cited throughout the pamphlet. While most of the more significant cases are discussed, this pamphlet is not intended to be a compendium of all court cases in this area. In addition, we referred to published opinions and letter opinions issued by this office. Published opinions are cited by volume and page number (e.g., 59 Ops.Cal.Atty.Gen. 339 (1979)). Indexed letters or letter opinions are cited by year and page number (e.g., I.L. 75-255). 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 editor.

We also referred to the regulations, published opinions and informal advice letters of the Fair Political Practices Commission (hereinafter "FPPC" or commission). The regulations are found in title 2 of the California Code of Regulations in section 18000 et seq. The opinions may be found in publications of Continuing Education of the Bar and are cited by name, request number, volume and page number, e.g., *In re Carey*, No. 76-087, 3 FPPC Ops. 99. We occasionally make reference to FPPC informal advice letters which are referred to by name and number, e.g., *In re Olson*, No. A-85-218. Copies of these materials may be obtained from the commission, or online through WESTLAW in the CAL-ETH database.

The pamphlet is current through October 1997 with respect to statutes, case law, Attorney General opinions, and opinions and regulations of the FPPC.

If you have specific questions, you should consult an attorney, or in the case of questions concerning the Political Reform Act, the FPPC. In the case of questions concerning the Legislature, its employees or other persons who are subject to Government Code section 8920 et seq., 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 interests statute, you should first consult with a representative of the government agency, board or commission which may be affected by the conflict of interests. If you continue to think that a conflict of interests violation may exist, you should contact the District Attorney for your county, or other enforcement authority described in the pertinent chapter of this pamphlet.

If you wish to obtain additional copies of this pamphlet, they may be ordered or downloaded via the Attorney General's Home Page, located on the World Wide Web at http://caag.state.ca.us. You may also write to the Public Inquiry Unit, P.O. Box 944255, Sacramento, CA 94244-2550 or by telephone at (800) 952-5225 (for callers within California), or (916) 322-3360 (for callers outside of California); the TTY/TDD telephone numbers are (800) 952-5548 (for callers within California), or (916) 324-5564 (for callers outside of California).

Other pamphlets available to the public produced by the Office of the Attorney General include:

The Brown Act (open meetings for local bodies)
Open Meeting Laws (state bodies)
Quo Warranto

LAW	GUIDEPOSTS
Financial Conflicts of Interests 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 $1,000 or more held by the official? Or a source of income of $250, or gifts to the official of $290, or more? If so, is there a reasonable possibility that the decision will significantly affect any of the interests involved? Are the official's 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 interests and be required to disqualify himself or herself from all participation in that decision. (See ch. I.)
Financial Interests in Contracts Gov. Code, § 1090 et seq.	Does a member of a board 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, the contract may be void and any private gain, received by the official under the contract, may have to be returned. Has any other state or local officer or employee participated in the making of a contract in which the official had a direct or indirect financial interest? If so, the contract may be void and any private gain received by the official under the contract may have to be returned. (See ch. VI.)

Limitations on State Contracts Pub. Con. 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? If the answers to any of these questions are yes, a prohibited activity may have occurred. (See ch. VI., sec. B)
Conflicts of Interests 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 to office? Has any board member received contributions of more than $250 during the proceeding or within the previous 12 months from, within 3 months following a final decision in the proceeding, the applicant or any other person who would be affected by the decision? If the answers to these questions are yes, the board member may have to disqualify himself or herself from participating in the decision. (See ch. III.)
Appearance of Financial Conflicts of Interests 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 interests. (See ch. XII.)
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.)

Incompatible Activities Gov. Code, § 1125 et seq. (local officials); Gov. Code, § 19990 (state officials)	Is an official using his or her government position or using government information or property in an improper manner? 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 possibly be disciplined. (See ch. IX regarding local officials, and ch. X regarding state officials.)
Incompatible Offices Common Law	Does a single official hold two offices simultaneously? (For purposes of this common law doctrine, an employment is not considered to be an office.) Do the offices overlap in jurisdiction, such that the official's loyalty would be divided between the two offices? If the answers to these questions are 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. XI.)
Transportation, Gifts or Discounts Cal. Const., art. XII, § 7	Is a state or local official, other than an employee, receiving a gift or discount in the price of transportation from a transportation company? (The prohibition covers inter or intrastate transportation in connection with either government or personal business.) If the answer to this question is yes, the officer may have forfeited his or her office. (See ch. VIII.)
Retired State Officials and Their Former Agencies Political Reform Act	Is a former state administrative official being compensated, by other than the State of California, to appear before any court or state

Gov. Code, §§ 87400 - 87405	administrative agency, in a judicial or quasi-judicial proceeding? If so, did the official while in office participate personally and substantially in the proceeding? If so, the official may be prohibited from appearing in the proceeding. (See ch. IV, sec. B.)
Gov. Code, § 87406	Is a former state official being compensated to communicate with a state agency within a year of his or her retirement? (See ch. IV, sec. C.)
<u>Retired State Officials and Their Contracts</u> Pub. Con. Code, § 10411	Is a former state official contracting with the former agency to provide goods and services? If the answer to this question is yes, a prohibited activity may have occurred. (See ch. VII, sec. C.)

I.

CONFLICT OF INTERESTS PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87100 Et Seq.*

A. OVERVIEW

The Political Reform Act, Government Code section 81000 et seq. (hereinafter "PRA" or "act"), was enacted by initiative measure ("Proposition 9") in June 1974. It is the starting point in any consideration of conflict of interests laws in California. Chapter 7 of the act (Gov. Code, §§ 87100-87500)[1] deals exclusively with conflicts of interests. The act also limits the receipt of specified gifts and honoraria and will be addressed in section K of this chapter separately from the general disqualification provisions of section 87100.

One of the legislative findings recited as a reason for the act sheds some light on the purpose of the conflict of interests provisions: "Public 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(b).)

The stated intent of the act was to set up a mechanism whereby "Assets 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(c).)

The Fair Political Practices Commission (hereinafter the "FPPC" or "commission") is the agency primarily charged with the responsibility of advising officials and the public and enforcing the conflict of interests provisions of 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 which conflict with their official duties nor does the mere possession of such interests require officials to resign from office.

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

*Selected statutory and regulatory materials appear in appendices A (at 93), B (at 94), C (at 96), and D (at 104).

[1]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

By establishing a broad objective disqualification standard, the PRA attempted to cover both actual and apparent conflicts of interests 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 may not even be 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.

Even though this is a broad disqualification requirement, it is by no means all inclusive. Conflicts arising out of matters other than a financial interest are outside the purview of the act, e.g., friendship, blood relationship, or general sympathy for a particular viewpoint.

To determine whether a conflict of interests exists under the act, five questions must be asked:

1. Is a public official involved? (See section C of this chapter.)

2. Does the official have a statutorily defined economic interest? (See section E of this chapter.)

3. Is the official making, participating in the making of, or using his or her official position to influence the making of a governmental decision? (See section D of this chapter.)

4. Is it reasonably foreseeable that the decision could materially affect the official's economic interest? (See sections F & G of this chapter.)

5. Will the effect of the decision on the public official's economic interest be distinguishable from its effect on the public generally? (See section H of this chapter.)

If the answer to all five of these questions is yes, a conflict of interests exists and the disqualification requirement is activated.

It should be noted at the outset that the act deals with conflict of interests situations on a transactional, or case-by-case, basis. This means that situations must be assessed for possible conflicts of interests in the light of their individual facts. The act demands continual attention on the part of officials. They must examine each transaction from the act's perspective to determine if a conflict of interests exists which triggers the disqualification requirement. When an official is disqualified, the financial interest creating the conflict as well as the act of disqualification, should be publicly announced. (See section K of this chapter for a discussion of the limits on gifts and honoraria.)

C. PERSONS COVERED

By its terms the act applies to "public officials." (§ 87100.) As that phrase 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." (§ 82048.) The term "public official" also includes individuals who perform substantially the same duties as an individual holding an office or a position listed in Government Code section 87200, including "other public officials who manage public investments" as that term

is defined in commission regulations. (C.C.R., tit. 2, §§ 18700(a); 18720.) Officials of all special purpose districts in the state are included, along with virtually all officers and employees at every level of state and local government. Note that by definition judges of courts and certain other judicial officials and the State Bar are expressly not included within the disqualification provisions otherwise applicable to all public officials. (§ 82048.) Economic disclosure provisions are, however, applicable to judges and court commissioners, as discussed *infra*. (§ 87200.)

Neither the act nor commission regulations specifically defines the terms officer or employee. However, the commission has defined the term "member" and "consultant." As to "members," the FPPC has, in keeping with the broad scope of the act, interpreted the act to apply to the members of all boards or commissions with decision making authority. (C.C.R., tit. 2, § 18700(a)(1).) It makes no difference whether such board members are salaried or unsalaried. (*Commission on Cal. State Gov. Org. & Econ.* v. *Fair Political Practices Com.* (1977) 75 Cal.App.3d 716.) For example, the "public members" on boards and commissions are subject to the provisions of the act. (I.L. 75-58.) The FPPC has determined that a board or commission possesses decision-making authority whenever:

1. it may make a final governmental decision (C.C.R., tit. 2, § 18700(a)(1)(A)) (*In re Maloney*, No. 76-082, 3 FPPC Ops. 69);

2. it may compel or prevent the making of a governmental decision by its action or inaction (C.C.R., tit. 2, § 18700(a)(1)(B)); or

3. its recommendations are routinely and regularly followed (C.C.R., tit. 2, § 18700(a)(1)(C)) (*In re Rotman*, No. 86-001, 10 FPPC Ops. 3).

Regulation 18700, subsection (a)(1)(C), refers to bodies which are technically advisory, but which the FPPC views as decision making, since their "advice" generally is followed by the recipient body. This standard involves the determination of whether the board or commission in question has established a track record of having its recommendations regularly or routinely adopted. (See *Commission on Cal. State Gov. Org. & Econ.* v. *Fair Political Practices Com., supra*, 75 Cal.App.3d 716; *In re Rotman*, No. 86-001, 10 FPPC Ops. 3, for a discussion of redevelopment project area committees.)

The final category of officials affected by the act is that of "consultant." To qualify as a consultant, an individual must either be delegated specified decision making authority or function as an officer or employee of a government agency. Examples of the type of delegated decision making authority which may make one a consultant include the power to approve a rule or regulation, adopt or enforce a law, or issue, deny, or suspend a permit, license or entitlement. Persons who contract to provide services or advice to a government agency which do not satisfy the criteria set forth in the regulation are not consultants for purposes of the act.

D. ACTIONS COVERED

A government official's actions are covered when the official: (1) makes, (2) participates in the making of, or (3) influences or attempts to influence a decision.

1. Actually Making A Decision

Decision making 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. (C.C.R., tit. 2, § 18700(b)(1)-(4).) Determining not to act in any of those ways is also "making a decision" under the act. (C.C.R., tit. 2, § 18700(b)(5).)

2. 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. (Gov. Code, § 87100.) The FPPC has interpreted "participation" to include (1) negotiations 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. (C.C.R., tit. 2, § 18700(c).)

Three areas of activity which 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 which are solely ministerial, secretarial, manual, or clerical. (C.C.R., tit. 2, § 18700(d)(1).) These functions are excluded from the definition of participation because they do not involve policy making judgment or discretion. Since 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 at a hearing or otherwise before a public agency to represent his or her own personal interests if the official does so in his or her private capacity and if the matter in question relates only to the official's private interests and not to his or her official duties. (C.C.R., tit. 2, § 18700(d)(2).) 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. With respect to appearing before one's own agency, see subsection 3, Influencing Decision Making, below, and C.C.R., tit. 2, § 18700.1(a) and (b)(1).

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. (C.C.R., tit. 2, § 18700(d)(3).)

3. Influencing Decision Making

The act, in section 87100, 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. The addition of this final category of prohibited activity was intended to ensure 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. (C.C.R., tit. 2, § 18700.1(a).) Contacts with agency personnel or other attempts to influence on behalf of an official's business entity, client or customers are prohibited. (C.C.R., tit. 2, § 18700.1(a).)

The commission regulations specifically exempt oral or written communications by an official as a member of the general public solely to represent his or her personal interests. Personal interests include: an interest in real property; or a business entity which 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. (C.C.R., tit. 2, § 18700.1(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. (C.C.R., tit. 2, § 18700.1(b)(2)-(5).)

In addition to the general provisions of the act, the Legislature created a special prohibition for state officials, including members of all state advisory bodies. Section 87104 specifically provides that no state official:

- shall for compensation act as agent or attorney for any other person;
- before his or her state agency;
- if the appearance or communication is made for the purpose of influencing a contract, grant, loan, license, permit or other entitlement for use.

The prohibition contained in section 87104 is not applicable to local government officials. However, the disqualification requirement contained in section 87100 generally would reach the same result since public officials may not make, participate in making, or use their official position to influence the making of government decisions which materially affect their sources of income. (Note: Section 87104 covers <u>all</u> state advisory bodies, whereas section 87100 only covers those advisory bodies with decision making authority. See C.C.R., tit. 2, § 18700(a)(1)(C).)

With regard to a decision which is not before the official's own agency, or 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 an agency. Such actions include the use of official stationery. (C.C.R., tit. 2, § 18700.1(c).)

As noted at the outset (chapter I, section B, The Basic Prohibition, *supra*), several elements must be present for a conflict of interests to exist. Having discussed the issues of who is a covered public official and the types of actions (e.g., making decisions), that are covered, it still must be determined if the official has a statutorily defined economic interest; if it is reasonably foreseeable that his or her governmental decision could affect that interest materially; and if that effect is distinguishable from the effect of that decision on the public generally. If the answer to all three inquiries is yes, the official has a prohibited financial interest under the act.

E. ECONOMIC INTERESTS COVERED*

(For more discussion of economic interests and their required disclosure under the act, see chapter II of this pamphlet.) Many variables come into play in determining when an official has a financial interest in the outcome of a decision sufficient to require the official to abstain from action on the matter.

Specifically, the act addresses five kinds of interests: (1) investments in business entities, (2) interests in real property, (3) sources of income, (4) holding positions with business organizations, and (5) donors of gifts and their agents or intermediaries. (§ 87103(a)-(e).) In the case of each category (except the fourth), the act specifies the minimum amount of holdings, income or gifts which must exist before an "interest" is created. An official with a holding, income or gift which is <u>less</u> than the minimum, need not be concerned with the act's provisions since such property or income does not constitute an "interest" under the act. But a holding, income or gift in excess of the minimum creates the potential, in terms of the act, for a "material financial effect" on the official's economic interests, should the official be called upon to make a decision in his or her public capacity which affects the official differently from the way the decision affects the public generally.

1. Business Investments

With regard to investments in a "business entity," any direct <u>or</u> <u>indirect</u> investment of $1,000 or more creates an "interest" for the official. "Business entity" is defined in the act and essentially means an organization which 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.)

By opinion, the FPPC defined the investment relationship between limited and general partners. (*In re Nord,* No. 83-004, 8 FPPC Ops. 6.) A limited partner is deemed to have an "investment" in his or her general partner, as well as in the partnership itself, if the limited partnership is "closely held" as defined by statute.

*Selected statutory materials appear in appendix B (at 94).

When the limited partner has such an investment, he or she must be disqualified 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 commission 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 other such entities. A parent corporation has a 50 percent or greater ownership interest in a subsidiary corporation. (C.C.R., tit. 2, § 18236(a).) One business entity is otherwise 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. (C.C.R., tit. 2, § 18236(b).)

"Indirect investment" is also defined and includes investments owned by an official's spouse, as either separate or community property, or owned by dependent children, as well as investments owned by someone else on behalf of the official, i.e., a trust arrangement. (§ 82034; § 87103; C.C.R., tit. 2, §§ 18234, 18235.) 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 interest or greater. (§ 82034.)

In I.L. 76-35 this office advised that one of the South Central Regional Coastal Commission's members had a conflict of interests and should be disqualified from participation, where the official owned more than $1,000 worth of stock in a corporation which was party to an appeal to the state commission. The stock had been placed in trust with the official's spouse and children as income beneficiaries. The commissioner was trustor. The official thus had both an investment and an income interest which gave rise to a "financial interest" under the act. (See *In re Biondo*, No. 75-036, 1 FPPC Ops. 54.)

2. Interests In Real Property

An official has an "interest in real property" when the official, spouse or dependent children have a direct or indirect equity, option, or leasehold interest of $1,000 or more in a parcel of property (e.g., ownership, mortgages, and deeds of trusts, options to buy and 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.) It should be noted that the $1,000 threshold applies to the value of the interest as opposed to the value of the property itself. Special provisions exist with respect to the disclosure of, or disqualification in connection with, leasehold interests. (See § 82033; C.C.R., tit. 2, § 18233; *In re Overstreet*, No. 80-010, 6 FPPC Ops. 12.)

3. Source Of Income And Gifts

a. Income

A public official has a financial interest in any source of income which is either received by or promised to the official (other than loans from commercial lending institutions in the ordinary course of business) and which totals $250 or more in the 12 months prior to the decision in question. (§ 87103(c).) 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 section 87460 which prohibits a public official from receiving personal loans from persons who contract with or are employed by the official's agency.) The FPPC regulations make it clear that a conflict of interests results whenever either the amount or the source of an official's income is affected by a decision. (C.C.R., tit. 2, §§ 18702(b), 18702.1(a)(1) and (4); see also *Witt* v. *Morrow* (1977) 70 Cal.App.3d 817.) Detrimental as well as positive effects on the amount or source of income can create a conflict of interests. Thus, a decision which foreseeably will materially affect an official's employer, for example, would necessitate disqualification even if the amount of income to be received by the official were not affected. (*In re Sankey*, No. 76-071, 2 FPPC Ops. 157.)

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 payments or benefits, whether tangible or intangible. (§ 82030(a).) Income also includes the official's community property interest in his or her spouse's income (the official would meet the $250 threshold if the spouse received $500 of income), and all of the dependent children's income.

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

This office interpreted the income provisions of the act in I.L. 75-249 where this office concluded that no conflict of interests existed where the wife of a deputy superintendent of schools was a supervisor in the same county. Her community property share of her husband's salary from the county was not "income" within the meaning of the act because it was a government salary specifically exempted by section 82030(b)(2). This exemption does not apply to a decision to hire, fire, promote, demote or discipline the 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. (C.C.R., tit. 2, § 18702.1(c)(2).)

For purposes of disqualification, the FPPC determined that income from a former employer does not create a conflict of interests 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. (C.C.R., tit. 2, § 18704.)

b. Gifts

Although gifts are included in the definition of income (§ 82030), a separate disqualification provision for gifts was placed in section 87103(e). That section provides that 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. As is the case with income, this section covers gifts received by or promised to the public official in the 12-month period. In addition to donors, this section also applies to persons who act as agents or intermediaries in the making of gifts.

The Legislature has provided that the $250 threshold be adjusted on a biennial basis to correspond with the gift limit established in section 89503. For the years 1997 and 1998 the disqualification threshold has been raised to $290. (C.C.R., tit. 2, §§ 18940.1 and 18954.) The disqualification threshold for sources of income pursuant to section 87103(c) remains at $250.

(See section K of this chapter for a discussion of the definition of a gift, the valuation of gifts, and limitations on the receipt of gifts and honoraria.)

Ordinarily, the receipt of property or services by a public official without the payment of consideration constitutes a gift to the public official. However, under limited circumstances, a gift is made to a public agency rather than to a public official. (C.C.R., tit. 2, § 18944.2.) In order for a gift to qualify as a gift to an agency rather than an official, four criteria must be satisfied. First, the agency must receive and control the payment. Second, the payment must be used for official agency business. Third, the agency in its sole discretion must determine the specific official or officials who will use the payment. The donor may identify a specific purpose for use of the payment, but may not designate the officials who will utilize the payment. Fourth, the agency must memorialize receipt of the payment in a written public record. This writing must embody the first three criteria, identify the donor, identify the officials receiving or using the payment, describe the use of the payment, and set forth the amount of the payment. This writing must be filed within 30 days with the person charged with the responsibility of maintaining the agency's statements of economic interests.

There is a partial exception for specified gifts made to public colleges and universities. (C.C.R., tit. 2, § 18944.2(b).) In addition, special procedures have been adopted concerning the receipt of passes or tickets by an agency. (C.C.R., tit. 2, § 18944.1.)

4. Business Positions

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 or receives income from the entity.

F. FORESEEABILITY

An official is not required to abstain from participating in a decision unless the effects of the decision which give rise to the conflict of interests 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 reasonable possibility, based on all the facts available to the official at the time of the decision, that the effects which would bring about the conflict of interests will occur. (*Downey Cares* v. *Downey Community Development Com.* (1987) 196 Cal.App.3d 983,; *Witt* v. *Morrow*, *supra*, 70 Cal.App.3d 817.)

In *Downey Cares* v. *Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983, the court analyzed the issue of foreseeability in the context of an ordinance amending a city's redevelopment plan. Plaintiffs brought suit contending that the amendment was invalid because a councilmember's property and business would be foreseeably affected by the amendment. The court stated at pages 991-992:

> "In determining the reasonably foreseeable effects of the adoption of the redevelopment plan, the court may justifiably consider that the very purpose of redevelopment is to improve the property conditions in the redevelopment area. (Health & Saf. Code, § 33037.) [Fn. omitted.] The fact that it might be possible to conceive of specific redevelopment projects which might fail to affect Mr. Santangelo's property and business does not show the trial court's decision was wrong. The test is whether it was reasonably foreseeable that the adoption of the plan would have a material financial effect on Santangelo's property and business, and we find the trial court's decision supported by reasonable inferences and the record.
>
> ". . . Not only did Mr. Santangelo own a valuable property in the amended area which was the site of a real estate business employing 32 persons of which he was the sole proprietor, and own 4 parcels of real property in the original redevelopment area, but also several of his properties were specifically mentioned in reports as possible areas for specific projects. [Fn. omitted.]"

In an opinion to the Marin Municipal Water District (*In re Thorner*, No. 75-089, 1 FPPC Ops. 198), the FPPC discussed foreseeability in the context of granting exceptions to the

county's water moratorium. In the case of one district director, the FPPC concluded that it was not foreseeable that a decision on the moratorium would affect the director's husband's private employer. The commission based its decision on the fact that her husband was on salary rather than commission, he was working outside the county, and his employer had only done one project in the county within the past ten years.

However, another director, who was closely connected to a building supply company which was in competition with many other firms in the county, was found to have a possible conflict of interests, since there was a reasonable possibility (hence, it was reasonably foreseeable) that decisions on exemptions from the moratorium might either affect the amount of his or her own income or have an effect on his or her business entity.

In *In re Gillmor*, No. 76-089, 3 FPPC 38, the commission interpreted the foreseeability requirement in the context of property owned by Gillmor near a redevelopment area.

> ". . . Thus, it is intended and anticipated that redevelopment will have a financial impact on real property and business located in and near the redevelopment zone.
>
> "In the present case, we think it is 'reasonably foreseeable' that these types of positive financial consequences will occur if the property in question is rezoned and the senior citizens' housing complex constructed. . . ."

In I.L. 75-58, this office concluded that the decisions of a state board regulating certain advertising would not materially affect a board member's source of income. In that case, the board member, as a condition of his contract with a television station, recorded a series for an industry, some of whose advertising was regulated by the board. This office reasoned that it was too remote and speculative that a decision to regulate the advertising of a particular industry would materially affect the television station which was the board member's source of income.

G. MATERIAL EFFECT*

To create a conflict of interests under the act, the effect of an official's governmental decision on his or her economic interest must be "material." The FPPC has promulgated a series of regulations which outline specific circumstances and monetary thresholds for determining when the effects of a decision are "material." (See C.C.R., tit. 2, § 18702.1 et seq.) Initially, one must determine whether the economic interest is directly involved in the decision. (C.C.R., tit. 2, §§ 18702(a), 18702.1.) If the official's economic interest is not directly involved in the decision, or the effect of the decision is not material under regulation 18702.1, then it must be determined if the effect is material under regulations 18702.2 through 18702.6. If the provisions of regulations 18702.2 through 18702.6 also are not applicable, one should consult the general materiality standard set forth in regulation 18702. Regulation 18702 states that the effect of a decision is material whenever it would have a "significant" effect on an official's economic interest.

*Selected regulations appear in appendix C (at 96).

The materiality requirement also contains a knowledge element. Section 87100 provides that the official must "know or have reason to know" of the effects of the decision in question. The FPPC has determined that in addition to an official's actual knowledge, he or she is under a duty of reasonable inquiry for a person in similar circumstances. (*In re Cohan*, No. A-82-197.) Thus, if a person is on notice that a decision may have certain effects, the official is under a duty to inquire into the facts so that he or she can make a reasonable judgment about the materiality of the proposed decision. Moreover, an official is under a duty to make a reasonable inquiry where the surrounding circumstances or the nature of the proposed decision would signal a reasonable person to seek further information.

Even though the disqualification test contains a knowledge component, the test is not a subjective standard. Materiality exists whenever an official knows or has reason to know, that a decision will significantly affect an official's economic interest as those terms are defined by commission regulations. Once the requisite thresholds are satisfied and that fact is known, or should have been known by the official, the effect will be considered material. An official's statement to the effect that he or she can act in an impartial manner, free from bias, is not sufficient to dissipate a finding of materiality resulting from application of the objective standards of the regulation. By relying on a numerical trip-wire in the form of dollar or percentage effects on an official's economic interest, the FPPC regulations determine materiality in an objective manner without the need to look into an official's mind to determine whether he or she is capable of acting impartially.

A brief summary of the FPPC materiality regulations is set forth below.

1. Direct Involvement

Commission regulation 18702.1 is divided into two categories. (C.C.R., tit. 2, § 18702.1.) The first category applies whenever the official's economic interest is directly involved in the decision. Where direct involvement is present, the regulation generally dictates disqualification. For example: decisions to rezone property in which the official has an interest, or to grant a business license to the official's employer, are decisions in which the official's economic interest is directly involved. However, disqualification is not required if, notwithstanding the direct involvement, there is no financial effect on the official's economic interest which reasonably could result from the decision. (C.C.R., tit. 2, § 18702.1(c).)

Subsections (a)(1) and (a)(2) of regulation 18702.1 require disqualification when a source of income to the official or business entity, in which the official has an investment or holds a position, is directly involved in a decision before the official's agency. A person or business entity is directly involved in a decision before an official's agency if the person or entity is a named party to the proceeding conducted by the official's agency or initiates the proceeding by filing an application, claim, appeal or similar request, or is otherwise the subject of a proceeding. (C.C.R., tit. 2, § 18702.1(b).)

In addition, regulation 18702.1, subsection (a)(1), establishes the requirement that an official disqualify himself or herself whenever there is a "nexus" between the purpose for which the official receives income and the governmental decision. The nexus test means that 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 which draws into consideration that policy or position. Under

the regulation, a nexus exists if the official receives income in his or her private capacity to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the governmental decision. (C.C.R., tit. 2, § 18702.1(d).)

The commission has advised that 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, was disqualified from participating in any decisions in his or her capacity as a member of a board which would advance or inhibit the accomplishment of his or her organization's goals. (*In re Best*, No. 81-032; see also *In re Hensen*, No. 81-501.)

Regulation 18702.1(a)(3) clarifies when decisions directly involving real property (e.g., zoning, annexation, sale, lease, actual or permitted use of, or taxes or fees imposed on real property) in which the official has an interest will necessitate disqualification. It explicitly includes certain redevelopment decisions where the official owns property in the redevelopment area. These decisions are the major ones which involve establishing or amending the redevelopment plan. (*Downey Cares* v. *Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983.)

Regulation 18702.1, subsection (a)(4) requires disqualification whenever a decision will affect the expenses, income, assets or liabilities of the official or his or her immediate family by $250 or more in a 12 month-period.

If an official's economic interest is directly involved in the decision but materiality is not present under regulation 18702.1, the official must still determine whether materiality is present under the regulations governing indirect involvement. (C.C.R., tit. 2, § 18702(a).)

2. Indirect Involvement

The second category of regulations (C.C.R., tit. 2, §§ 18702.2-18702.6) applies whenever the official's economic interest is not directly involved in the decision, but it is reasonably foreseeable that the economic interest will be affected by the decision. For example, a decision to rezone property across the street from property owned by a source of income to the official is a situation where the official's economic interest (i.e., the source of income) is not directly involved in the decision. However, it may be reasonably foreseeable that the rezoning decision will have a material financial effect on the official's source of income. Under the second category of regulations, a standard is provided for measuring the materiality of a financial effect in such situations.

Materiality is present if the decision will have the specified effects on the gross revenues, assets, or liabilities of the business entity in which the investment is held, or permits the business entity to avoid the expenditure of a designated amount of funds. (C.C.R., tit. 2, § 18702.2.) Whether an effect on a business entity will be considered material depends on the financial size of the business entity. (C.C.R., tit. 2, § 18702.2.) For example, an effect of only $10,000 on the gross revenues or assets of a small business is material (C.C.R., tit. 2, § 18702.2(g).), while an effect of less than $1 million dollars on the gross revenues or assets may not be material on a Fortune 500 company. (C.C.R., tit. 2, § 18702.2(a).)

a. Real Property

Materiality is present if the decision will have the specified effects on the fair market value or the income-producing potential of the property. (C.C.R., tit. 2, § 18702.3.) Subsection (a) provides that disqualification is required when the decision involves another's real property located within a 300-foot radius of the official's property, unless the decision will have no financial effect on the official's property. The 300-foot radius is taken from planning law concepts, which require notice to owners of property within 300 feet of the subject property. (C.C.R., tit. 2, § 18702.3(a)(1).) An official would also be disqualified if the decision involves construction of or improvements to public facilities such as water, sewer or streets, which will result in the official's property receiving new or substantially improved services. (C.C.R., tit. 2, § 18702.3(a)(2).)

When a decision affects another's property which is more than 300 feet from the official's property, the regulation provides standards for determining whether the effect will be material. (C.C.R., tit. 2, § 18702.3(a)(3).) The primary standard is whether the decision will effect the fair market value of the official's property by $10,000, or the rental value by $1,000, in a 12-month period. Subsection (d) of the regulation provides some factors to consider in determining whether the requisite change in value is likely to occur. These factors include proximity, the effect on development potential, and the character of the neighborhood.

Subsection (b) of the regulation provides that a decision will not have a material financial effect when an official's property is located more than 2,500 feet from the subject property, unless certain criteria are met. First, to be material, there must be specific factors present which make it likely that the value of the official's property will be affected by $10,000 or more, or $1,000 in rent in a 12-month period. Second, assuming that there are more than 10 separately owned properties within a 2,500 foot radius of the official's property, less than 25 per cent of the properties surrounding the official's property will be affected in the same manner as the official's property. This exception provides some degree of certainty that an official is not disqualified from participating in decisions affecting another's property, which is located a substantial distance from the official's property, unless there are specific circumstances which dictate disqualification.

Subsection (c) merely is a catch-all for dealing with those decisions affecting real property which are not site-specific or which directly involve an official's property but are excluded from coverage under regulation 18702.1. For example, a decision to amend the set-back requirement for a particular zone would not have a "subject property" from which to measure a radius. Under such circumstances the basic monetary test discussed above would apply.

b. Leasehold Interests

Regulation 18702.4 governs when an official is required to disqualify himself or herself because the decision will affect real property in which the official has a leasehold, as opposed to an ownership interest. The regulation focuses

on those changes which will affect the lessee's use of the property. The regulation also provides a standard for determining materiality when the decision does not directly involve the leased property but does involve property nearby.

c. Nonprofit Entity

Regulation 18702.5 defines materiality in the context of a nonprofit entity which is indirectly affected by a decision. This regulation parallels the structure of the regulation governing effects on business entities. It sets up a series of criteria based upon the monetary size of the nonprofit entity. Very large nonprofit entities such as Stanford University and the University of Southern California would be subject to the same materiality standards as Fortune 500 companies. Smaller nonprofit entities would be subject to lower standards.

d. Individuals

Regulation 18702.6 establishes standards for determining materiality when a governmental decision will have a material effect on an individual who is a source of income or gift to an official. The regulation establishes a materiality threshold of $1,000 and incorporates the standards for real property in regulations 18702.3 and 18702.4.

H. THE PUBLIC GENERALLY

If an official has a financial interest within the meaning of the act and the governmental decision in question will foreseeably 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: whether the decision will affect the official's personal interest differently than it does those of the "public generally." (§ 87103.) If the official is participating in a decision on an issue, which 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 the official's interest materially does not create a conflict of interests for the official.

Recognizing that no decision will affect every member of the public in the same way, the FPPC, by regulation has defined the term "public generally" to include a "significant segment" of the public. (C.C.R., tit. 2, § 18703.) For a conflict of interests to be avoided, the official's interests must be affected in substantially the same manner as the interests of all members of the group which 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 because the effect on his or her interests is distinguishable from the effect of the interests of at least some members of the segment.

In general, the FPPC requires a group of people to be large in number and heterogeneous in nature for it to qualify as a significant segment of the public. (*In re Overstreet*, *supra*, No. 80-010, 6 FPPC Ops. 12; *In re Ferraro*, No. 78-009, 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. (I.L. 75-58; *In re Brown*, No. 77-024, 4 FPPC Ops. 19; *In re Legan*, No. 85-001, 9 FPPC Ops. 1.)

The Fair Political Practices Commission has established specific percentage and numerical thresholds for determining when a group of people constitute a significant segment of the general public, as summarized below:

- Ten percent or more of the population in the jurisdiction of the official's agency or the district which the official represents. (C.C.R., tit. 2, § 18703(a)(1)(A)(i).)

- Ten percent or more of all property owners, homeowners or households in the jurisdiction of the official's agency or the district which the official represents. (C.C.R., tit. 2, § 18703(a)(1)(A)(ii).)

- Fifty percent of all businesses in the jurisdiction of the agency or the district which the official represents, so long as the businesses are comprised of other than a single industry, trade or profession. (C.C.R., tit. 2, § 18703(a)(1)(A)(iii).)

- Five thousand residents of the jurisdiction. (C.C.R., tit. 2, § 18703(a)(1)(B).)

- With respect to an elected state officer, an industry, trade or profession; with respect to any other elected official, an industry, trade or profession which is predominant in the jurisdiction or district which the official represents. (C.C.R., tit. 2, §§ 18703(a)(1)(C), 18703.2.)

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. (C.C.R., tit. 2, § 18703.3.) 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 interests is vitiated and the official may participate in the making of the decision. In order for a member to represent a specific economic group or interest, the following criteria must be met:

- The statute, ordinance, or other provision of law which creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.

- The member is required to have the economic interest the member represents.

- The board's or commission's decision does not have a material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.

- The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent.

If the statute creating the board or commission does not expressly provide that the member represents the industry, trade or profession, it may be inferred that the Legislature 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. (C.C.R., tit. 2, § 18703.3(b).)

In addition to the foregoing, the commission has adopted special rules interpreting the general public exception in connection with states of emergency (C.C.R., tit. 2, § 18703(c)); rate making decisions, including those by landowner/water districts (C.C.R., tit. 2, § 18703(b)); and decisions affecting the principal residences of elected officials in small jurisdictions (C.C.R., tit. 2, § 18703.1). Notwithstanding the specific thresholds established in the regulation, exceptional circumstances may nevertheless justify application of the general public exception. (C.C.R., tit. 2, § 18703(a)(1)(D).)

Section 87103.5 provides a special interpretation of the public generally doctrine which addresses specific problems concerning retailers in small communities. (See C.C.R., tit. 2, § 18703.5 for numerical thresholds.)

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 interests exists. 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 which the official represents 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.

I. LEGALLY REQUIRED PARTICIPATION -- THE RULE OF NECESSITY

There is an exception in the act itself to the general prohibition against an official's participation in decision making when a financial conflict of interests exists. The exception applies when the individual public official involved must act in order that a decision be made or 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. The exception expressly does not include the situation in which the official's vote is merely needed to break a tie. (§ 87101.) This exception is similar to, but is different in several important respects from, the common law rule of necessity.

The necessity provision has been rather narrowly construed by this office. In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that participation is legally required under the act (and therefore the exception is applicable) only when the official is faced with the isolated, nonrecurring situation involving a conflict of interests. Government Code section

81003 provides, "This title should be liberally construed to accomplish its purposes" as authority for this interpretation. If the exception were to be broadly construed, the central purpose of the act could be vitiated.

Stressing the "necessity" character of the exception, the FPPC has said in its regulations that an official is "legally required to make or to participate" within the meaning of this section only if there is no reasonable alternative manner of decision making. (C.C.R., tit. 2, § 18701(a).) In determining what is a "reasonable" alternative, the purposes and terms of the statute authorizing the decision must be examined. (*Affordable Housing Alliance* v. *Feinstein* (1986) 179 Cal.App.3d 484.) The regulations promulgated by the FPPC detail several steps to be taken by officials who wish to exercise the "necessity" exception. (C.C.R., tit. 2, § 18701.) Initially, the official must disclose the existence of the financial interest in the outcome of the particular action involved and make it a matter of public record. This disclosure is to include a description of the particular nature of the conflicting personal interest. The official is required by the regulations not to use his or her official position to influence any other public official with regard to the matter. Also, for the record, the official must state exactly why there is no alternative route by which action can be taken. And finally, the official must limit his or her participation to acting only so far as is legally required. (C.C.R., tit. 2, § 18701(b)(1)-(4).)

In *In re Hudson*, No. 77-007, 4 FPPC Ops. 13, the commission outlined its interpretation of the legally required participation exception when multiple members of a body are disqualified. The commission concluded that if a quorum of the body were 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 activated. However, unlike the common law, all disqualified members do not return to voting and participating status; rather, only the number of members needed to reconstitute a quorum are rehabilitated. (See also *In re Brown*, *supra*, No. 77-024, 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 draw or by any other fair and impartial method.

In *In re Hopkins*, No. 77-022, 3 FPPC Ops. 107, the commission 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 commission 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.

J. DISQUALIFICATION MUST BE ANNOUNCED PUBLICLY

Once a public official determines that he or she has a financial interest in a decision under the act, necessitating disqualification, the official must publicly announce the economic interest which is the subject of the potential conflict of interests, and the fact that the official is disqualifying himself or herself from any participation in the decision. (C.C.R., tit. 2, § 18700(b)(5).) If the official is an employee rather than a member of a board, commission,

or council, the official's announcement is required to be in writing and given to the official's supervisor, appointing power or other specified individual. (C.C.R., tit. 2, § 18700(b)(5).)

K. LIMITATIONS ON GIFTS AND HONORARIA

1. Limits On Gifts

The act limits the amount of gifts which can be received by specified officials and candidates from a single source during the calendar year to $250, adjusted biennially by the Fair Political Practices Commission to reflect changes in the consumer price index. (§ 89503(f); C.C.R., tit. 2, § 18940.2.) These limits are separate from the prohibition against receiving gifts totaling $10 or more a month, provided by or arranged by a lobbyist. (§ 86204.) The covered officials and candidates, and corresponding gift limitations, effective until they are adjusted again on January 1, 1999 (C.C.R., tit. 2, § 18940.1), are set forth below:

- **Elected State or Local Officer or Candidate:** $290 (§ 89503(a) and (b); C.C.R., tit. 2, § 18940.1.)

- **State Board Member or State or Local Designated Employee:** $290 if the receipt of the gift would have to be reported as a gift or income from that source on the member's or designated[2] employee's statement of economic interests (exception for part-time members of governing boards of institutions of higher education). (§ 89503(c); C.C.R., tit. 2, § 18940.1.)

- **Any person covered by Section 87200 except Judges, but including Judicial Candidates:** $290. (§ 89503(a), (b) and (d).)

2. Limits On Honoraria

The act prohibits the receipt of honoraria by elected state and local officers and candidates and by persons described in section 87200. (§ 89502(a) and (b); C.C.R., tit. 2, § 18930.1.) Members of state boards and state and local designated employees are prohibited from receiving honoraria from any source of income which is required to be reported on the official's statement of economic interests. (§ 89502(c); C.C.R., tit. 2, § 18930.1.) The prohibition does not apply to judges or part-time members of governing boards of institutions of higher education. (§ 89502(d).) The prohibition does, however, apply to judicial candidates. (§ 89502(b).)

3. Reportability Of Gifts

Gifts aggregating $50 or more in a calendar year from a single source generally must be reported. (§ 87207; C.C.R., tit. 2, § 18941.) 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. (C.C.R., tit. 2, § 18941(b).) In the case of a promise to make a gift, the gift is made on the date on

[2]For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests, since such persons are covered by the prohibition and should be included in the agency's conflict of interest code.

which it is offered so long as the recipient knows of the offer and ultimately receives the gift. (C.C.R., tit. 2, § 18941(c).)

Both a source of a gift and any intermediary in the making of a gift must be disclosed. (C.C.R., tit. 2, § 18945.3.) The gifts of an individual donor are accumulated with any gift by an entity in which the donor is more than a fifty percent (50%) owner. (C.C.R., tit. 2, § 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. (C.C.R., tit. 2, § 18945.4.)

Under specified circumstances, a gift may be made to a public agency rather than to an individual. (C.C.R., tit. 2, § 18944.2; see section E, subsection 3(b) of this chapter.)

4. Reportability Of Travel Expenses

When an official or candidate is required to report travel expenses, they should be reported on the special schedule created by the Fair Political Practices Commission for that purpose. (§ 87207(c), C.C.R., tit. 2, § 18950.1.)

5. Special Rules On Travel

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

a. Totally Exempt

1. The following travel expenses, when provided to an official or candidate who gives a speech, participates in a panel or seminar, or performs a similar service, are not payments and are not subject to any prohibition, limitation or reporting obligation (see C.C.R., tit. 2, § 18950.3):

   (i) Free admission, refreshments and non-cash nominal benefits provided to a filer during the entire event

   (ii) actual intrastate transportation to and from the event

   (iii) any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar or service, including meals and beverages on the day of the activity.

   In other words, qualifying food, beverages, nominal benefits, accommodations and intrastate transportation in connection with giving a speech or appearing on a panel are not limited, prohibited, or reportable as either gifts, income, or honoraria under the act. In effect, these payments are invisible.

2. Travel expenses paid for from campaign funds are not honoraria or gifts so long as they are expressly authorized by section 89513(a). (§ 89506(d)(1); C.C.R., tit. 2, §§ 18950.1(c) and 18950.4.)

3. Travel expenses paid for by an official's public agency do not constitute honoraria or gifts. (§ 89506(d)(2); C.C.R., tit. 2, § 18950.1(d).)

4. Travel expenses which are reasonably necessary in connection with the operation of a bona fide business, trade or profession, which would qualify for a business deduction under the federal income tax laws (IRC 162 and 274) are not honoraria or gifts unless the predominate activity of the business is making speeches. (§ 89506(d)(3); C.C.R., tit. 2, § 18950.1(e).)

b. Reportable but Not Limited

The travel expenses discussed below are not subject to the gift and honoraria limits contained in the act. However, such travel expenses may trigger the basic disqualification requirement contained in section 87100. In addition, if the reporting threshold is reached, the expenses must be reported by the official or candidate on any applicable statement of economic interests.

Travel expenses are not subject to the limitations on gifts and honoraria if the travel is reasonably related to a legislative or governmental purpose or to an issue of public policy and either of the following apply:

1. the travel expenses are in connection with a speech given by an official or candidate; the lodging and subsistence is limited to the day before, the day of, and the day after the speech; and the travel is within the United States; or

2. the payment is provided by a government agency (foreign or domestic), an educational institution, or a nonprofit organization which is tax exempt under Internal Revenue Code section 501(c)(3).

(§ 89506(a); C.C.R., tit. 2, § 18950.1.)

Although not limited, these travel expenses are reportable unless they are exempt pursuant to California Code of Regulations, title 2, section 18950.3.

c. 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.

6. Definition Of Gift

A gift is anything of value, either tangible or intangible, provided to a public official or candidate for which the donor has not received equal or greater consideration. (§ 82028(a).) Gifts frequently include money, food, transportation, accommodations, tickets, plaques, 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.

The act and commission regulations contain a number of exemptions from the basic definition of a gift. Items which are exempt from the gift definition provisions are likewise exempt from any reporting or limitations placed on gifts. Unfortunately, the rules providing for these exemptions are extraordinarily technical and complex. Below is a summary of the major exemptions from the definition of gift.

a. Informational Material

Serves primarily to convey information and is provided to assist the official or candidate in the performance of his or her official duties, or the elective office he or she seeks. These materials may include books, magazines, maps, models, etc. (C.C.R., tit. 2, § 18942.1.) If the item is a scale model, pictorial representation, or map, and the value is $290[3] or more, the recipient has the burden of demonstrating that the purpose of the material is to assist the recipient in performing his or her official duties in order for the item to be exempt. (C.C.R., tit. 2, § 18942.1(b).) Travel is not informational material, except that on-site tours or visits designed specifically for public officials or candidates are informational material. However, transportation to and from the site does not constitute informational material unless there are no commercial or other normal means of travel to the site (such as by private auto). (§ 82028(b)(1); C.C.R., tit. 2, § 18942.1(c).)

b. Returned Unused

Gifts are exempt if unused and returned within 30 days to the donor or donated to a government agency or nonprofit entity exempt from taxation under § 501(C)(3) of the Internal Revenue Code so long as a charitable tax deduction is not taken. (§ 82028(b)(2); C.C.R., tit. 2, § 18943(a).) Specific procedures for returning gifts in order to avoid disqualification are set forth in California Code of Regulations, title 2, section 18943(b). A recipient may negate a gift or may reduce a gift's value by reimbursing the donor for some or all of the gift within 30 days of receipt or acceptance of the gift. (C.C.R.,

[3]This amount is adjusted biennially. See section K, subsection 1, of this chapter.

tit. 2, § 18943(a)(4).) As a general rule, a recipient may not negate the receipt of a gift by turning the item over to another person or discarding it. (C.C.R., tit. 2, § 18941(b).)

c. Relatives

Gifts from close family relatives (e.g. spouse, children, siblings, grandparents, aunts and uncles) are specified as exempt. (§ 82028(b)(3); C.C.R., tit. 2, § 18942(a)(3).)

d. Campaign Contributions

Bona fide campaign contributions under either federal or state law are exempt. (§ 82028(b)(4); C.C.R., tit. 2, § 18942(a)(4).)

e. Plaques or Awards

A plaque or trophy which is personalized, for the recipient in question, and which has a value of less than $250 is exempt. (§ 82028(b)(6); C.C.R., tit. 2, § 18942(a)(6).)

f. Home Hospitality

Hospitality provided by an individual in his or her home is not a gift when the donor or a member of his or her family is present. (C.C.R., tit. 2, § 18942(a)(7).)

g. Exchange of Gifts

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. (C.C.R., tit. 2, § 18942(a)(8).)

h. Devise or Inheritance

Section 82028(b)(5); California Code of Regulations, title 2, section 18942(a)(5).

7. Valuation Of Gifts

Gifts are valued as of the date they are received or promised to the recipient. (C.C.R., tit. 2, § 18946(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. (C.C.R., tit. 2, § 18946(b).)

a. 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 price at which the ticket is offered to the public. However, the pass or ticket has no value unless it is either used or transferred to another. (C.C.R., tit. 2, § 18946.1(a).)

A pass or series of tickets which permits repeated admissions to events or facilities is valued as follows: For purposes of disclosure and gift limits the value is based on actual use by the recipient and the recipient's guests, and any possible use by transferees of the pass or tickets. For purposes of disqualification the value is the actual use by the recipient and the recipient's guests, and any possible use by transferees through the date of the decision in question plus the maximum reasonable value of the usage following the date of the decision. If this type of pass or tickets are returned prior to the date of the decision, the value is determined by actual use and the value of any retained tickets for future events. (C.C.R., tit. 2, § 18946.1(b).)

b. Testimonial Dinners

Where 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. (C.C.R., tit. 2, § 18946.2.)

c. Wedding Gifts

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 shall be allocated in whole to that spouse. (C.C.R., tit. 2, § 18946.3.) When wedding gifts are exchanged with another person the wedding gift may be exempt from reporting or limitations. (See section K, subsection 6(g), of this chapter.)

d. Tickets to Political and Nonprofit Fundraisers

Tickets to political fundraisers or fundraisers conducted by nonprofit organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code have 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 fair market value of food, beverage, or other tangible benefits provided to each attendee. (C.C.R., tit. 2, § 18946.4.)

e. 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. (C.C.R., tit. 2, § 18946.5.)

8. Definition Of Honoraria

In general, 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; C.C.R., tit. 2, § 18931.) However, the definition excludes certain travel-related payments. For information concerning limitations on food, transportation, lodging, and subsistence, see section K, subsection 5, of this chapter.

A speech includes virtually any type of oral presentation including participation as a panel member. Comedy, dramatic, musical, or artistic performances do not constitute the making of a speech for purposes of the honoraria limitation.

For purposes of the honoraria limitation, a published article refers to a non-fiction written work which 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. (A bona fide business is defined in C.C.R., tit. 2, § 18932.1.) 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. (C.C.R., tit. 2, § 18931.2.)

a. Earned Income

Honoraria does not include earned income for personal services if both of the following apply:

- The services are provided in connection with an individual's business (including nonprofit entities) or employment in a bona fide business, trade, or profession (other than speech making). (C.C.R., tit. 2, § 18932(a)(1) and (b).)

- The services are customarily rendered as a part of the business. (C.C.R., tit. 2, § 18932(a)(2).)

b. Teaching Profession

For purposes of the honoraria limitations, an individual is presumed to be participating in the profession of teaching if:

- The individual is under contract or employed to teach at a school, college, or university which is accredited, approved, or authorized as an educational institution by the State of California, another state, the federal government or an independent accrediting organization. (C.C.R., tit. 2, § 18932.2(a).)

- The individual is paid to teach a course which is presented to maintain or improve professional skills and knowledge and where the course provides continuing education credits for members of the profession. (C.C.R., tit. 2 § 18932.2(b).)

- The individual is paid for teaching individuals who are enrolled in an examination preparation program such as a state bar examination review course. (C.C.R., tit. 2, § 18932.2(c).)

c. Return or Donation of Honoraria

The limitations on honoraria do not apply if within 30 days of the receipt of the honorarium, the honorarium is returned unused, or it is donated to the general fund of the agency in question. If the payment is not money and cannot be contributed to the general fund, the recipient may reimburse the donor for the value or use of the honorarium. (C.C.R., tit. 2, § 18933.)

Donations made to a charity by a third person in return for a speech by an individual do not constitute honoraria to the individual pursuant to Title 2, California Code of Regulations section 18932.5, if all of the following conditions apply:

- the donation is made directly to the charity;

- the donation is not a condition of the speech or appearance;

- the donation is not claimed as a tax exemption by the individual;

- the donation will not have a foreseeable material financial effect on the individual or the individual's immediate family; and

- the individual is not identified to the recipient in connection with the donation.

Honoraria which is so donated or reimbursed need not be reported by the individual.

L. SPECIAL RULES FOR ELECTED STATE OFFICERS

Although, pursuant to section 87102, elected state officers are exempt from the act's remedies for violation of section 87100, special disqualification prohibitions exist for these officials. (§§ 87102.5 - 87102.8.) With respect to legislators, these prohibitions generally are imposed where legislators have specified interests in non-general legislation, i.e., legislation which 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 which do not involve legislation.

Elected state officers are prohibited from participating in decisions of their agency where the decision would affect a lobbyist employer which 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(a) and (b); 87102.8(b).) With respect to legislators, this prohibition applies to persons who are not lobbyist employers as well. (§ 87102.5(a)(7).)

M. PENALTIES AND ENFORCEMENT

In the past, violations of section 87100 were enforceable by injunctive relief only. However, the PRA was amended in 1979 to apply all of the enforcement remedies of the act to violations of section 87100. (§ 87102.)

Generally legislators and other elected state officers are exempt from administrative, civil and criminal penalties for violation of the disqualification requirement contained in Government Code section 87100; however, in 1990, the Legislature adopted limited disqualification requirements for legislators and other elected state officers. These disqualification requirements are only subject to administrative enforcement by the commission. (§§ 87102.5 - 87102.8.)

Persons who violate the gift or honoraria limits set forth in Government Code section 89500 et seq. are subject to a civil action brought by the Fair Political Practices Commission 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.)

For a general discussion of penalties and enforcement under the PRA, see chapter V of this pamphlet.

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II.

ECONOMIC DISCLOSURE PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87200 Et Seq.*

A. OVERVIEW

In addition to the requirement that public officials disqualify themselves from conflict of interests situations, public officials whose decision could affect their economic interests, are required under the act to file economic interest 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 who act, of that economic interest. By making officials and the public aware of what constitutes a conflict of interests, they will be able to identify conflict of interests situations and disqualify themselves from participating in discussions when appropriate. Questions from the media and interested citizens often aid in the public discussion of conflict of interests issues and assist in their resolution.

Articles 2 and 3 of Chapter 7 of the Political Reform Act of 1974 (hereinafter "PRA" or "act") deal with disclosure of economic interests by public officials. These provisions were challenged in the case of *Hays* v. *Wood* (1979) 25 Cal.3d 772 as being unconstitutionally overbroad and as violative of privacy rights. The court rejected these claims holding that the disclosure scheme established in the act was not overbroad and that any infringements on the official's right to privacy or associational freedom was justified by the limited disclosure needed to prevent conflicts of interests.

B. PERSONS COVERED

The PRA 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 their positions and others are required to file because of their duties. The disclosure requirements for constitutional officers, members of the Legislature, county supervisors, city councilmembers, mayors, judges, and other highranking officials are set forth in Government Code sections 87200-87210.[4] All other officials who make or participate in the making of 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 will be discussed in section F of this chapter. Under Government Code section 87200 et seq., highranking 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 are determined according to the powers of the official's position to affect financial interests.

* Selected statutory materials appear in appendix B (at 94).

[4]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

C. STATEMENTS OF ECONOMIC INTERESTS

Public officials disclose their private economic interests on a document entitled "Statement of Economic Interests." (For information concerning public access to these statements, see section E of this chapter.) There are three basic types of statements of economic interests: assuming office; annual; and leaving office. As the names of these statements suggest, officials must report their economic interests when they begin public service, annually thereafter, and when they leave service. In addition, candidates for the elective offices specified in section 87200 et seq., (other than appellate or supreme court justices), must file candidate statements. (§ 87201.) The time for filing statements is set forth in section 87200, for those subject to its provisions, and in conflict of interest codes for all other officials.

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 he or she potentially could affect in his or her public capacity. (For a brief discussion of these economic interests, see chapter I, sections E and K. For specific instructions, see the disclosure forms and manual of the Fair Political Practices Commission (hereinafter "FPPC" or "commission") 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 $1,000; $1,000 or more; or $10,000 or more. By merely indicating the applicable value range, the public is alerted at least partially to the potential conflict of interests, and the official's privacy is safeguarded from those who are merely curious about the degree of the official's wealth. (*City of Carmel-By-The Sea* v. *Board of Supervisors* (1982) 137 Cal.App.3d 964.)

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 and dependent children and their community property interest in the income of their spouses. (§§ 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 with respect to trusts. Assets held by a truly blind trust are not disclosable. (See C.C.R., tit. 2, § 18234.)

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 business entity in which an official has an investment or holds a business position must be reported only if the source or entity 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. Once again, the purpose for this limitation is to protect the official's privacy in financial affairs which are beyond the official's power to affect. In reporting income, the appropriate value range is determined by the gross amount received, rather than the net. (*In re Carey*, No. 76-087, 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.

For a discussion of gifts, including definitions, valuation and reporting, see Chapter I, section E, subsection 3; and Chapter I, section K, specifically subsections 3 through 8.

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 constitutional officers, members of the Legislature, county supervisors, mayors, city councilmembers, and judges are forwarded to the FPPC by their respective agencies.

All statements of economic interests are available for public inspection during regular business hours. Persons wishing to examine statements may not be asked to identify themselves and may only be charged a maximum of 10 cents per page for copies of statements. (§ 81008.)

Disclosure Statements by state lobbyists and their employers also are available for public inspection from the Secretary of State's Office.

F. CONTENTS AND PROMULGATION OF CONFLICT OF INTEREST CODES

Every agency, which foreseeably may materially affect economic interests must adopt a conflict of interest code for its employees. A conflict of interest code lists those employees or officers who have disclosure obligations (designated employees) and prescribes the types of interests which must be disclosed by such officials (disclosure categories). Employees who perform merely ministerial or manual tasks or members of advisory nondecision making boards, as defined by commission regulations, are not subject to a conflict of interest code. The public is entitled to participate in the code adoption process as provided for in section 87311 and the applicable open meeting law. (For local government bodies, The Brown Act, contained in Gov. Code, § 54950 et seq.; for state bodies, The Bagley-Keene Open Meeting Act, contained in Gov. Code, § 11120 et seq. For more information you may contact the Office of the Attorney General for a pamphlet on the applicable open meeting law.) For more information about the promulgation and contents of conflict of interest codes, contact the FPPC. The commission can provide sample lists of designated employees, model disclosure categories, and other aids.

When a conflict of interest code is adopted by an agency, it must be submitted to the "code reviewing body" for approval. 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 should be reviewed periodically to determine whether changed circumstances necessitate its amendment. 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. If the agency fails to initiate necessary amendments, a resident of the jurisdiction can compel such amendments. (§ 87308.)

G. PENALTIES AND ENFORCEMENT

Sections 87200-87313 et seq. are a part of the Political Reform Act. For a discussion of penalties and enforcement under the act, see chapter V of this pamphlet.

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III.

CONFLICTS OF INTERESTS AND CAMPAIGN CONTRIBUTIONS

Government Code Section 84308*

A. OVERVIEW

As previously noted in chapter I, discussing financial conflicts of interests under the Political Reform Act of 1974 (hereinafter "PRA" or "act"), campaign contributions are not a basis for disqualification by public officials. (See § 82030(b)(1).)[5] However, based on the increased concern about the link between campaign contributions and alleged conflicts of interests, the Legislature enacted section 84308 in 1982. Note: state or local laws may impose limits on campaign contributions that are lower than $250.00 (e.g., section 85100 et seq.)

B. THE BASIC PROHIBITION

Briefly stated, Government Code section 84308 provides the following:

(1) The law applies to proceedings on licenses, permits, and 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.

(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. However, the exemption does not apply when they serve in a capacity other than that for which they were directly elected.

* Selected statutory materials appear in appendix E (at 107).

[5]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

A more comprehensive description of the provisions of section 84308 is set forth below. If you have specific questions, you should consult the actual wording of the statute, and the regulations of the Fair Political Practices Commission (hereinafter "FPPC" or "commission").

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(a)(3); C.C.R., tit. 2, § 18438.1.) Alternates to elected or appointed board members and candidates for elective office in an agency also are covered. (§ 84308(a)(4); C.C.R., tit. 2, § 18438.1.) 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 members of other boards or bodies (e.g., joint powers agencies, regional government bodies, etc.). (§ 84308(a)(3), (a)(4); C.C.R., tit. 2, § 18438.1 et seq.)

Interested persons refers to persons who are financially interested in the outcome of specified proceedings (e.g., 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 which 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 Government Code section 87100 et seq.; and (2) they have acted to influence the decision through direct contacts with the officials or their staffs. (§ 84308(a)(1), (a)(2), (b) and (c); C.C.R., tit. 2, § 18438.4.)

When a closely held corporation is a party or participant in a proceeding, the requirements of the law apply to the majority stockholders. (§ 84308(d).)

D. AGENTS

Agents of parties and participants are subject to the same prohibitions and requirements as their principals. (§ 84308(b), (c).) A person is an agent under section 84308 if he or she represents an interested person in connection with the covered proceeding. (C.C.R., tit. 2, § 18438.3(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. (C.C.R., tit. 2, § 18438.3(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. C.C.R., tit. 2, § 18438.3(b).) 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.

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(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. (C.C.R., tit. 2, § 18438.2.) Ministerial decisions also are not covered. (C.C.R., tit. 2, § 18438.2.)

F. REQUIRED CONDUCT

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

1. 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. (§ 84308(d).) 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(c); C.C.R., tit. 2, § 18438.8.) If there is no public hearing, the disclosure must be entered on the written record of the proceeding. (C.C.R., tit. 2, § 18438.8.) As will be discussed subsequently, receipt of such contributions may necessitate the disqualification of the official from the decision making process.

2. Prohibition On Contributions

During the pendency of the proceeding involving the license, permit, or entitlement for use in question, and for a period of three months thereafter, parties and participants are prohibited from making contributions of more than $250 to officials involved in the proceedings. (§ 84308(b).) 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(b).) Covered officials also are prohibited from soliciting, receiving, or directing contributions on behalf of another person or on behalf of a committee. (§ 84308(b).)

3. 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 during the previous 12 months, the official must disqualify himself or herself from participating in the proceeding. (§ 84308(c).) A similar prohibition exists with respect to 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(c); C.C.R., tit. 2 § 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, then disqualification is not required. (§ 84308(c).)

4. Knowledge

Before the contribution prohibition and disqualification requirement are applicable, the covered official must have the requisite knowledge of (1) the contribution and (2) the fact that the source of the contribution is financially interested in the proceeding. By regulation, the FPPC provides that 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. (C.C.R., tit. 2, § 18438.7(c).) With respect to the official's knowledge of the financial interest of the source of the contribution, parties are conclusively presumed to be financially interested. (§ 84308(a)(1), (b), (c); C.C.R., tit. 2, § 18438.7(a)(1).) With respect to participants, the covered official's knowledge requirement is satisfied if the participant reveals facts before the agency that make his or her financial interest apparent. (§ 84308(a)(2), (b), (c); C.C.R., tit. 2, § 18438.7(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 V of this pamphlet.

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IV.

LIMITATIONS ON FORMER STATE OFFICIALS APPEARING BEFORE STATE GOVERNMENT AGENCIES

Government Code Section 87400 Et Seq.*

A. OVERVIEW

Historically, there has been a regular flow of personnel between government and the private sector. Sometimes, individuals from the private sector enter government for a short tenure of service and then return to their private enterprise occupations. Other times, individuals with longstanding government service who have developed expertise choose to leave government service and join the private sector. In still other instances, elected officers retire or are defeated and, therefore, return to private industry.

Effective in 1981 the Political Reform Act of 1974 (hereinafter "PRA" or "act") was amended to include Government Code section 87400 et seq.[6] In 1990, the Legislature enacted categorical restrictions on post-government employment to coincide with the restrictions previously placed on government officials who participated in specific judicial, quasi-judicial or similar proceedings. Section 87406 places restrictions on former government officials from contacting specified government agencies. These sections constitute the only general state law regulating the activity of former government officials who enter the private sector. (See Pub. Contract Code, § 10411 for specific prohibition.)

In addition, the 1990 legislation prohibits government officials from participating in government decisions directly relating to any person with whom the official is negotiating concerning future employment. (§ 87407.)

If a former local government official wishes to influence his or her former agency, the official should consult local laws and rules to determine if there are limitations on his or her activities. Special provisions for air pollution control districts appear in section 87406.1.

B. LIFETIME RESTRICTIONS

1. The Basic Prohibition

The basic prohibition contained in section 87400 et seq. provides that: (1) no former state administrative official, (2) shall for compensation act as agent or attorney for any person other than the State of California, (3) before any court or state administrative agency, (4) in a judicial or quasi-judicial proceeding if previously the official personally and substantially participated in the proceeding in his or her official capacity.

*Selected statutory materials appear in appendix F (at 109).

[6]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

If the elements of the prohibition are found to be present, a former state administrative official is forever banned from acting as an agent or attorney in a covered proceeding or from assisting another to so act.

2. State Administrative Official

State administrative officials include 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 a purely clerical, secretarial or ministerial capacity. (§ 87400(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(a).)

3. Compensation For Representation As Agent Or Attorney

The statutory prohibition only extends to former state administrative officials who, for compensation, represent people as agents or attorneys. (§ 87401, 87402.) Former officials who provide representation without compensation are not covered by the prohibition. However, representing an individual as part of one's employment does constitute receiving compensation for such representation. A firm which has as one of its partners a former administrative official generally may not represent persons in covered proceedings, because the official ultimately will benefit directly or indirectly from the compensation paid to the firm for such representation. However, where a former administrative official merely shares office space and some other overhead expenses with another attorney, that attorney would not be prohibited from handling such cases so long as the former administrative official were in no way involved in fee splitting or the representation. (*In re Zatopa*, No. 82-95.)

The statute does specify the types of conduct which constitute prohibited representation of another in a covered proceeding (e.g., § 87402). It prohibits any formal or informal appearance or any written or oral communication with an intent to influence the covered proceeding. The prohibition on representation only applies to proceedings in which the State of California is a party or in which it has a direct or substantial interest. (§ 87401(a), (b).) In addition, the statute prohibits former administrative officials, for compensation, from aiding or assisting another to represent a person in a covered proceeding. (§ 87402.) 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 such representation.

4. Court Or Quasi-Judicial Proceeding

It is important to note that the statute only applies to judicial, quasi-judicial or other proceedings involving specific parties before a court or administrative agency (§ 87400(c); *In re Xander*, No. A-86-162; *In re Berrigan*, No. A-86-045). Thus, quasi-legislative proceedings of an agency for the purposes of adopting general regulations do not activate the prohibition. (*In re Nutter*, No. A-86-042; *In re Swoap*, No. A-86-199.) Participation in a lawsuit, an administrative enforcement action under section 11500 of the Government Code, or application proceedings are

specifically covered. (§ 87400(c).) Any other proceeding which involves a controversy or ruling concerning specific parties also is covered. (§ 87400(c).)

5. Previous Participation

Once it has been determined that a former administrative official is prepared to act as an agent or attorney for another in a court or in an administrative proceeding, it must be determined whether the former official participated in the proceeding during his or her official tenure. (*In re Anderson*, No. A-86-324; *In re Petrillo*, No. A-85-255.) If so, the elements of the prohibition are complete and the former administrative official is prevented from acting in a representative capacity. (§ 87401.) A former administrative official is deemed to have participated in a proceeding only if he or she were personally and substantially involved in some aspect. (§ 87400(d).) 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 substantial advice. In addition, involvement in an investigation or the use of confidential information qualifies as participation under the statute. (§ 87400(d).) However, the statute specifically exempts from coverage the rendering of legal advice to departmental or agency staff which does not involve specific parties.

Unless covered by a specific exemption, a former administrative official who participated in a covered proceeding in his or her official capacity, is forever banned from acting as an agent or attorney in that proceeding, or from assisting another to do so. Section 87403 provides several limited exceptions to this general prohibition.

The statute does not act to prevent a former administrative official from making a statement which 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(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 makes specified findings. (§ 87403(b).) The court or administrative agency must find that the former administrative 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. 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 administrative official if the agency of former employment gives its consent by determining that the former administrative official left office at least five years previously and the public interest would not be harmed by the appearance or communication.

6. Enforcement And Disqualification

Upon petition of any interested person, or party, the court or administrative agency may act to enforce the terms of the statutory 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 PRA apply to section 87400 et seq. (See chapter V of this pamphlet.)

C. ONE-YEAR PROHIBITION

1. The Basic Prohibition

The restrictions prohibit the following former officials from accepting compensation to act as the agent, attorney or representative of another person for purposes of influencing specified government agencies through oral or written communications.

- With respect to members of the Legislature, the law imposes a one-year prohibition on communications 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 legislative action. (§ 87406(b).)

- With respect to an elected state officer (excluding legislators), the law imposes a one-year prohibition on communications with any state administrative agency, for the purpose of influencing any administrative action or any action or proceeding concerning a permit, license, grant or contract, or the sale or purchase of goods or property. (§ 87406(c).)

- With respect to a state designated employee[7] or member of a state body, the law imposes a one-year prohibition on communications with any state administrative agency, which either employed or was represented by the former official during the last 12 months of his or her government service, for the purpose of influencing: any administrative or legislative action; any action or proceeding concerning a permit, license, grant or contract; or the sale or purchase of goods or property. (§ 87406(d)(1).)

Appearances before a court, a state administrative law judge, or the Workers Compensation Appeals Board are not subject to the prohibitions of section 87406. Also, uncompensated appearances are not subject to the prohibition. The prohibition is not applicable to officials who transfer between agencies (§ 87406(e)), and designated employees of the Legislature (§§ 87406(d) and 87400(a)).

2. Administrative Or Legislative Action

"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

[7] A "designated employee" refers to an employee whose position has been designated in his or her agency's conflict of interest code. (See Chapter II of this pamphlet.) For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests, since such persons are covered by the prohibition and should be included in the agency's conflict of interest code.

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.)

D. JOB SEEKING BY GOVERNMENT OFFICIALS

Prior to leaving government office or employment, the act prohibits state administrative officials as defined in section 87400, elected state officers and designated employees of the Legislature 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.)

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V.

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

Government Code Sections 83114-83123 And 91000 Et Seq.

A. PENALTIES AND ENFORCEMENT

The Political Reform Act of 1974 (hereinafter "PRA" or "act") provides administrative, civil and criminal penalties for its violation. In past years, the Fair Political Practices Commission (hereinafter "FPPC" or "commission") and local district attorneys have brought numerous enforcement actions which have resulted in hundreds of thousands of dollars of fines. If you have a question about a potential violation of the PRA you should contact the FPPC's enforcement division (428 J Street, 7th Floor, Sacramento, CA 95814, (916) 322-6441) or your local district attorney. The Attorney General and the commission have concurrent jurisdiction with district attorneys over criminal violations. (Gov. Code, §§ 91000(d), 91001(a).)[8]

Administrative penalties are levied by the FPPC 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. (§ 83123; see also *McCauley* v. *BPC Direct Marketing* (1993) 16 Cal.App.4th 1262, 1268-69 (certain provisions of the act can only be addressed by an FPPC administrative action).)

Injunctive relief may be sought by the civil prosecutor or any person residing in the official's jurisdiction. (§ 91003.) The court, in its own discretion, may require a plaintiff to file a complaint with the commission prior to seeking injunctive relief. In the event the action would not have been taken but for the conflict of interests, the court is empowered to void the decision. (§ 91003.) (*Downey Cares* v. *Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983.) The civil prosecutor also may seek civil damages for violations of the act. (§§ 91004, 91005 & 91005.5.) In addition, any person who purposely or negligently causes any person to commit a violation, or aids and abets in the commission of a violation, is liable to civil, criminal and administrative sanctions. (§§ 83116.5, 91006.) A plaintiff who prevails in an action brought pursuant to this section may be awarded attorneys fees. (§ 91003.) The standard for awarding fees is determined by application of the standards and case precedent established for attorney fee awards under Code of Civil Procedure section 1021.5, including the use of a multiplier. (*Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d 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 act also provides misdemeanor criminal sanctions for knowing or willful violations of the act. (§ 91000.) 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. (§ 91002.)

[8]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

In the past, violations of section 87100 were enforceable by injunctive relief only. However, the PRA was amended in 1979 to apply all of the enforcement remedies of the act to violations of section 87100. (§ 87102.)

Generally legislators and other elected state officers are exempt from administrative, civil and criminal penalties for violation of the disqualification requirement contained in Government Code section 87100; however, in 1990, the Legislature adopted limited disqualification requirements for legislators and other elected state officers. These disqualification requirements are only subject to administrative enforcement by the commission. (§§ 87102.5 - 87102.8.)

Persons who violate the gift or honoraria limits set forth in Government Code section 89500 et seq. are subject to a civil action brought by the Fair Political Practices Commission 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.)

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

The chart which follows briefly describes who has authority to initiate enforcement proceedings under the Political Reform Act. With respect to each type of proceeding (administrative, civil and criminal) the chart indicates who has the authority to initiate actions against both state and local officials for violations of the act.

* * * * *

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(b), 91001.5, 91003 et seq.)	The FPPC is the civil prosecutor of state officials. The AG is civil prosecutor of the FPPC and its employees. If the civil prosecutor fails to act, individual residents may file civil suit.	The DA is the civil prosecutor. The elected city attorney of a charter city may act as a civil prosector of city violations. If the civil prosecutor fails to act, individual residents may file a civil suit. The DA may authorize the FPPC to file a civil suit whenever an individual resident could file suit.
Criminal (§§ 91001(a), 91001.5)	The AG, the commission and the DA have concurrent authority.	The AG, the commission and the DA have concurrent authority. The elected city attorney of a charter city may act as criminal prosecutor of city violations.

B. PROSPECTIVE ADVICE

Staff members at the FPPC are available by telephone or in writing to provide advice on the Political Reform Act in hopes of avoiding future violations of the law. Written advice can usually be obtained within 21 working days. (§ 83114(b); C.C.R., tit. 2, § 18329.) On occasion, the commission itself adopts formal published opinions. (§ 83114(a); C.C.R., tit. 2, § 18329.) 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 PRA so long as the requester provides the commission with all relevant facts and the official follows the commission's advice in good faith. Written advice, on the other hand, is not a formal opinion of the FPPC nor a declaration of its policies. Therefore, written advice may only provide "guidance" to persons other than the requestor. (C.C.R., tit. 2, § 18329(a)(7).) Written advice pursuant to 83114(b) provides the requester only with immunity from enforcement actions brought by the commission itself if the requestor committed the acts complained of either in reliance on the FPPC's advice or because the FPPC did not provide advice within section 83114's time limits. (§ 83114(b); C.C.R., tit. 2, § 18329.) "Informal assistance," as opposed to a formal opinion or written advice, rendered by the FPPC does not provide the requestor with the immunity set forth in either section 83114(a) or (b). (C.C.R., tit. 2, § 18329(c).)

* * * * *

VI.

CONFLICTS OF INTERESTS IN CONTRACTS

Government Code Section 1090 Et Seq.*

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,[9] which codifies the prohibition as to contracts, can be traced back to an act passed originally in 1851 (Stats. 1851, ch. 136, § 1, p. 522) and has been characterized as "merely express legislative declarations of the common-law doctrine upon the subject." (*Stockton P. & S. Co.* v. *Wheeler* (1924) 68 Cal.App. 592, 597.)

Frequently amended in its details, the concept of the prohibition has remained unchanged. In fact, this office and the courts often refer to very early cases when discussing possible violations of this fundamental precept of conflict of interests law. (See, for example, *Berka* v. *Woodward* (1899) 125 Cal. 119.)

In 59 Ops.Cal.Atty.Gen. 604 (1976), this office specifically concluded that the Political Reform Act (hereinafter "PRA" or "act") did not repeal section 1090 et seq. ". . . but that the PRA will control over section 1090 *et seq*. where the PRA would prohibit a contract otherwise allowable under section 1090 *et seq*."

Government Code section 1090 basically prohibits the public official from being financially interested in a contract or sale in both his or her public and private capacities. In *Thomson* v. *Call* (1985) 38 Cal.3d 633, 649, the California Supreme Court reiterated the long-standing purpose and framework of section 1090. 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." (*Id.* at p. 650.) The Court also stated:

> ". . . the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all of this in his own favor.' [Citation.]" (*Thomson* v. *Call*, *supra*, 35 Cal. 3d at p. 648; see also *Campagna* v. *City of Sanger* (1996) 42 Cal.App.4th 533, 542.)
>
> ". . . . . .

*Selected statutory materials appear in appendix G (at 112).

[9]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

"It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the violation of section 1090 cannot turnon the question of whether actual fraud or dishonesty was involved. Nor is an actual *loss* to the city or public agency necessary for a section 1090 violation. . . ." (*Id.* at p. 648; emphasis in original.)

". . . . . .

"In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of validity. (*Capron* v. *Hitchcock* (1893) 98 Cal. 427.) . . ." (*Id.* at p. 649.)

B. THE BASIC PROHIBITION

Section 1090 provides that an officer or employee may not make a contract in which he or she is financially interested. Any participation by an officer or an employee in the process by which such a contract is developed, negotiated and executed is a violation of section 1090. If the governmental discussion in question does not involve a contract, or if a contract in which an officer or employee has a financial interest is not ultimately executed, no violation exists. A board member is 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.

The prohibition applies to virtually all state and local officers, employees and multimember bodies, whether elected or appointed, at both the state and local level. 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. The remote interest exception set forth in section 1091 enumerates specific interests which trigger abstention for board members but which do not prevent the board from making a contract. The interests set forth in section 1091.5 are labeled "non-interests" in that, once disclosed, they do not prevent an officer, employee or board member from participating in a contract.

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

C. PERSONS COVERED

Virtually all board members, officers, employees and consultants are public officials within the meaning of section 1090. (*Thomson* v. *Call*, *supra*, 38 Cal.3d 633, councilmember; *City Council* v. *McKinley* (1978) 80 Cal.App.3d 204, councilmember; *People* v. *Vallerga* (1977) 67 Cal.App.3d 847, county employee; *People* v. *Sobel* (1974) 40 Cal.App.3d 1046, city employee; 70 Ops.Cal.Atty.Gen. 271 (1987), contract city attorney; 46 Ops.Cal.Atty.Gen. 74 (1965), consultant.) Beginning in 1986, section 1090 became applicable to school boards pursuant to 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. (*Millbrae Assn. for Residential Survival* v. *City of Millbrae* (1968) 262 Cal.App.2d 222.)

Board members are conclusively presumed to be involved in the making of all contracts under their board's jurisdiction. (*Thomson* v. *Call*, *supra*, 38 Cal.3d at p. 649.) With respect to all other public officials, it is a question of fact as to whether they were involved in the making of the contract.

D. PARTICIPATION IN MAKING A CONTRACT

Having determined that a public official is involved, the next issue is whether the decision in question involves a contract which was "made" in his or her official capacity. The use of the term "made" in the statute indicates that a contract must be finalized before a violation of section 1090 can occur. Once a contract is made, section 1090 would be violated if the official had participated in any way in the making of the contract. (See *People* v. *Sobel*, *supra*, 40 Cal.App.3d 1046.)

In *People* v. *Sobel*, *supra*, 40 Cal.App.3d at p. 1052, the court outlined the broad reach of 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."

In determining whether a decision involves a contract, one should refer to general contract principles. Two situations which were not readily apparent have been analyzed by this office. In 78 Ops.Cal.Atty.Gen. 230 (1995) this office determined that a development agreement between a city and a developer was a contract for purposes of section 1090. In 75 Ops.Cal.Atty.Gen. 20 (1992), section 1090 was interpreted to prohibit a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. The opinion concluded that the board member had a financial interest in the payment of his or her spouse's expenses and that the payment itself constituted a contract.

Participation in a decision to modify, extend or renegotiate a contract constitutes involvement in the making of a contract under section 1090. In *City of Imperial Beach* v. *Bailey* (1980) 103 Cal.App.3d 191, the city entered into a contract for construction and operation of a concession stand on a pier. Later, one of the owners was elected to the city council. Under the contract, the provider had an option to renew the contract and seek an adjustment of rates. The court concluded that exercise of this option would require the city council to affirm the contract and negotiate a rate structure. In so doing, the city would be making a contract within the meaning of section 1090.

With respect to the making of a contract, the court in *Millbrae Assn. for Residential Survival* v. *City of Millbrae*, *supra*, 262 Cal.App.2d 222, held that the test is whether the officer or employee participated in the making of the contract in his or her official capacity. The court defined the making of the contract to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for

bids. (See also *Stigall* v. *City of Taft* (1962) 58 Cal.2d 565; *People* v. *Sobel*, *supra*, 40 Cal.App.3d at p. 1052.)

These, and similar interpretations, make it clear that the prohibition contained in section 1090 also applies to persons in advisory positions to contracting agencies. (*Schaefer* v. *Berinstein* (1956) 140 Cal.App.2d 278; *City Council* v. *McKinley*, *supra*, 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.

If an official is a member of a board or commission which executes the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts. (*Thomson* v. *Call*, *supra*, 38 Cal.3d at pp. 645, 649.) This absolute prohibition applies regardless of whether the contract is found to be fair and equitable (*Thomson* v. *Call*, *supra*, 38 Cal.3d 633; *People* v. *Sobel*, *supra*, 40 Cal.App.3d 1046) or the official abstains from all participation in the decision. (*Fraser-Yamor Agency, Inc.* v. *County of Del Norte* (1977) 68 Cal.App.3d 201.)

In I.L. 92-407 the issue concerned whether a water district could enter into an employment contract with a member of the board of trustees on the proviso that the individual would not be paid any compensation until he resigned his position on the board. The board member in question would disqualify himself from any participation in the board's decision. This office concluded that the proposed contract would violate Government Code section 1090 since board members are conclusively presumed to make all contracts made by the district. Once the board member retires, the district may enter into an employment contract with the former board member, so long as no discussions concerning such employment took place between the board member and his or her colleagues or staff prior to the date of retirement. See also I.L. 91-210 in which Government Code section 1090 was interpreted to prohibit a contract between the school district and a member of its governing board to serve as a substitute school teacher. (See also Gov. Code, § 53227, which prohibits an employee of a local agency from simultaneously serving on the legislative body of the local agency; Ed. Code, § 35107(b), which specifically applies the same prohibition to school employees. These code sections were enacted subsequent to *Eldridge* v. *Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311 (in which a hospital employee was permitted to hold office as an elected member of the hospital board of directors).

This office has applied Government Code section 1090 to a city airport commission's award of a contract for the construction of a new airport terminal. (77 Ops.Cal.Atty.Gen. 112 (1994).) The design of the terminal also had to be approved by the city arts commission, and all modifications ordered by the arts commission had to be made free of charge to the city. Under these circumstances, this office concluded that the contract was made by both the airport commission and the arts commission.

The question posed was whether the contract could be awarded to an architectural firm where a member of the firm simultaneously was a member of the arts commission. The opinion concluded that a member of the firm who sat as a member of the arts commission would have a financial interest in the contract because each modification ordered by the arts commission would impose costs on the architectural firm which could not be recouped from the city. Accordingly, the opinion concluded that the contract could not be awarded to an architectural firm where a member of the firm simultaneously was a member of the arts commission.

In *Stigall* v. *City of Taft*, *supra*, 58 Cal.2d 565, the court concluded that where a councilmember 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 councilmember had been involved in the making of the contract. In *City Council* v. *McKinley*, *supra*, 80 Cal.App.3d at p. 212, the court followed this reasoning and stated:

> ". . . the negotiations, discussions, reasoning, planning, and give and take which go beforehand in the making of a decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense [citation] . . . . 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."

In 66 Ops.Cal.Atty.Gen. 156 (1983), this office concluded that county employees who proposed that their functions be accomplished through private consulting contracts were barred from contracting with the county to perform such services. This office stated:

> "We are told that the persons involved, while employees of the county, and *as employees of the county*, have provided input in the formulation of the contract. . . . By that participation in the give and take that went into such 'embodiments' of the contract as the negotiations, discussions, reasoning, planning, and drawing of plans and specifications, the county employees had the opportunity to, and did bring their influence to bear on the ultimate contract itself. While no fraud or dishonesty may have been involved, we are nonetheless satisfied that in so doing they participated, *not* in their personal capacities but in their official ones *as county employees*, in the 'making of the contract' within the meaning of section 1090. . . ." (*Id.* at 160.)

(See also 63 Ops.Cal.Atty.Gen. 19 (1980), where county officials were prohibited from bidding on surplus county land because of participation in the land sale process in their official capacity.)

In I.L. 92-1212 the issue was whether a former planning commissioner could contract with the city to perform consulting services in connection with revisions of the general plan. The policy decisions, including budgetary considerations, were discussed by the commission prior to the former member's resignation. This office's informal opinion concluded:

> "In short, the former commissioner was an active participant in the overall city policy decision to 'contract-out' much of the general plan revision. Accordingly, he cannot now benefit from such participation. (*Cf.* 66 Ops.Cal.Atty.Gen. 156 (county employees could not propose agreement for consultant services, then resign, and provide such consulting services).)"

In *Santa Clara Valley Water Dist.* v. *Gross* (1988) 200 Cal.App.3d 1363, at 1369 and 1370, the court concluded that participation in a statutorily mandated process in connection with the sale of property through eminent domain did not constitute involvement in the making of a contract. In that case, a water district initiated eminent domain proceedings against a landowner who was a member of the water district's board of directors. In order to recover litigation expenses, Code of Civil Procedure section 1250.410 requires the parties to file a final demand and offer respectively. Believing they were barred from participating in the demand and offer process by section 1090, the parties failed to file the required documents.

The court concluded that participation in the demand and offer process was mandated by statute and did not violate section 1090 and therefore refused to allow litigation expenses. The court stated:

> ". . . Once a condemnation action has been filed, however, the property owner and his agency become adversaries, subject to the rules of court and civil procedure which govern the course of litigation. A settlement achieved pursuant to these rules can be supervised by the court and receive the imprimatur of court confirmation. Government Code section 1090 is directed at dishonest conduct and at '"'conduct that tempts dishonor"'' (*Thomson* v. *Call* (1985) 38 Cal.3d 633, 648 [214 Cal.Rptr. 139, 699 P.2d 316]); it has no force in the context of a condemnation action where the sale of property is accomplished by operation of law and each side is ordinarily represented by counsel.
>
> ". . . . . .
>
> "'The Legislature [in § 1250.410] did not direct the parties to "apprise" each other or "communicate" with each other about an offer or demand.' (*City of San Leandro* v. *Highsmith*, *supra*, 123 Cal.App.3d at p. 155.) Rather it directed that each file with the court, and serve upon the other, a formal offer and demand, as an absolute prerequisite to an award of attorney's fees. This procedure is not the equivalent of negotiations between the parties and consequently does not run afoul of section 1090."

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 official was involved in the contract-making process. So 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 has disqualified 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 official is interested.

In 80 Ops.Cal.Atty.Gen 41 (1997), firefighters were permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity. In 63 Ops.Cal.Atty.Gen. 868 (1980), a 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. (See I.L. 72-143 re disqualification of advisory board member.) (See I.L. 73-146, re state employee; but see Pub. Contract Code, § 10410, prohibiting contracts between state employees and state agencies; see also chapter VII of this pamphlet.)

E. 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 term "financial interest" is not specifically defined in the statute, an examination of case law and the statutory exceptions to the basic prohibition indicate that the term is to be liberally interpreted. In *Thomson* v. *Call*, *supra*, 38 Cal.3d at p. 645, the court stated that the term financial interest included both direct and indirect interests in a contract. As an example of an indirect interest, the court cited *Moody* v. *Shuffleton* (1928) 203 Cal. 100, in which a county supervisor sold his business to his son in return for a promissory note secured by the business. Because the business helped to secure the value of the official's mortgage, a conflict existed when county printing contracts were awarded to the son. The court also stated that an official who was a stockholder in a corporation had an indirect interest in the contracts of the corporation.

Although special statutory exemptions may negate the full effect of the section 1090 prohibition, the following economic relationships generally constitute a financial interest: employee of a contracting party; attorney, agent or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; officer or employee of a nonprofit corporation which is a contracting party.

Prior to 1963, section 1090 applied to all interests, not merely financial ones. 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 in order to bring the transaction under the coverage of the prohibition.

In *People* v. *Deysher* (1934) 2 Cal.2d 141, 146, the court stated that:

> "'However 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.'" (See also *People* v. *Honig* (1996) 48 Cal.App.4th 289, 315.)

The court went on to say that section 1090 attempted to prohibit any measure of duality in contractual situations because officials, as trustees of the public, may not exploit their public positions for private benefits. In *Stigall* v. *City of Taft*, *supra*, 58 Cal.2d at p. 571, the court stated:

> "The legislation with which we are here concerned seeks to prohibit a situation wherein a man purports to deal at arm's length with himself and any construction which condones such activity is to be avoided. . . ."

Below is a discussion of several decisions and opinions in which public officials in question have possessed the requisite financial interest.

(Complex multi-party transaction) -- In the 1985 California Supreme Court case of *Thomson* v. *Call*, *supra*, 38 Cal.3d 633, the court found that a complex multi-party transaction involving the sale of property from a city councilmember through an intermediary corporation to the city constituted a violation of section 1090. The corporate intermediary 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 councilmember'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 councilmember'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 councilmember's land was part of a pre-arranged agreement with the city. Under these circumstances, the court concluded that the city councilmember was financially interested in the contract that conveyed the land to the city.

(Shareholder insulated from contract payments) -- In *Fraser-Yamor Agency, Inc.* v. *County of Del Norte*, *supra*, 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 benefited by increased business, so did the official, despite the fact that the benefit was in some way indirect.[10]

(Contingent payment) -- In *People* v. *Vallerga*, *supra*, 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.

(Primary shareholder in contracting party) -- In *People* v. *Sobel*, *supra*, 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.

(Debtor-creditor relationship) -- In *People* v. *Watson* (1971) 15 Cal.App.3d 28, the court concluded that a debtor-creditor relationship constituted a financial interest within the meaning of section 1090. (See also *Moody* v. *Shuffleton*, *supra*, 203 Cal. 100.)

In *People* v. *Watson*, *supra*, 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) -- 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.) In 78 Ops.Cal.Atty.Gen. 230 (1995), this office concluded that an city councilmember had a financial interest in a contracting party by virtue of the fact that the councilmember's spouse was a partner in a law firm which represented the contracting party on matters unrelated to the contract. Since the spouse's property is attributed to the official, exemptions which

[10]The court indicated that it did not have enough evidence to determine whether or not the interest was remote.

would be applicable if the official possessed the interest directly are also attributed to the spouse's property. (See section I of this Chapter for a discussion of remote interests.) In 69 Ops.Cal.Atty.Gen. 255 (1986), this office discussed this interest and the application of the exemption in section 1091.5(a)(6) to a school board member and a teacher who were married. (See 65 Ops.Cal.Atty.Gen. 305 (1982), regarding an interested superintendent's participation in labor negotiations; see also section J, subsection (6) of this chapter for further discussion.)

In 69 Ops.Cal.Atty.Gen. 102 (1986), this office discussed participation of a school board member in a collective bargaining agreement with the union which represented the member's spouse who was a tenured teacher.

75 Ops.Cal.Atty.Gen. 20 (1992), was interpreted to prohibit a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. The opinion concluded that the board member had a financial interest in the payment of his or her spouse's expenses.

(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, *supra*, 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.

F. TEMPORAL RELATIONSHIP BETWEEN FINANCIAL INTERESTS AND THE CONTRACT

The essence of the 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.

Thus, an official who has contracted in his or her private capacity with the government before the official is elected or appointed does not violate the section, and the official may continue in his or her position as such 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.) When the time comes for the contract to be renegotiated, the official faces a new set of problems.

In the case of a board member, the official must resign from office or eliminate the private interest to avoid the proscription of section 1090. (*City of Imperial Beach* v. *Bailey*, *supra*, 103 Cal.App.3d 191; see also I.L. 92-407, I.L. 75-170.) A new contract between the board member and the city, county or district, which the board member represents, may not be executed. (But see Pub. Contract Code, §§ 10410, 10411 regarding state employees discussed in chapter VII of this pamphlet.)

However, simply resigning a public post may not cure a conflict in all situations. Timing is essential. In *Stigall* v. *City of Taft*, *supra*, 58 Cal.2d 565, the court ruled that a public official may not resign from office at the last minute in order to take private advantage of a contract in whose formation the official had participated in his or her public capacity. In that case, a city councilmember owned a plumbing business which was awarded a plumbing subcontract in connection with construction of a city civic center. The official had taken part in the planning, preliminary discussions, compromises, drawing of plans and specifications, and solicitation of bids for the civic center project. The court held that this councilmember had participated in the "making" of the contract within the meaning of section 1090, even though the official resigned from office before the contract was finally awarded. (See *City Council* v. *McKinley*, *supra*, 80 Cal.App.3d 204; 66 Cal.Ops.Atty.Gen. 156, *supra*; I.L. 92-1212, *supra*.)

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 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. In the past, this office has issued oral advice concerning the manner in which a contract consultant, e.g., a city attorney, may renegotiate a contract without violating section 1090. In general, this office advised that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility for a misunderstanding to arise concerning whether the contractor's statements were made in the performance of the contractor's public duties or in the course of the contractual negotiations. 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.

G. EFFECT OF SPECIAL STATUTES

Some statutes contain special provisions which alter or eliminate the general rule set forth in section 1090 in a specific situation. For example, in *Old Town Dev. Corp.* v. *Urban Renewal Agency* (1967) 249 Cal.App.2d 313, an individual was employed both as a consultant with the redevelopment corporation and as a member of an advisory panel reviewing redevelopment bids and making recommendations to the city regarding them. The court seemed to say that this duality of interests did not, in and of itself, create a conflict of interests vitiating the resulting contract for redevelopment which the city made with the individual's private employer. (*Id.*, at 328-329.)

However, the case involved a special conflict of interests code section (Health & Saf. Code, § 33130) which is directed to government officers and employees involved in redevelopment planning. That section directs such an individual with property or some other interest in an

area slated for redevelopment immediately to disclose such interests to his or her governmental agency. He or she may then participate in redevelopment planning regardless of his or her interest. Since the advisor in *Old Town* disclosed his interest in accordance with section 33130, it was assumed that the city took his advice with that relationship in mind. The special law took precedence over the more general law of section 1090.

Similarly, in 51 Ops.Cal.Atty.Gen. 30 (1968), this office advised that "when the organic act under which a particular commission has been formed contains a very specific conflict of interest rule, neither general statutes nor the common law need be consulted." (*Ibid.*)

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.

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

It should be noted that such special statutes may not take precedence over the PRA unless they are adopted in accordance with the procedures set forth in Government Code section 81013.

H. CONTRACT MADE IN VIOLATION OF SECTION 1090 IS VOID AND UNENFORCEABLE

In addition to the proscription against officials making contracts in which they have a financial interest, a contract made in violation of section 1090 is void. Any payments made to the contracting party, under a contract made in violation of section 1090 must be returned and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits which it receives under the contract. (*Thomson* v. *Call*, *supra*, 38 Cal.3d at p. 650.)

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 interests. (See § 1092.5 for exception concerning good faith parties involved in the lease, sale or encumbrance of real property.)

Despite the wording of the section "may be avoided," case law demonstrates that any contract made in violation of section 1090 is void, not merely voidable. (*Thomson* v. *Call*, *supra*, 38 Cal.3d 633; *People* ex rel. *State of Cal.* v. *Drinkhouse* (1970) 4 Cal.App.3d 931.)

Courts often give public policy reasons for this holding (see *City of Oakland* v. *California Const. Co.*, *supra*, 15 Cal.2d 573), and note the general rule that a contract made in violation of an express statutory provision is always void. (*Stockton P. & S. Co.* v. *Wheeler*, *supra*, 68 Cal.App. 592; *Smith* v. *Bach* (1920) 183 Cal. 259.) In *Stockton*, the court said, "`where a statute provides a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it.'" (*Id.*, at 601.)

A contract can be rendered 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; *Thomson* v. *Call*, *supra*, 38 Cal.3d 633.) Contracts made in violation of section 1090 are unenforceable, and no recovery will be afforded the contracting party for services rendered

under the contract. (*Thomson* v. *Call*, *supra*, 38 Cal.3d 633; *County of Shasta* v. *Moody* (1928) 90 Cal.App. 519, 523-524.) In *Shasta*, the court said, "The contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels." (*Id.*, at 523; see also *County of San Diego* v. *Cal. Water ETC. Co.* (1947) 30 Cal.2d 817, 830.)

In addition to the contract being void under section 1092, section 1095 provides that payment of any evidence of indebtedness against the state, city, or county which has been purchased, sold, received, or transferred contrary to section 1090 or section 1093 is specifically disallowed. Any entitlement to payment pursuant to a contract, made in violation of section 1090, is effectively rendered worthless by this section.

In *Thomson* v. *Call*, *supra*, 38 Cal.3d 633, the court stated:

> "Clearly, no recovery could be had for goods delivered or services rendered to the city or public agency pursuant to a contract violative of section 1090 or similar conflict-of-interest statutes. (*Moody* v. *Shuffleton*, *supra*, 203 Cal. 100; *Berka* v. *Woodward*, *supra*, 125 Cal. at pp. 121, 123-124; *Domingos* v. *Supervisors of Sacramento Co.* (1877) 51 Cal. 608; *Salada Beach ETC. Dist.* v. *Anderson* (1942) 50 Cal.App.2d 306, 310 [123 P.2d 86]; *Miller* v. *City of Martinez*, *supra*, 28 Cal.App.2d at pp. 370-371; *Hobbs, Wall & Co.* v. *Moran*, *supra*, 109 Cal.App. at p. 320; *County of Shasta* v. *Moody*, *supra*, 90 Cal.App. at pp. 523-525.) Moreover, the city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract. (*Berka*, *supra*, at pp. 123-124; *Miller*, *supra*, at p. 370; *County of Shasta*, *supra*, at pp. 523-524.) . . .
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> ". . . . . .
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> "Mitigating factors--such as Call's disclosure of his interest in the transaction, and the absence of fraud--cannot shield Call from liability. Moreover, the trial court's remedy--allowing the city to keep the land and imposing a money judgment against the Calls--is consistent with California law and with the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." (*Id.* at 646-647, 650.)

In *Campagna* v. *City of Sanger*, *supra*, 42 Cal.App.4th 533, a city attorney was required to forfeit a finder's fee which he received in connection with a contract between the city and a private law firm.

I. REMOTE INTERESTS OF MEMBERS OF BOARDS AND COMMISSIONS

1. The Exception And Its Operation

A public official who is a member of a public board or commission with only a "remote interest" in a contract will not be deemed to have an "interest" within the meaning of section 1090. It is to be noted that "remote" always refers to the private

interest an official has in the contract. The official's public interest either exists or it does not. An official whose interest falls into one of the "remote interest" categories (see discussion below) must, however, (1) disclose the official's interest to his or her agency, board, or body and (2) have it noted in the official records of that body. 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. (See discussion of sanctions, below.) 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(d).)

When an official claims a remote interest, the board or agency may take action on the sale, purchase, or other contract involved if it acts in good faith and if the vote to authorize, approve, or ratify is sufficient without counting the vote or votes of those with remote interests. The provision which requires the action to be taken, without counting the interested official's vote, has been interpreted by this office to require complete disqualification of the interested officials. (78 Ops.Cal.Atty.Gen. 230, 237 (1995); 67 Ops.Cal.Atty.Gen. 369, 377, fn. 8 (1984); 65 Ops.Cal.Atty.Gen. 305, *supra*.) 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 utilize the remote interest exception. (§ 1091(c).)

The term "remote" has a special statutory meaning in the context of section 1090 et seq. When the terms "remote" or "speculative" are used in other contexts, they are general terms concerning the potentiality of whether certain effects will occur. Use of these terms in the general context should not be confused with the term "remote" in the specific context of section 1090.

2. Definition Of Remote Interests

As used in this section, the concept of "remote interests" is not vague or general; rather "remote interests" are carefully defined in the statutes. Set forth below is a brief description of the remote interest exceptions.

a. Officer or Employee of a Nonprofit Corporation

An officer or employee of a nonprofit corporation has only a remote interest in the contracts, purchases, and sales of that corporation. (§ 1091(b)(1).) By adopting this exception, the Legislature made it clear that corporate officers had a financial interest in their corporations even if the corporations were nonprofit. This exception indicates that an official can legally, under section 1090, have a financial interest even though the official does not have a personal interest in the contract.

See also § 1091.5(a)(8) concerning "noncompensated officers" of specified tax exempt corporations.)

b. Employee or Agent of a Private Contracting Party

An employee or agent of a private contracting party may have only a remote interest in its contracts when (1) the private party has 10 or more other employees and (2) the official/employee has been an employee or agent of that party for at least three years. Some latitude is allowed in computing the three-year period, to permit an employee of a business, which has gone through a reorganization or some other metamorphosis, 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 further defined to include "stockholders, bondholders, partners, or other persons holding an interest. . . . " (§ 1091(b)(2).) (See *Fraser-Yamor Agency, Inc.* v. *County of Del Norte, supra*, 68 Cal.App.3d 201, for a discussion of agent relationship.)

c. Employees Are Agents; Special Contracts

Section 1091(b)(3) provides that an official who is an employee or agent of a contracting party has a remote interest in the contract if all of the enumerated factors set forth in the subsection are present. First, the official must be an officer in the local agency located in a county with a population of 400,000 or less. Second, the contract must be competitively bid, and the contracting party must be the lowest bidder. Third, the official must not hold a primary management position with the contracting party, the official must not be an officer or director of the contracting party, and the official must not hold any ownership interest in the contracting party. In addition, the official may not have directly participated in formulating the bid of the contracting party. Fourth, the contracting party must have at least 10 other employees.

d. Parent

A parent has only a remote interest in the earnings of his or her minor child for personal services. (§ 1091(b)(4).)

e. Landlord or Tenant

A landlord or tenant of a contracting party has a remote interest in the contracts of that party. (§ 1091(b)(5).) Formerly the landlord/tenant relationship had been held to create an interest within the meaning of section 1090. (*People* v. *Darby* (1952) 114 Cal.App.2d 412.)

f. Attorney, Stockbroker, Insurance or Real Estate Broker/Agent

Under specified conditions set forth in § 1091(b)(6), the remote interest exception may apply to:

- the attorney of a contracting party

- an owner, officer, employee, or agent of a firm which renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker.

For the remote 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 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

Thus, if both of these conditions are present, a member of a board who is an attorney of a contracting party, or an agent/broker of a contracting party may disqualify himself or herself from participating in the making of the contract, and the remaining members of the board would be free to enter into the contract. (For attorneys and agent/brokers who have less than a 10 per cent ownership interest in their firm, see 1091.5(a)(10).)

In 78 Ops.Cal.Atty.Gen. 230 (1995), a city councilmember was found to have an interest in the client of a law firm in which his spouse was a partner. However, since the representation was on matters unrelated to the contract, the remote interest exception applied to the spouse's interest as attributed to the official. This opinion was issued prior to the addition of the 10 per cent ownership provision in § 1091(b)(6).

g. Member of a Nonprofit Corporation Formed Under the Agricultural Code or Corporation Code

A special designation of remote interest is given to any member of a nonprofit corporation formed under either the Agricultural Code or Corporations Code for the sole purpose of selling agricultural products or supplying water. (§ 1091(b)(7).)

h. 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(b)(8).)

i. Party to a Land Conservation Contract

An official who enters into a contract or agreement under the California Land Conservation Act of 1965 (The Williamson Act) is deemed to have only a remote interest in that contract for the purposes of section 1090. (§ 1091(b)(9).) This allows land-owning supervisors to enter into such contracts with their own counties in accordance with the purpose of the Land Conservation Act. But note I.L. 73-197 in which this office advised that county supervisors who had previously made land conservation contracts were ineligible to vote on a motion to abolish future use of the Land Conservation Act in their county because of the common law prohibition against conflicts of interests.

j. Director or 10 percent Owner of Bank or Savings and Loan

An official who is a director, or holds a 10 percent 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(b)(10).) (For officers, employees and persons holding less than a 10 per cent interest, see 1091.5(a)(11); for competitively bid banking contracts, see 1091.5(b).)

It should be noted here that a private loan can, however, create an interest which is not remote. In *People* v. *Watson, supra,* 15 Cal.App.3d 28, the court determined that a loan by a corporation, controlled by a public official, to another corporation created a financial interest for the official in the contract activities of the second corporation.

k. Employee of a Consulting, Engineering, or Architectural Firm

An engineer, geologist, or architect has a remote interest in a consulting, engineering, or architectural firm if he or she does not serve as an officer, director, or in a primary management capacity. (§ 1091(b)(11).)

l. Housing Assistance Contracts

Subsection (b)(12) provides a limited exception from the 1090 prohibition in connection with housing assistance contracts. This exception provides that an elected officer has a remote interest in a housing assistance contract, which is entered into pursuant to section 8 of the United States Housing Act of 1937, provided that the officer was elected after November 1, 1986, and the contract was in existence prior to the officer's assumption of office. The exemption for housing assistance contracts extends only to the renewal or extension of an existing tenant's contract or to new tenants, where the unit was previously under a housing assistance contract and the rental vacancy rate for the jurisdiction is less than five percent.

J. NONINTERESTS

Section 1091.5 delineates situations which might technically create conflicts of interests under section 1090, but which the Legislature has decided as a matter of policy are exempt from its operation. Unlike the "remote interest" exception, the interest which falls into one of these categories is treated as no interest at all, and holding such an interest does not require abstention and generally does not require disclosure.

It must be remembered that an interest which is a noninterest under section 1091.5 might still create an interest for an official under the terms of the PRA. That act's provisions must be consulted before proceeding with any transaction in which an official may have a conflict of interests since, by its own terms, it supersedes other conflict of interests legislation where inconsistencies exist. (§ 81013.)

The interests which fall into the section 1091.5 exception are as follows:

1. Corporate Ownership And Income

An official has a noninterest in a business corporation, in which he or she owns less than three 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 five percent of his or her income and any other income he or she receives from the corporation also amounts to less than five percent. In other words, it is a three-part test, and the official who fails any of the three parts cannot qualify for the noninterest exemption with regard to that corporation. (§ 1091.5(a)(1).)

2. Reimbursement Of Expenses

An official has a noninterest in reimbursement for his or her actual and necessary expenses incurred in the performance of his or her official duties. (§ 1091.5(a)(2).)

3. Public Services

An official has a noninterest 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(a)(3).)

4. Landlords And Tenants Of Governments

Public officials who are landlords or tenants of the local, state, or federal government or any arm thereof, have a noninterest in the government entities contracts unless the subject matter of the contract is the very land regarding which he or she is either the landlord or tenant. In the latter case, he or she has a remote interest rather than a noninterest, and is subject to the provisions of section 1091. (§ 1091.5(a)(4).)

5. Public Housing Tenants

A tenant in public housing, created pursuant to the provisions of the Health and Safety Code, has a noninterest in agreements regarding that housing if he or she is serving as a member of the board of commissioners overseeing it. This provision was passed in response to the situation illustrated in I.L. 70-64, in which a public housing tenant who was also a member of the Housing Authority Commission was advised he or she would have a remote interest in most of the regulatory activities of the commission and would have to abstain from participating in many decisions pursuant to section 1091, thus making his or her appointment almost a nullity. The subsequent passage of this subsection shows clear legislative intent that public housing tenants are to be allowed to serve as housing authority commissioners. The exemption was extended further in 1975 to a tenant serving on a community development commission. (§ 1091.5(a)(5).)

6. Spouses

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

Pursuant to section 1091.5(a)(6), this office concluded in 69 Ops.Cal.Atty.Gen. 255, *supra*, 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.

In 69 Ops.Cal.Atty.Gen. 102, *supra*, this office concluded that the "rule of necessity" permitted a school district to contract on an annual basis with a tenured teacher who was the spouse of a member of the school district board, until the board member could qualify for an exemption under section 1091.5(a)(6). Pending qualification, this office concluded that the board member was prohibited from participating in the collective bargaining agreement. The "rule of necessity" might not have been applicable had the spouse not been a tenured teacher who, barring special circumstances, was required to be offered a new contract annually.

In 65 Ops.Cal.Atty.Gen. 305, *supra*, this office reached a similar conclusion with respect to a superintendent who was interested in his or her spouse's school employment. However, because the superintendent is an individual officer rather

than a member of a board, the rule of necessity permits both the contract to be made and the superintendent's participation in its making.

7. Unsalaried Members Of Nonprofit Corporations

A noninterest exists when a public official is a nonsalaried member of a nonprofit corporation provided the official's interest is disclosed to the body or board at the time the contract is first considered and is noted in its official records. (§ 1091.5(a)(7).)

Although there are no cases or opinions concerning application of this section, this office believes that the reference to "members" refers to persons who constitute the membership of an organization rather than to persons who serve as members of the board of directors of 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.

(See §§ 1091(b)(1) and 1091.5(a)(8) concerning "officers" as opposed to "unsalaried members" of nonprofit corporations.)

8. Noncompensated Officers Of Tax Exempt Corporations

A noninterest exists when a public official is a noncompensated 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. Such interest, if any, must be noted in the official records of the public body. An officer is noncompensated 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(a)(8).) For example, a nonprofit symphony association may be organized to support the publicly operated symphony hall and symphony orchestra.

(Compare with § 1091(b)(1) concerning "officers of nonprofit corporations" and § 1091.5(a)(7) concerning "unsalaried members of nonprofit corporations.")

9. Contracts Between Government Agencies

Subdivision (a)(9) of section 1091.5 deals expressly with contracts between two public agencies. It provides that an officer or employee is not interested in a contract if his or her interest is:

> "That of compensation for employment with a governmental agency, other than the governmental agency that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record."

The scope of subdivision (a)(9) is not readily apparent. Here the legislative history of the 1991 amendment of section 1091.5 (Stats. 1991, ch. 382, § 1), which added subdivision (a)(9), is helpful in construing the amendment's language. In the report

of the Assembly Committee on Elections, Reapportionment and Constitutional Amendments dated May 9, 1991, the background information supplied for the proposed legislation was as follows:

> "According to the author, government employees who also serve as local elected officials are often prohibited from voting on a broad range of issues, rather than just those bills that affect their employers. For example, a peace officer who is also an elected official may be prohibited from voting on contracts dealing with any city agency, rather than only those contracts affecting the police department."

This background information was also contained in the report of the Senate Committee on Governmental Organization for its hearing on June 25, 1991, and in the report of the Senate Rules Committee dated July 17, 1991.

Consequently, subdivision (a)(9) of section 1091.5 may be construed as allowing a government employee who serves on the board of another public agency to vote on a contract between the agency and his government employer except when the contract involves his particular employing unit. (78 Ops.Cal.Atty.Gen. 362 (1995).)

If the contract does involve the employee's particular unit, see 78 Ops.Cal.Atty.Gen. 362, *supra*, for a discussion of whether the contract may be made without the participation of the interested individual.

10. Attorney, Stockbroker, Insurance or Real Estate Broker/Agent

Under specified conditions set forth in § 1091.5(a)(10), the noninterest exception may apply to:

- the attorney of a contracting party
- an owner, officer, employee, or agent of a firm which renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker.

For the noninterest 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.

Thus, if both of these conditions are present, a member of a board who is an attorney of a contracting party, or an agent/broker of a contracting party may participate in the making of the contract. (For attorneys and agent/brokers who have more than a 10 per cent ownership interest in their firm, see 1091(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 noninterest in the contracts of parties

who are depositors or borrowers at the official's institution. (§ 1091.5(a)(11).) A narrower exemption relating only to competitively bid contracts is set forth in 1091.5(b), and appears to be subsumed within the exemption added to 1091.5 in subdivision (a)(11). (For directors or persons holding more than a 10 per cent interest, see 1091(b)(10).)

K. SPECIAL EXEMPTION FOR SUBDIVISION OF LAND AND INDUSTRY COUNCILS

1. Subdivision Of Land Permitted

Section 1091.1 provides a special exemption from the prohibition of section 1090 for public officials who must deal with state and local government entities regarding subdivision of land which they own. This section provides that such an official may subdivide lands which 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 which has jurisdiction over his or her subdivision (§ 1091.1(a)) and abstain from voting on any matter concerning it. (§ 1091.1(b).)

2. Industry Councils

Section 1091.2 provides that section 1090 does not apply to any contract or grant made by private industry councils established pursuant to the Unemployment Insurance Code, unless both of the following conditions are met:

a. The contract or grant directly bears on services to be provided by any member of a private industry council or any business or organization which the member directly represents, or the contract or grant would financially benefit the member or business or organization which the member represents.
b. The affected private industry councilmember fails to comply with section 87100.

Prior to the enactment of section 1091.2, this office had opined in 65 Ops.Cal.Atty.Gen. 41 (1982), that the existence of a financial interest by a member of a private industry council barred the making of the contract under section 1090.

L. LIMITED RULE OF NECESSITY

This office and the courts have applied a limited rule of necessity to the application of section 1090. In 69 Ops.Cal.Atty.Gen. 102, 109, *supra*, this office described the rule of necessity as follows:

> "'With respect to contractual conflicts of interest the "rule of necessity" may be said to have two facets. The first, . . . to permit a governmental agency to acquire an essential supply or service despite a conflict of interest. The contracting officer, or a public board upon which he serves, would be the sole source of supply of such essential supply or service, and also would be the only official or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest. [Citation.] The second facet of the doctrine, . . . [citation] arises in nonprocurement situations and permits a public officer to carry out the essential duties of his office despite a conflict of interest where he is the only one who may legally act. It ensures that essential governmental functions are performed even where a conflict of interest exists." (Fn. omitted.)

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. In 4 Ops.Cal.Atty.Gen. 264 (1944), a city was advised that it could 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. This office cautioned that "An event that can be reasonably anticipated, such as the repeated failure of a battery or the necessity for periodic service, would not be considered an emergency" so as to give rise to the rule of necessity. Other arrangements would be required in such cases. (But see Gov. Code, § 29708, which flatly prohibits a county officer or employee from presenting a claim to the county for other than his or her official salary.)

The second facet of the rule of necessity focuses on the performance of official duties rather than upon the procurement of goods and services. In 69 Ops.Cal.Atty.Gen. 102, *supra*, this office applied the rule of necessity to permit a school board to enter into a memorandum of understanding with a teachers' association despite the fact that a member of the school district board was married to a tenured teacher. A similar conclusion was reached in 65 Ops.Cal.Atty.Gen. 305, *supra*, where this office concluded that the Superintendent of Education could enter into a memorandum of understanding with school employees, despite the fact that he was married to a permanent civil service school employee. Both opinions concluded that the labor agreements with the teachers' association were necessary and that there was nothing in the history of section 1090 that suggested a person should be required to resign his or her employment because of marital status. Accordingly, to the extent that the noninterest exception for public official spouses set forth in section 1091.5(a)(6) was not applicable, this office advised that the rule of necessity would permit issuance of a memorandum of understanding.

When the rule of necessity is applied to a member of a multimember board, as opposed to a single official or employee, this office has concluded that the 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 a substantially interested member to nevertheless make a contract, but the board member is still prohibited 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. (69 Ops.Cal.Atty.Gen. 102, *supra*, at p. 112, school board trustee abstention; 67 Ops.Cal.Atty.Gen. 369, *supra*, at p. 378, board member abstention; 65 Ops.Cal.Atty.Gen. 305, *supra*, at p. 310, superintendent of schools permitted to participate.)

M. PENALTIES FOR VIOLATION BY OFFICIALS

Any officer or person, who is found guilty of willfully violating any of the provisions of section 1090 et seq., is punishable by a fine of not more than $1,000 or imprisonment in 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*, *supra*, 48 Cal.App.4th 289, 334-339.) The statute of limitations for 1090 prosecutions is three years after discovery of the violation. (*Id.*, at p. 304, fn. 1; Penal Code, §§ 801 and 803.) 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.)

One example of a conviction under section 1097 is *People* v. *Sobel*, *supra*, 40 Cal.App.3d 1046. In that case, a deputy purchasing agent for a county had a financial interest in a book seller which sold books to the county pursuant to contracts made by that agent. His conviction was based on the prosecution having established that he had the opportunity to and did influence execution of purchase contracts, directly or indirectly, to promote his personal interests.

For a discussion of other consequences which may result from a violation of section 1090, see section H (contract made in violation of § 1090 is void and unenforceable) of this chapter.

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VII.

CONFLICT OF INTERESTS LIMITATIONS ON STATE CONTRACTS

California Public Contract Code Sections 10410-10430*

A. OVERVIEW

Sections 10410[11] and 10411 of the California Public Contract Code provide a two-level approach to potential conflicts of interests in connection with the making of state contracts. Section 10410 concerns potential conflicts of interests by persons currently holding office and section 10411 concerns potential conflicts of interests by those who have left state service. The prohibitions do not apply to unsalaried members of part-time boards and commissions who only receive payments in connection with preparing for meetings and per diem for travel and accommodations. (§ 10430(e).) The code also expressly exempts the Board of Regents for the University of California from its coverage and provides a limited exception for the trustees of the California State University. (§ 10430(a), 10430(c).)

Other specific exemptions are contained in section 10430(b)-(g). They include contracts for computer and telecommunication systems, architectural land engineering services, specified contracts exempt by section 10295, and contracts by spouses of state officers or employees and their employers for the provision of services to regional centers for persons with developmental disabilities pursuant to section 4648 of the Welfare and Institutions Code. With these exceptions, sections 10410 and 10411 generally cover all appointed officials, officers and civil service employees of state government.

B. THE BASIC PROHIBITION REGARDING CURRENT STATE OFFICERS AND EMPLOYEES

Reduced to its essentials, section 10410 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. An exception is provided if the employment or enterprise is required as a condition of the individual's regular state employment. In addition to the general prohibition, section 10410 specifically prohibits any covered official from contracting on his or her own behalf with a state agency as an independent contractor to provide goods or services.

*Selected statutory materials appear in appendix H (at 117).

[11]All section references in this chapter hereafter refer to the California Public Contract Code unless otherwise specified.

The prohibition contained in section 10410 does not appear to be a transactional disqualification provision such as that contained in the Political Reform Act. Rather, it is similar to the prohibition in Government Code section 1090 which forbids an individual from making a contract in which he or she has a financial interest. In the case of section 10410, the statute prohibits an individual from engaging in certain activities which 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. However, the provisions of section 10410 apply only to state contracts and are different than the restrictions contained in Government Code section 1090 in certain respects.

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 REGARDING FORMER STATE OFFICERS AND EMPLOYEES

Section 10411 regarding former state officials is divided into two parts. Subsection (a) involves a two-year prohibition against participating in a contract with which the official was involved during his or her state service. Subsection (b) involves a one-year prohibition of any contract by former policy making officials with their prior agencies.

Section 10411(a) 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. The statute does, however, place 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*, *supra*, 58 Cal.2d 565 and 66 Ops.Cal.Atty.Gen. 156 (1983).

Section 10411(b) establishes a 12-month moratorium on any former state officer or employee, entering into a contract with his or her former agency, if the covered official held a policy making 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. 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.

D. PENALTIES AND ENFORCEMENT

Section 10420 provides that any contract made in violation of these prohibitions is void unless the violation is technical and non-substantive. Section 10421 provides the state or any person acting on behalf of the state, the right to bring a civil suit in superior court to have the performance of a contract temporarily restrained and ultimately declared void. Successful plaintiffs may be awarded costs and attorney's fees but the statute specifically provides that defendants may not receive either. Section 10425 provides that willful violation of the

prohibitions is a misdemeanor and sections 10422 and 10423 provide felony penalties for persons involved in the corrupt performance of contracts.

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VIII.

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

Cal. Const., Art. XII, § 7

A. OVERVIEW

The prohibition on the acceptance of passes or discounts from transportation companies by public officers was originally contained in article XII, section 19, of the California Constitution. In 1970, the Constitutional Revision Commission proposed that the provision be repealed. However, the proposal to eliminate this provision was defeated by the electorate. In 1974, the prohibition was moved from section 19 to section 7 of article XII. The genesis of the prohibition is in the historical relationship between the railroads and the state government in California.

In 67 Ops.Cal.Atty.Gen. 81 (1984), this office indicated that the origins of the prohibition were in the corruptive influences which might be brought about by gifts of free transportation to public officials. The opinion provided:

> "Article XII, section 7 (formerly 19), was adopted to control the perceived corruptive influences of the railroads on the legislative process. (See Debates and Proceedings of the Constitutional Convention, p. 379; John K. McNulty, `Background Study -- California Constitution Article XII, Corporations and Public Utilities' (1966) p. 100.) . . . It is apparent that the perceived corruptive influence consisted of the granting of special benefits in exchange for legislative favor. Thus, explicitly or implicitly, legislation favorable to the railroads was the *quid pro quo*. . . ."

The 1982 quo warranto authorization letter, regarding Santa Monica, stated:

> "It appears that the intention of the framers of what is now article XII, section 7 was to inhibit and if possible preclude the undue influence of railroads and other transportation companies over legislators and public officials." (*In re Knickerbocker*, Feb. 1982.)

B. THE BASIC PROHIBITION

The constitutional prohibition on the acceptance of passes or discounts from transportation companies by public officials currently is contained in article XII, section 7 of the California Constitution. It 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."

Reduced to its component parts, this office has interpreted the prohibition to apply 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 provides that it applies to "public officers." In 3 Ops.Cal.Atty.Gen. 318 (1944), this office reiterated its interpretation that the prohibition applied only to officers and not employees. "As to the question of passes, it has always been the opinion of this office that the constitutional prohibition does not operate to include `employees'. . . ." Accordingly, the prohibition did not bar a state employee from receiving gifts of free transportation from a transportation company in connection with part-time private employment.

It is generally said that an "office" requires the vesting in an individual of a portion of the sovereign powers of the state. (See *Parker* v. *Riley* (1941) 18 Cal.2d 83, 87.) This office has provided informal advice as to the distinction between an officer and an employee. (I.L. 75-294 (1975).) There, we stated 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.

I.L. 75-294, *supra*, addressed the issue of whether officers and employees of the Division of Tourism could accept free airline transportation in the course of their duties. In that letter, this office concluded that the constitutional prohibition applied only to the officers but not the employees. The letter stated:

> "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. See *Parker* v. *Riley*, 18 Cal.2d 83, 87 (1941); 42 Ops.Cal.Atty.Gen. 91, 95 (1963); 56 Ops.Cal.Atty.Gen. 556 (1973).
>
> "In *Parker* v. *Riley*, *supra*, the court said:
>
> "`Thus, it is generally said that an office or trust requires the vesting in an individual of a portion of the sovereign powers of the state. (*Patton* v. *Board of Health*, *supra*, pp. 394, 398; *Curtin* v. *State*, *supra*, p. 390; *Leymel* v. *Johnson*, 105 Cal.App. 694, 699 [288 Pac. 858]; *Couts* v. *County of San Diego*, 139 Cal.App. 706, 712 [34 Pac. (2d) 812]; *State ex rel. Barney* v. *Hawkins*, *supra*, p. 520; *State ex rel Kendall* v. *Colt*, *supra*; 53 A.L.R. 595, 602.) The positions here created do not measure up to so high a standard.

> They involve merely the interchange of information, the assembling of data, and the formulation of proposals to be placed before the legislature. Such tasks do not require the exercise of a part of the sovereign power of the state.'
>
> "Government Code section 1001 includes in the definition of civil executive officers '. . . the head of each department and all chiefs of divisions, deputies and secretaries of a department. . . .'"

In I.L. 70-155 (1970), this office concluded that the executive director of a redevelopment agency was a public officer within the meaning of the constitutional prohibition. This office specifically concluded that the prohibition applied to any officer, not just those who succeeded to office through the electoral process. The letter also reiterated that the constitutional prohibition did not apply to employees as contrasted with officers. (I.L. 71-159 provides additional discussion of these principles and is based on the same factual situation.)

I.L. 64-111 (1964) concluded that the prohibition, at least in some circumstances, did not apply to the families of public officers. 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 would not be attributed to the officer. However, this conclusion might be different if the circumstances surrounding the pass or discount suggested that it was provided in order to curry favor or extend a benefit to the officer.

In 67 Ops.Cal.Atty.Gen. 81, *supra*, this office analyzed a situation involving application of the prohibition to a state legislator. Under the unique facts of that case, the opinion concluded that the legislator was not covered by the prohibition. There, the member of the Legislature was the spouse of a flight attendant. As a part of the flight attendant's employment package all spouses were offered specified free airline trips. The opinion concluded that a state legislator was a public officer for the purposes of the section and that the airline company in question was a transportation company within the meaning of the prohibition. However, the free transportation was offered to the legislator as a member of a larger group under a generally authorized or approved plan.

> "If, as we assume in the absence of contrary advisement or indication, the <u>sole</u> condition of 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.
>
> "Accordingly, it is concluded that the acceptance by a member of the California Legislature who is the spouse of a flight attendant of a free or discounted air travel pass is not prohibited by article XII, section 7, of the California Constitution when such passes are offered on the same conditions to spouses of all flight attendants." (67 Ops.Cal.Atty.Gen. 81, *supra*, at p. 84.)

In 74 Ops.Cal.Atty.Gen. 26 (1991), this office indicated that a free upgrade from coach class to first class constituted a "discount" within the meaning of the constitutional prohibition. However, under those facts the receipt of the discount did not violate the prohibition because the officer received the tickets in his capacity as a member of a group unrelated to his official

status. The official, who was on his honeymoon, received the free upgrade pursuant to the airline's policy of providing free first class upgrades to all honeymooning couples.

These situations are distinguishable from the circumstances described in 76 Ops.Cal.Atty.Gen. 1 (1993) in which 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. The opinion concluded that the mayor received the free first class upgrade as a result of his status as mayor and not as a result of his participation in some larger group unrelated to his official status. (*Id.* at p. 4.) The opinion also concluded that the official need not be aware of the prohibition against the receipt of free transportation in order to violate it. (*Id.* at p. 2-3.)

Thus, if the pass or discount is provided to the official because of his or her position as a government official, the prohibition applies. If, on the other hand, the pass or discount is provided to the official as a member of a larger group, that is not related to the function of his or her office, the prohibition may not be applicable.

D. INTERSTATE AND INTRASTATE TRAVEL COVERED

Over the years, this office has interpreted the constitutional prohibition against the acceptance of passes or discounts from transportation companies to apply to interstate as well as intrastate carriers and transportation. This interpretation applies irrespective of whether the interstate carrier in question does business in California and therefore applies to airline carriers over which the official had no jurisdiction. (See, 76 Ops.Cal.Atty.Gen. 1, *supra*.)

In I.L. 75-294, *supra*, this office concluded that the prohibition applied to members of the Division of Tourism who wished to attend informational seminars at various locations to which the airlines would provide free transportation. In order to avoid any conflict with federal regulatory powers over the issuance of free passes, the letter indicated that the prohibition with respect to interstate transportation prohibited the officer from accepting the pass or discount and not on the transportation company for offering it. The prohibition applied to interstate as well as intrastate travel in I.L. 64-111, *supra*. That letter concluded that the prohibition applied to Los Angeles City Airport Commissioners who wished to take a free airline trip to Tahiti.

In 1982, this office authorized the filing of a quo warranto lawsuit to remove two officers from the Santa Monica City government for violating the prohibition against the acceptance of free travel. The allegations were that the two officers had accepted free round trip transportation from Los Angeles to London provided by Laker Airline.

In I.L. 71-159, *supra*, this office authorized another quo warranto lawsuit against the executive director and treasurer of the Redevelopment Agency of the City and County of San Francisco. There the officeholder accepted free round trip passage from San Francisco to

Taipai on China Airlines. In 1985, this office advised the Mayor of Burbank that acceptance of free transportation from Burbank, California to Durango, Colorado and free transportation on a railroad in Durango could violate the constitutional prohibition.

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.

In I.L. 75-294, *supra*, members of the Division of Tourism wished to attend informational seminars to which they would receive free airline transportation. The attendance at such seminars clearly was within the scope of the member's official public duties. Without discussing the distinction between public and private use of transportation, this office concluded that the constitutional prohibition acted to bar the members from accepting the free airline transportation. Similarly, in I.L. 70-155, *supra*, this office concluded that the executive director of a redevelopment agency was barred from accepting free transportation to assist him in the performance of his official duties. Again, the matter of the public versus the private use of the transportation was not discussed as a relevant factor in determining whether the prohibition applied.

In several other instances the issue of public versus private business was not viewed as relevant to the application of the prohibition. (E.g., I.L. 64-111, *supra*, in which the City of Los Angeles Airport Commissioners accepted free trips to Tahiti; 1982 quo warranto authorization regarding officers of Santa Monica accepting a free round trip from Los Angeles to London; 1985 letter to Burbank mayor regarding transportation from Burbank to Colorado and rail transportation in Colorado.)

F. PENALTIES AND ENFORCEMENT

Article XII, section 7, specifically provides that the acceptance of a pass or discount by a public officer other than a Public Utilities Commissioner, shall work 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 pursuant to Code of Civil Procedure section 803 is a civil action by which title to any public office may be determined. (*Barendt* v. *McCarthy* (1911) 160 Cal. 680, 686-687; 53 Cal.Jur.3d, 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 the proceeding

is brought in the name of the People on the relation of a private individual (relator), the relator is not a party and the entire control remains in 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.)

In practice, the Attorney General requires submission of an application for leave to sue on behalf of the People. (C.C.R., tit. 11, §§ 1-10.)

In deciding whether to issue leave to sue to 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 for that is the role of the court. (35 Ops.Cal.Atty.Gen. 123 (1960).)

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IX.

INCOMPATIBLE ACTIVITIES OF LOCAL OFFICERS AND EMPLOYEES

Government Code Section 1125 Et Seq.*

A. OVERVIEW

These sections, which were originally enacted in 1971, provide a statutory prohibition against any officer or employee of a local agency from engaging in any employment or other activity which is in conflict with his or her public duties. Government Code section 1125[12] defines local agency to mean a "county, city, city and county, political subdivision, and municipal corporation." Section 1126 contains the basic prohibition, and focuses on the remunerative activities of agency officials. See section 1098 concerning prohibition against disclosure of confidential information, which is punishable as a misdemeanor.

B. THE BASIC PROHIBITION

Section 1126 provides that a local officer or employee shall not engage in any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her official duties or the duties, functions or responsibilities of his or her appointing authority or employing agency. This general prohibition usually is not self-executing and, in order to give notice of what activities are incompatible, must be accomplished through promulgation of a statement of incompatible activities by the agency. The incompatible activities statement may address a broad range of conflict of interests issues. But an officer or an employee may not have sanctions imposed on him or her unless the officer or employee has violated a duly noticed statement. If a statement is adopted, the local agency shall enact rules providing notice to employees regarding prohibited activities, disciplinary action and appeal procedures.

C. PROHIBITION GENERALLY NOT SELF-EXECUTING

In 1980, the court in *Mazzola* v. *City and County of San Francisco* (1980) 112 Cal.App.3d 141 (hereinafter "*Mazzola*"), ruled that section 1126 provided only authorization to implement a statutory prohibition by adoption of an incompatible activities statement as set forth in section 1126(b). The court reasoned that without notice, an employee could be subject to charges under section 1126 at any time. Therefore, before the prohibition can be applied to an employee based on his or her outside activities, the employee must be informed that those activities constitute a conflict of interests. (See also 70 Ops.Cal.Atty.Gen. 271, *supra*.) In addition, the court indicated that the employee was entitled to receive notice of the agency's intended disciplinary action and the procedures for appealing that action. Thus, aside from a narrow exception applicable only to school board members, discussed below, the prohibition is not self-executing.

*Selected statutory materials appear in appendix I (at 118).

[12]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

D. PERSONS COVERED

Section 1126 applies to officers and employees of local agencies. This office has opined that employees include 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).)

In 64 Ops.Cal.Atty.Gen. 795 (1981), this office concluded that, in light of the *Mazzola* case, section 1126 did not apply to a member of the board of supervisors or any other elected official. This conclusion was based on an interpretation of the language of section 1126(b). By its terms, subdivision (b) provides that the guidelines, which the *Mazzola* court stated were a prerequisite to activating the prohibition, are to be adopted by the "appointing power." Since elected officials have no appointing authority, the opinion concluded that section 1126 was applicable only to local employees and not to elected officials.

In 1986, Education Code section 35233 was amended to make school boards subject to the requirements of section 1126. Since school boards have no appointing authority, this office concluded in 70 Ops.Cal.Atty.Gen. 157 (1987), that the provisions of section 1126(a) must be self-executing with respect to school boards if the amendment to Education Code section 35233 was to have any effect. Thus, section 1126 remains inapplicable to elected officials except for school board members where it is both applicable and self-executing.

E. PROHIBITED ACTIVITIES

In *Long Beach Police Officers Assn.* v. *City of Long Beach* (1988) 46 Cal.3d 736, the California Supreme Court ruled that local governments have broad discretion to limit incompatible activities of their employees. (*Id.* at p. 748.) After an involved analysis of legislative history, the court concluded that the enumerated activities set forth in subdivision (b) did not constitute the exclusive list of prohibited activities. Rather, the court concluded that the list of enumerated activities was exemplary and did not represent either a floor or a ceiling on the activities which local governments could restrict as incompatible with public employment.

The court cited with favor the opinions of this office and stated that an examination of these opinions revealed a consistent interpretation applying the statute to any factual situation involving a potential conflict of loyalties, whether or not specifically enumerated in subdivision (b). (*Id.* at 747-48, citing, 58 Ops.Cal.Atty.Gen. 109 (1975) (section 1126, subd. (b) doctrine of incompatibility applies to a member of a school board concurrently serving as a member of a city personnel board); 63 Ops.Cal.Atty.Gen. 868 (1980) (county assessor may determine, pursuant to § 1126(b), that employee's purchase of land at tax-deeded land sale within the county is incompatible with his duties as an appraiser in the assessor's office); 68 Ops.Cal.Atty.Gen. 175 (1985) (pursuant to § 1126(b), a city police department may determine whether the police chief may undertake to contract with private parties to provide private security services by off-duty police officers for a fee); 70 Ops.Cal.Atty.Gen. 157, *supra*, (a school board may determine, pursuant to § 1126(b), that a board member's operation of a private preschool facility for profit, conflicts with his duties as a member of the board).)

A variety of potential incompatible activities are enumerated in section 1126, subdivision (b). An outside activity which involves the use of the agency's time, resources, uniforms, or prestige may be prohibited. (§ 1126(b)(1).) If the outside activity involves double remuneration, i.e., private payment for the performance of an activity which he or she is already required to perform in his or her public capacity, such employment may be prohibited. (§ 1126(b)(2); see also Pen. Code, § 70.) If the result of this outside activity will ever in any way be subject to the control or audit or other scrutiny of the official's agency, it may be prohibited as well. (§ 1126(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(b)(4).)

A local agency does not have as broad discretion to restrict the political activities of its officers or employees.[13] Section 3203 prohibits placing restrictions upon the political activities of such officers or employees unless the restriction is otherwise authorized by sections 3201-3209 or is necessary to meet federal requirements relative to a particular employee or employees. Authorized restrictions include a prohibition from participating in political activities while in uniform, and prohibition or restrictions from engaging in political activity during working hours or on the local agency's premises, if the agency has adopted rules in that regard. (§§ 3206, 3207.) In addition, while officers or 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. Sections 3201-3209 also provide for restrictions upon an employee's political activities such as using one's office to influence, positively or negatively, another person's position within the state or local agency, and knowingly soliciting political funds from other local agency employees unless the request is made to a "significant segment of the public" that otherwise includes local agency officers or employees.

In addition to these provisions, employees should be aware of Penal Code section 424, which prohibits the misuse of public funds and property for political or personal use. (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.)

Section 1127 specifically states that off-duty employees (e.g., firefighters, police officers) may accept private employment which is related to and compatible with their public employment. To do so, the employee must receive permission from his or her supervisor and must be certified by the appropriate agency.

For a discussion of the special incompatibility provisions for public attorneys, see section F of chapter XI, concerning Government Code section 1128.

F. PENALTIES AND ENFORCEMENT

The statute does not set forth any penalties or remedies for its violation. However, several enforcement vehicles would appear to be available. First, with respect to a local government employee, disciplinary action such as a letter of reprimand, suspension, or firing 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 the case of a particularly serious

[13]Restrictions upon the political activities of state officers or employees is discussed in Chapter X, *infra*.

violation. In addition, a taxpayer or member of the public may have the right to seek relief through injunction or mandamus.

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

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X.

INCOMPATIBLE ACTIVITIES OF STATE OFFICERS AND EMPLOYEES

Government Code Section 19990*

A. OVERVIEW

The prohibitions applicable to state officers and employees as contained in Government Code section 19990[14] are similar to those applicable to local officials under section 1126 (see chapter IX of this pamphlet). Like section 1126, section 19990 creates a general prohibition followed by specific areas of conduct which should be covered in an incompatible activities statement adopted by an employee's appointing power.

B. THE BASIC PROHIBITION

Initially, section 19990 prohibits state officers and employees from engaging in any activity or enterprise which 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. PROHIBITION MAY NOT BE SELF-EXECUTING

In construing section 1126, which is applicable to local officers and employees, the court in *Mazzola* v. *City & County of San Francisco, supra*, 112 Cal.App.3d 141, concluded that the general prohibition was not self-executing. There, the City and County of San Francisco had appointed and reappointed a plumbers' union official to the position of airport commissioner. At the time of the appointments, the city had full knowledge that the commissioner was a union official. After several unions, including the plumbers' union, engaged in a lengthy strike against the city, the Board of Supervisors removed the commissioner from office based on "official misconduct." The court set aside that decision, stating that the prohibition against incompatible activities could be exercised only through the agency's adoption of an incompatible activities statement which specifically notified employees of the prohibited activities. The court took the position that a general ban on activities which were inconsistent, incompatible, in conflict with or inimical to one's public duties was too vague to have any effect without the adoption of specific guidelines by the employee's agency. The same argument could be made with respect to section 19990.

*A copy of this statute appears in appendix J (on 119).

[14]All section references in this chapter hereafter will refer to the Government Code unless otherwise specified.

D. PERSONS COVERED

There is some question as to whether section 19990 covers state officers who are outside the state civil service. The provision concerning the incompatible activities statement provides:

> "Each 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. . . ." (§ 19990; emphases added.)

In the past, section 19251, predecessor to section 19990, was interpreted by this office 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 noncivil 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, section 19815(d) defines the term "employee" to include ". . . all employees of the executive branch of government who are not elected to office."

Thus, there are strong indications that section 19990 covers all nonelected, 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(r) as a reason for imposing discipline on a civil service employee. In addition, the term "appointing power" is defined in section 18524 as the entity authorized to appoint civil service personnel. Nevertheless, these factors do not conclusively bar the application of section 19990 to noncivil 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

Only those outside activities that are clearly incompatible, inconsistent or in conflict with the employee's public duties may be restricted. (73 Ops.Cal.Atty.Gen. 239 (1990); see also *Keeley* v. *State Personnel Board* (1975) 53 Cal.App.3d 88 (prison guard terminated because of his ownership and operation of a liquor store).) The types of activities specifically enumerated for coverage by incompatible activities statements include: using the prestige or influence of the state for private gain; using state facilities, time, equipment, or supplies for private gain; using confidential information for private gain[15]; receiving compensation from other than the state for the performance of state duties; performing private activities which later may be subject to the control, review, inspection, audit, or enforcement by the officer or employee; and receiving anything of value from a person 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. Section 19990 specifically states that incompatible activities shall include, but are not limited to, the enumerated areas of conduct specified in the statute.

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[15]See also Government Code section 1098, which prohibits the disclosure of confidential information for pecuniary gain.

Further, in *Long Beach Police Officers Assn.* v. *City of Long Beach*, *supra*, 46 Cal.3d 736, the Supreme Court held that local governments have broad discretion to regulate conflicts of interests. Thus, the statutory language combined with the *Long Beach Police Officers Assn.* holding make it clear that state agencies also have broad authority to regulate conflicts of interests.

There is, however, less discretion afforded with respect to regulating the political activities of state officers or employees. Pursuant to section 3208, 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.[16] In addition to these provisions, employees should be aware of section 8314 and Penal Code section 424, which prohibits the misuse of public funds and property for political or personal use. (See also *Stanson* v. *Mott*, *supra*, 17 Cal.3d 206; *League of Women Voters* v. *Countywide Crim. Justice Coordinating Com.*, *supra*, 203 Cal.App.3d 529.)

It should also be noted that 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, *supra*, (under specified circumstances, a State Franchise Tax Board employee can teach courses on tax law).)

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 appeal rights to contest any finding. (See, *Mazzola*, *supra*, 112 Cal.App.3d at pp. 154-155.) Since violations of the statement of incompatible activities are a matter of civil service employee discipline pursuant to section 19572(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 pursuant to 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 in the budget act.

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(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. In addition, members of the public may file a complaint with the State Personnel Board pursuant to section 19583.5 requesting that disciplinary action be taken against the state employee.

[16]The restrictions upon the political activities of local officers and employees are discussed in Chapter IX, *supra.*

If you have a question about an officer or 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 Government Code section 6250 et seq.

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XI.

THE COMMON LAW DOCTRINE OF INCOMPATIBLE OFFICES

A. OVERVIEW

The doctrine of incompatibility of office concerns a potential clash of two public offices held by a single official. Thus, the doctrine concerns a conflict between potentially overlapping public duties. (*People* ex rel. *Chapman* v. *Rapsey* (1940) 16 Cal.2d 636; see also *Mott* v. *Hortsmann* (1950) 36 Cal.2d 388, and 56 Ops.Cal.Atty.Gen. 488 (1973).) This is distinguishable from the concept of conflicts of interests which 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 interests notion of incompatible activities on the other. (55 Ops.Cal.Atty.Gen. 36, 39 (1972).)

B. THE BASIC PROHIBITION

To fall within the common law doctrine of incompatibility of office, two elements must be present. (68 Ops.Cal.Atty.Gen. 337 (1985).) 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.

The doctrine of incompatibility of offices was announced in the landmark case of *People* ex rel. *Chapman* v. *Rapsey, supra,* 16 Cal.2d at pp. 636, 641-642 (hereinafter "*Rapsey*"). In that case the court outlined issues which must be addressed in evaluating incompatibility of office problems: whether there is any significant clash of duties or loyalties between the offices; whether considerations of public policy make it improper for one person to hold both offices; and whether either officer exercises a supervisory, auditory, appointive, or removal power over the other.

In *Rapsey*, 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.

(For special rules governing attorneys, see Government Code section 1128, 66 Ops.Cal.Atty.Gen. 382 (1983), and the discussion in section F of this chapter.)

C. PUBLIC OFFICE VERSUS EMPLOYMENT

At the outset, it should be noted that a common law doctrine can be superseded by legislative enactment. Thus, the Legislature may choose to expressly authorize the dual holding of offices notwithstanding the fact that the dual holding would otherwise be prohibited by the common law doctrine. In 78 Ops.Cal.Atty.Gen. 60 (1995), this office concluded that section 6508 was intended to insure that the common law rule does not apply to joint powers agencies or their governing boards. Accordingly, a member of a city council may serve as a member of an airport commission which is a joint powers agency comprised of the city and other governmental agencies. After concluding that the offices of city and county planning commissioners were incompatible, this office in 66 Ops.Cal.Atty.Gen. 293, 302 (1983) stated: "It is concluded, therefore, that the county and city may provide by coordinate

legislation for the simultaneous holding of the offices in question notwithstanding the common law rule."

In *Rapsey, supra*, 16 Cal.2d 636, 640, the court defined the elements of a public "office" as including "the right, authority, and duty, created and conferred by law -- the tenure of which is not transient, occasional, or incidental -- by which for a given period an individual is invested with power to perform a public function for public benefit." In 68 Ops.Cal.Atty.Gen. 337, *supra*, this office summarized the court's conclusions as follows:

> "For the purpose of the doctrine of incompatible public offices, a public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state."

Since an "employment" is not an "office," the doctrine of incompatibility of office does not preclude an official from simultaneously holding an office and an employment. (58 Ops.Cal.Atty.Gen. 109, 111 (1975).)

A deputy to a principal is not necessarily deemed to be holding the same office as the principal for purposes of the incompatible offices doctrine; 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 doctrine. (See 78 Ops.Cal.Atty.Gen. 362, *supra*, modifying 63 Ops.Cal.Atty.Gen. 710 (1980).)

Employment with a public agency which 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).)

For examples of situations in which the doctrine has been applied to the holding of two offices, see the following:

> 76 Ops.Cal.Atty.Gen. 38 (1993) (full time position as fire chief incompatible with office of city council where fire chief is responsible to fire district and council members serve as directors of fire protection district); 73 Ops.Cal.Atty.Gen. 354 (1990) (offices of school district trustee and city councilmember incompatible where district and city have common territory; 68 Ops.Cal.Atty.Gen. 337, *supra*, (offices of a hospital district general manager and a superintendent of schools were incompatible with the office of community services' district director); 68 Ops.Cal.Atty.Gen. 171 (1985) (offices of school trustee for high school and elementary school districts are incompatible); see also 68 Ops.Cal.Atty.Gen. 240 (1985); 68 Ops.Cal.Atty.Gen. 7 (1985) (offices of deputy sheriff and county supervisor were incompatible even if the salary for one of the positions were waived); 66 Ops.Cal.Atty.Gen. 293 (1983) (offices of county planning commissioner and city planning commissioner are incompatible); 66 Ops.Cal.Atty.Gen. 176 (1983) (offices of fire chief of a county fire protection district and member of the board of supervisors of the same county are incompatible offices); 65 Ops.Cal.Atty.Gen. 606 (1982) (offices of school board member and city councilmember are incompatible where both have territory in common); 64

> Ops.Cal.Atty.Gen. 288 (1981) (offices of county planning commissioner and county water district director are incompatible offices); 64 Ops.Cal.Atty.Gen. 137 (1981) (member of the board of directors of a public utility district and a member of the board of county supervisors for the county in which the district is located are incompatible); 63 Ops.Cal.Atty.Gen. 607 (1980) (offices of county planning commissioner and city councilmember are incompatible offices).

For an example of situations in which the doctrine has not been applied because one of the positions was an employment, see the following:

> 74 Ops.Cal.Atty.Gen. 82 (1991) (position of city fire division chief is employment and therefore not incompatible with office of city councilmember); 65 Ops.Cal.Atty.Gen. 316 (1982) (a member of the State Board of Architectural Examiners may serve simultaneously as assistant to the Director of the Department of Consumer Affairs); 62 Ops.Cal.Atty.Gen. 615 (1979) (a person who is employed as a superintendent of a school district may serve as a member of the State Board of Education); 61 Ops.Cal.Atty.Gen. 88 (1978) (county employees may serve simultaneously as members of a county grand jury).

In *Eldridge* v. *Sierra View Local Hospital Dist.*, *supra*, 224 Cal.App.3d 311, the court determined that the doctrine did not bar a nurse from holding office as a member of the board of directors of the hospital district which employed her because the position of nurse is an employment rather than an office. (*Id.* at 319.) (However, in response to the *Eldridge* decision and 73 Ops.Cal.Atty.Gen. 191 (1990), the Legislature enacted Education Code section 35107(b), which supersedes the common law doctrine, and specifically prohibits school district employees from simultaneously holding office as a member of a school district's governing board.)

D. CONFLICT IN DUTIES OR FUNCTIONS

With respect to a conflict between the duties or functions of two offices, a clash between the two offices in the context of a particular decision need not be proved, in order to activate the doctrine of incompatibility of office. It is enough that there is a potential for a significant clash between the two offices at some point in the future. (See 78 Ops.Cal.Atty.Gen. 316 (1995) and 64 Ops.Cal.Atty.Gen. 288, *supra*, at p. 289.)

The *Rapsey* court, 16 Cal.2d, *supra*, at pp. 641-642, discussed the conflict between offices in the following passage:

> "Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both."

In 78 Ops.Cal.Atty.Gen. 316, *supra*, this office concluded that a member of a county board of supervisors could not simultaneously serve as a member of the Board of Governors of the California Community Colleges. There, we concluded that there was an inconsistency in the duties because a supervisor and a member of the Board of Governors could have divided loyalties over matters concerning the use of college district property, the issuance of district bonds, as well as matters pertaining to funding and fees. Likewise, in 65 Ops.Cal.Atty.Gen. 606, *supra*, this office opined that there was significant potential for a conflict between a city councilmember and a school board member. The opinion discussed six areas of potentially overlapping jurisdiction which could lead to a clash in official loyalties for an individual holding both positions. (*Id.*, at 607.) The areas of potential conflict ranged from financial and budgetary matters to zoning and development issues.

In 64 Ops.Cal.Atty.Gen. 288, *supra*, at p. 291, this office discussed potential conflicts in several factual contexts. With respect to a conflict between the offices of city planning commissioner and state highway commissioner, the opinion stated:

> "'What is best for the state in highway location may differ significantly as to what . . . is best for the . . . city itself.'" (*Ibid.*)

With respect to a conflict between the offices of county planning commissioner and a member of the county water district, the opinion stated: "Likewise, what is best for the county in its planning activities may differ significantly from what is best for the county water district and the exercise of its independent powers."

For similar reasons, we 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 have an effect on the actions of the other. (76 Ops.Cal.Atty.Gen. 81 (1993).) Likewise, we have concluded that an individual may not simultaneously hold the office of county superintendent of schools and member of the State Board of Education. (74 Ops.Cal.Atty.Gen. 116 (1991).)

However in 71 Ops.Cal.Atty.Gen. 39, at 42 (1988), this office concluded that an individual could be a member simultaneously of the State Industrial Welfare Commission and the Personnel Commission of the Los Angeles County Superintendent of Schools. This conclusion was based on the absence of any incompatibility between the two offices:

> "While we entertain no doubt that both of the positions in question are public offices, we predicate our conclusion herein exclusively upon the absence of incompatibility between them. The commission is concerned solely with public employees, i.e., the classified employees of the County Superintendent of Schools. As we shall see, I.W.C. is concerned solely with employees in the private sector. Neither agency has any official interest in or jurisdiction over the province of the other."

When two offices are consolidated, the common law rule of incompatible offices may be violated if one office is made subordinate to the other. (*The People ex rel. Deputy Sheriffs' Assn.* v. *County of Santa Clara* (1996) 49 Cal.App.4th 1471.)

E. PENALTIES AND ENFORCEMENT

Where a public official is found to have accepted two public offices, common law doctrine provides for an automatic vacating of the first office. (See 66 Ops.Cal.Atty.Gen. 293, *supra*, at p. 295; 66 Ops.Cal.Atty.Gen. 176, *supra*, at p. 178; 65 Ops.Cal.Atty.Gen. 606, *supra*, at p. 608.) The appropriate mechanism for enforcing the departure from office is a suit in quo warranto under section 803 of the Code of Civil Procedure. (See chapter VIII, section F regarding the quo warranto remedy.) (*Rapsey*, *supra*, 16 Cal.2d 636.) Disqualification or abstention from those decisions where an actual clash of the two offices is found to occur, is not an available remedy under the common law doctrine. (See 66 Ops.Cal.Atty.Gen. 176, *supra*, at pp. 177-178; 63 Ops.Cal.Atty.Gen. 710, *supra*, at pp. 715-717.) However, notwithstanding the legal forfeiture, the person remains in the prior 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).)

F. SPECIAL PROVISION FOR PUBLIC ATTORNEYS

In 1981, the Legislature added section 1128 to the Government Code concerning the right of public attorneys to hold other elective or appointive office. In 63 Ops.Cal.Atty.Gen. 170, *supra*, this office concluded that the incompatibility of office doctrine applied to a deputy if his or her principal would be prohibited from holding the other office in question. The opinion also concluded that the doctrine of incompatibility of offices may not be avoided by use of abstention or by realigning or by limiting the deputy's duties.

In 66 Ops.Cal.Atty.Gen. 382, *supra*, this office interpreted Government Code section 1128. The opinion concluded that the statutory provision modified the common law in several respects. First, the statute does not prohibit a 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 assumed by the public attorney under any circumstances. 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, *supra*.)

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XII.

THE COMMON LAW DOCTRINE AGAINST CONFLICTS OF INTERESTS

A. OVERVIEW

Courts and this office have, in the past, found conflicts of interests by public officials to be violative of both the common law[17] and statutory prohibitions. (See the discussion in Kaufmann, *The California Conflict of Interest Laws*, (1963) 36 So. Cal.L.Rev. 186.)

Although this office continues, for the sake of completeness, to refer to the common law doctrine in our opinions (see, e.g., 67 Ops.Cal.Atty.Gen. 369, 381 (1984) and citations therein) it could be argued that its application has been severely limited by the passage of the Political Reform Act of 1974. In this regard I.L. 76-69 stated:

> "Though one might urge . . . the Political Reform Act of 1974 has now preempted the common law doctrine against conflict of interests, and therefore that which is not specifically prohibited is now permitted, we would caution against such a conclusion for the reasons (1) that the courts have traditionally predicated their decisions on the dual basis of the statutes and the common law rule, see 58 Ops.Cal.Atty.Gen. 345, *supra*, at pp. 354-56, and (2) were a violation of the common law rule found to exist, such could form the basis of an allegation of willful misconduct in office within the meaning of section 3060 *et seq*." (See also 59 Ops.Cal.Atty.Gen. 604 (1976).)

B. THE BASIC PROHIBITION

A good expression of the common law doctrine is found in *Noble* v. *City of Palo Alto* (1928) 89 Cal.App. 47, 51: "A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public. [Citations.]"

This office has cautioned that where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the longstanding common law doctrine. (53 Ops.Cal.Atty.Gen. 163 (1970).) That opinion advised that the inquiry to be made was into the possibility that an official's private interests might be enhanced through his or her

[17]The common law is a body of law which has been made by precedential court 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 combined action of the State Legislature and the Governor.

official action. Another judicial explication of the common law doctrine was in *Terry* v. *Bender* (1956) 143 Cal.App.2d 198. In that case the court stated: "Public officers are obligated, . . . [by virtue of their office], to discharge their responsibilities with integrity and fidelity." (*Id.*, at 206.)

In 26 Ops.Cal.Atty.Gen. 5, 7 (1955), this office advised that if a situation arises where a common law conflict of interests exists as to a particular transaction, the official "is disqualified from taking any part in the discussion and vote regarding" the particular matter.

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.)

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XIII.

CONFLICT OF INTERESTS STATUTES APPLICABLE TO PARTICULAR OFFICERS OR AGENCIES

In addition to statutes of general applicability (e.g., Political Reform Act of 1974 ("PRA") or act; Gov. Code, § 1090), there are a multitude of conflict of interests statutes which are applicable only to particular officers or agencies. The statutes may go beyond and be more sweeping than the general statutes discussed above. Some may be directed to conflicts which may 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 pamphlet to attempt to set forth all such statutes. However, anyone who is attempting to determine if a conflict of interests exists in a particular instance, must be aware of the fact that these special statutes may exist and must, therefore, determine from the law establishing a particular office or agency, whether any special conflict of interests statutes have been enacted.[18]

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

[18]See generally West's Annotated California Codes, General Index, under the heading "Adverse or Pecuniary Interest" or Deering's Annotated California Codes, General Index, "Conflicts of Interest."

APPENDICES

APPENDIX A

Government Code Sections 87100, 87101, 87103, 87103.5

§ 87100.
No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

§ 87101.
Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.

§ 87103.
A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars ($1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars ($250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

§ 87103.5.
Notwithstanding subdivision (c) of Section 87103, a retail customer of a business entity engaged in retail sales of goods or services to the public generally is not a source of income to an official who owns a 10-percent or greater interest in the entity if the retail customers of the business entity constitute a significant segment of the public generally, and the amount of income received by the business entity from the customer is not distinguishable from the amount of income received from its other retail customers.

APPENDIX B

Government Code Sections 82030, 82033, 82034

§ 82030.
(a) "Income" means, except as provided in subdivision (b), a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse. Income also includes an outstanding loan. Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. "Income," other than a gift, does not include income received from any source outside the
jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.

(b) "Income" also does not include:

(1) Campaign contributions required to be reported under Chapter 4 (commencing with Section 84100).

(2) Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

(3) Any devise or inheritance.

(4) Interest, dividends, or premiums on a time or demand deposit in a financial institution, shares in a credit union or any insurance policy, payments received under any insurance policy, or any bond or other debt instrument issued by any government or government agency.

(5) Dividends, interest, or any other return on a security which is registered with the Securities and Exchange Commission of the United States government or a commodity future registered
with the Commodity Futures Trading Commission of the United States government, except proceeds from the sale of these securities and commodities futures.

(6) Redemption of a mutual fund.

(7) Alimony or child support payments.

(8) Any loan or loans from a commercial lending institution which are made in the lender's regular course of business on terms available to members of the public without regard to official status if:

(A) The loan is secured by the principal residence of filer; or

(B) The balance owed does not exceed ten thousand dollars ($10,000).

(9) Any loan from or payments received on a loan made to an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, uncle, aunt, or first cousin, or the spouse of any such person, provided that a loan or loan payment received from any such person shall be considered income if he or she is acting as an agent or intermediary for any person not covered by this paragraph.

(10) Any indebtedness created as part of a retail installment or credit card transaction if made in the lender's regular course of business on terms available to members of the public without regard to official status, so long as the balance owed to the creditor does not exceed ten thousand dollars ($10,000).

(11) Payments received under a defined benefit pension plan qualified under Internal Revenue Code Section 401(a).

(12) Proceeds from the sale of securities registered with the Securities and Exchange Commission of the United States government or from the sale of commodities futures registered with the Commodity Futures Trading Commission of the United States government if the filer sells the securities or the commodities futures on a stock or commodities exchange and does not know or have reason to know the identity of the purchaser.

§ 82033.
"Interest in real property" includes any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is one thousand dollars ($1,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater.

§ 82034.
"Investment" means any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights, warrants, options, debt instruments and any partnership or other ownership interest owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family, if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. No asset shall be deemed an investment unless its fair market value equals or exceeds one thousand dollars ($1,000). The term "investment" does not include a time or demand deposit in a financial institution, shares in a credit union, any insurance policy, interest in a diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940 or a common trust fund which is created pursuant to Section 1564 of the Financial Code, or any bond or other debt instrument issued by any government or government agency. Investments

of an individual includes a pro rata share of investments of any business entity, mutual fund, or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater. The term "parent, subsidiary or otherwise related business entity" shall be specifically defined by regulations of the commission.

APPENDIX C

California Code of Regulations, Title 2,
Sections 18702, 18702.1, 18702.2, 18702.3
18702.4, 18702.5, 18702.6

§18702.
(a) Specific Rules. The following specific rules, governing specific types of governmental decisions which affect certain specific types of economic interests, shall be utilized in determining whether the reasonably foreseeable effects of the decision will be material with respect to the economic interest.

(1) Where an official's economic interests are directly involved in the decision, Section 18702.1 applies.

(2) Where an official's economic interests are indirectly involved in the decision, the following apply:

(A) Business entities--Section 18702.2;

(B) Ownership interests in real property--Section 18702.3;

(C) Leasehold interests in real property--Section 18702.4;

(D) Nonprofit source of income--Section 18702.5; and

(E) Individual source of income--Section 18702.6.

(3) In order to determine if a decision's effect is material, it must first be determined if the official's economic interest is directly involved and the effect of the decision is material under Section 18702.1. If the official's economic interest is not directly involved in the decision, or the effect of the decision is not material, under Section 18702.1, then it must be determined if the effect is material under the appropriate regulation of Sections 18702.2 through 18702.6.

(4) For purposes of Title 2, Division 6 of the California Code of Regulations, the term "economic interest" includes the interests specified in Government Code Section 87103(a) through (e), and direct effects on the official or a member of the official's immediate family as set forth in Government Code Section 87103 and Section 18702.1(a) (4).

(b) General Rule. Whenever the specific provisions of Sections 18702.1 through 18702.6, inclusive, cannot be applied, the following general rule shall apply:
The financial effect of a governmental decision is material if the decision will have a significant effect on the official or a member of the official's immediate family, or on the source of income,

the source of gifts, the business entity, or the real property, which is an economic interest of the official.

(c) Public Generally Exception. Notwithstanding any determination that the reasonably foreseeable effect of a decision is material under this regulation or under Sections 18702.1 through 18702.6, an official is not disqualified from participation in a governmental decision if the decision affects the official's interest in a manner which is not distinguishable from the manner in which the decision will affect the public generally as set forth in Section 18703.

(d) Even if the specific provisions of Section 18703 do not apply, the following "public generally" exceptions shall apply, provided that all of the requirements for the specific exception are met.

(1) Public Generally: Small Jurisdictions; Principal Residence -- Section 18703.1.

(2) Public Generally: Industries, Trades, or Professions -- Section 18703.2.

(3) Public Generally: Appointed Members of Boards and Commissions -- Section 18703.3.

(e) For purposes of Government Code Section 87102.5 (Members of the Legislature) and Government Code Section 87102.8 (elected state officers), the "public generally" exception in Section 87102.6(b) (2) applies.

§18702.1.
(a) The effect of a decision is material if any of the following applies:

(1) Source of Income or Gifts--Any person (including a business entity) which has been a source of income to the official of $250 or more, or of gifts of $290 or more, in the preceding 12 months is directly involved in a decision before the official's agency or there is a nexus (as defined in subdivision (d)) between the purpose for which the official receives income and the governmental decision; or

(2) Investment in Business Entity--Any business entity (other than one covered by Section 18702.2(a) or (b)) in which the official has a direct or indirect investment of $1,000 or more, any business entity covered by Section 18702.2(a) or (b) in which an official has a direct or indirect investment of $10,000 or more, or any business entity in which the official is an officer, director, partner, trustee, employee, or holds any position of management, is directly involved in a decision before the official's agency.

Note: With respect to any business entity covered by subdivision (a) or (b) of Section 18702.2 in which an official has a direct or indirect investment of $1,000 or more, but less than $10,000, materiality must still be analyzed pursuant to Title 2, Division 6, Section 18702.2 of the California Code of Regulations.

(3) Interest in Real Property--

(A) The decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of real property in which the official has a direct or indirect interest (other than a leasehold interest) of $1,000 or more, or a similar decision affecting such property;

(B) The decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of such property;

(C) The decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on such property; or

(D) The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

(E) For purposes of this subdivision, the terms “zoning” and “rezoning” shall refer to the act of establishing or changing the zoning or land use designation on the subject property. The terms “zoning” and “rezoning” shall not refer to an amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under Title 2, Division 6, Section 18702.3(c) of the California Code of Regulations.

(4) The Official or Immediate Family--The decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing by at least $250 in any 12-month period. Section 18702.1(a)(4) does not apply to a financial effect on the value of real property owned directly or indirectly by the official, or a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has an investment interest.

(b) A person or business entity is directly involved in a decision before an official’s agency when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

(c) Notwithstanding subdivision (a) an official does not have to disqualify himself or herself from a governmental decision if:

(1) The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency. This subdivision does not apply to decisions to hire, fire, promote, demote, or discipline an official’s spouse, or to set a salary for an official’s spouse which is different from salaries paid to other employees of the spouse’s agency in the same job classification or position;

(2) Although disqualification would otherwise be required under subdivision (a)(1), (a)(2), or

(a)(3) the decision will have no financial effect on the person or business entity who appears before the official, or on the real property.

(d) There is a nexus between the purpose for which an official receives income and a governmental decision if the official receives income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.

§18702.3.
The effect of a decision is material as to a business entity in which an official has an economic interest if any of the following applies:

(a) For any business entity listed on the New York Stock Exchange or the American Stock Exchange:

(1) The decision will result in an increase or decrease to the gross revenues for a fiscal year of $250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 1,000 largest U.S. corporations, in which case the increase or decrease in gross revenues must be $1,000,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $100,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 1,000 largest U.S. corporations, in which case the increase or decrease in expenses must be $250,000 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of $250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 1,000 largest U.S. corporations, in which case the increase or decrease in assets or liabilities must be $1,000,000 or more.

(b) For any business entity listed on the National Association of Securities Dealers National Market List (securities of companies on this over-the-counter market list are registered with and subject to the Security and Exchange Commission’s rule requiring tape reporting of last sale information [17 CFR Section 240.77 Aa3-1]):

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of $150,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $50,000 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of $150,000 or more.

(c) For any business entity not covered by subdivisions (a) or (b) but which is listed on the Pacific Stock Exchange or is qualified for public sale in this state and is listed on the Eligible Securities List maintained by the California Department of Corporations (which applies to partnerships and other business entities as well as corporations):

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of $30,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $7,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of $30,000 or more.

(d) For any business entity not covered by subdivision (a) which meets the financial standards for listing on the most recently published Fortune Magazine Directory of the 1,000 largest U. S. corporations, the tests in subdivision (a) applicable to non-Fortune 1,000 business entities listed on the New York or American Stock Exchanges may be applied.

(e) For any business entity not covered by subdivisions (a) or (b) which meets the financial standards for listing on the New York Stock Exchange, the tests in subdivision (b) may be applied. The standards are as follows: The business entity has net tangible assets of at least $18,000,000 and had pre-tax income for the last fiscal year of at least $2,500,000.

(f) For any business entity not covered by subdivisions (a) or (b) which meets the financial standards for listing on the National Association of Securities Dealers National Market List, the tests in subdivision (c) may be applied. The standards are as follows: The business entity has net tangible assets of at least $4,000,000, and had pre-tax income for the last fiscal year of at least $750,000, with net income from that period of at least $400,000.

(g) For any business entity not covered by subdivisions (a), (b), (c), (d), (e) or (f):

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of $10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of $10,000 or more.

§18702.3.
(a) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if any of the following applies:

(1) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official’s real property interest.

(2) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.

(3) The real property in which the official has an interest is located outside a radius of 300 feet and any part of the real property is located within a radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable financial effect of:

(A) Ten thousand dollars ($10,000) or more on the fair market value of the real property in which the official has an interest; or

(B) Will affect the rental value of the property by $1,000 or more per 12 month period.

(b) The reasonably foreseeable effect of a decision is not considered material as to real property in which an official has a direct, indirect or beneficial interest (not including a leasehold interest), if the real property in which the official has an interest is located entirely beyond a 2,500 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision; unless:

(1) There are specific circumstances regarding the decision, its effect, and the nature of the real property in which the official has an interest, which make it reasonably foreseeable that the fair market value or the rental value of the real property in which the official has an interest will be affected by the amounts set forth in subdivisions (a)(3)(A) or (a)(3)(B); and

(2) Either of the following apply:

(A) The effect will not be substantially the same as the effect upon at least 25 percent of all the properties which are within a 2,500 foot radius of the boundaries of the real property in which the official has an interest; or

(B) There are not at least 10 properties under separate ownership within a 2,500 foot radius of the property in which the official has an interest.

(c) For decisions which may affect an interest in real property but which do not involve a subject property from which the distances prescribed in subdivisions (a) and (b) can be determined, the monetary standards contained in subdivision (a)(3)(A) and (B) shall be applied.

(d) For a decision which is covered by subdivision (a)(3) or (b)(1) or (c), factors which shall be considered in determining whether the decision will have the effects set forth in subdivision (a)(3)(A) or (B) include, but are not limited to:

(1) The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;

(2) Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

(3) In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effect on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

(e) Redevelopment Decisions: For purposes of this section “the boundaries (or proposed boundaries) of the property which is the subject of the decision” are the boundaries (or proposed boundaries) of the redevelopment project area whenever the decision is a redevelopment decision to designate the survey area, to make findings of blight, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions.

§18702.4.
The effect of a decision is material as to a leasehold interest in real property if any of the following applies:

(a) The decision will change the legally allowable use of the leased property, and the lessee has a right to sublease the property;

(b) It is reasonably foreseeable that the lessee will change the actual use of the property as a result of the decision;

(c) It is reasonably foreseeable that the decision will result in a change in the actual use of property within 300 feet of the leased property, and the changed use will significantly enhance or significantly decrease the use or enjoyment of the leased property;

(d) The decision will increase or decrease the amount of rent for the leased property by $250 or 5 percent, whichever is greater, during any 12-month period following the decision; or

(e) The decision will result in a change in the termination date of the lease.

§18702.5.
The effect of a decision is material as to a nonprofit entity which is a source of income or gifts to the official if any of the following applies:

(a) For an entity whose gross annual receipts are $400,000,000 or more, the effect of the decision will be any of the following:

(1) The decision will result in an increase or decrease of the entity’s gross annual receipts for a fiscal year in the amount of $1,000,000 or more; or

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of $250,000 or more; or

(3) The decision will result in an increase or decrease in the value of the entity’s assets or liabilities in the amount of $1,000,000 or more.

(b) For an entity whose gross annual receipts are more than $100,000,000 but less than $400,000,000, the effect of the decision will be any of the following.

(1) The decision will result in an increase or decrease of the entity’s gross annual receipts for a fiscal year in the amount of $400,000 or more; or

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of $100,000 or more; or

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of $400,000 or more.

(c) For an entity whose gross annual receipts are more than $10,000,000, but less than or equal to $100,000,000 the effect of the decision will be any of the following:

(1) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of $200,000 or more.

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of $50,000 or more.

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of $200,000 or more.

(d) For an entity whose gross annual receipts are more than $1,000,000, but less than or equal to $10,000,000 the effect of the decision will be any of the following:

(1) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of $100,000 or more.

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of $25,000 or more.

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of $100,000 or more.

(e) For an entity whose gross annual receipts are more than $100,000 but less than or equal to $1,000,000 the effect of the decision will be any of the following:

(1) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of $50,000 or more.

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of $12,500 or more.

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of $50,000 or more.

(f) For an entity whose gross annual receipts are $100,000 or less, the effect of the decision will be any of the following:

(1) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of $10,000 or more.

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of $2,500 or more.

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of $10,000 or more.

§18702.6.
The effect of a decision is material as to an individual who is a source of income or gifts to an official if any of the following applies:

(a) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by $1,000 or more; or

(b) The decision will affect the individual's real property interest in a manner that is considered material under Section 18702.3 or Section 18702.4.

APPENDIX D

Government Code Sections 89501, 89502, 89503 and 89506

§ 89501.

(a) For purposes of this chapter, "honorarium" means, except as provided in subdivision (b), any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.

(b) The term "honorarium" does not include:

(1) Earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches. The commission shall adopt regulations to implement this subdivision.

(2) Any honorarium which is not used and, within 30 days after receipt, is either returned to the donor or delivered to the State Controller for donation to the General Fund, or in the case of a public official for local government agency, delivered to his or her agency for donation to an equivalent fund, without being claimed as a deduction from income for tax purposes.

(c) Section 89506 shall apply to all payments, advances, or reimbursements for travel and related lodging and subsistence.

§ 89502.
(a) No elected state officer, elected officer of a local government agency, or other individual specified in Section 87200 shall accept any honorarium.

(b) (1) No candidate for elective state office, for judicial office, or for elective office in a local government agency shall accept any honorarium. A person shall be deemed a candidate for purposes of this subdivision when the person has filed a statement of organization as a committee for election to a state or local office, a declaration of intent, or a declaration of candidacy, whichever occurs first. A person shall not be deemed a candidate for purposes of this subdivision after he or she is sworn

into the elective office, or, if the person lost the election after the person has terminated his or her campaign statement filing obligations for that office pursuant to Section 84214 or after certification of the election results, whichever is earlier.

(2) Paragraph (1) shall not apply to any person who is a candidate as described in paragraph (1) for judicial office on or before December 31, 1996.

(c) No member of a state board or commission and no designated employee of a state or local government agency shall accept an honorarium from any source if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.

(d) This section shall not apply to a person in his or her capacity as judge . This section shall not apply to a person in his or her capacity as a part-time member of the governing board of any public institution of higher education unless that position is an elective office.

§ 89503.
(a) No elected state officer, elected officer of a local government agency, or other individual specified in Section 87200 shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars ($250).

(b) (1) No candidate for elective state office, for judicial office, or for elective office in a local government agency shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars ($250). A person shall be deemed a candidate for purposes of this subdivision when the person has filed a statement of organization as a committee for election to a state or local office, a declaration of intent, or a declaration of candidacy, whichever occurs first. A person shall not be deemed a candidate for purposes of this subdivision after he or she is sworn into the elective office, or, if the person lost the election, after the person has terminated his or her campaign statement filing obligations for that office pursuant to Section 84214 or after certification of the election results, whichever is earlier.

(2) Paragraph (1) shall not apply to any person who is a candidate as described in paragraph (1) for judicial office on or before December 31, 1996.

(c) No member of a state board or commission or designated employee of a state or local government agency shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars ($250) if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.

(d) This section shall not apply to a person in his or her capacity as judge . This section shall not apply to a person in his or her capacity as a part-time member of the governing board of any public institution of higher education unless that position is an elective office.

(e) This section shall not prohibit or limit the following:

(1) Payments, advances, or reimbursements for travel and related lodging and subsistence permitted by Section 89506.

(2) Wedding gifts and gifts exchanged between individuals on birthdays, holidays, and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value.

(f) Beginning on January 1, 1993, the commission shall adjust the gift limitation in this section on January 1 of each odd-numbered year to reflect changes in the Consumer Price Index, rounded to the nearest ten dollars ($10).

(g) The limitations in this section are in addition to the limitations on gifts in Section 86203.

§89506.

(a) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence that is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, are not prohibited or limited by this chapter if either of the following apply:

(1) The travel is in connection with a speech given by the elected state officer, local elected officeholder, candidate for elected state office or local elected office, an individual specified in Section 87200, member of a state board or commission, or designated employee of a state or local government agency, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

(b) Gifts of travel not described in subdivision (a) are subject to the limits in Section 89503.

(c) Subdivision (a) applies only to travel that is reported on the recipient's statement of economic interests.

(d) For purposes of this section, a gift of travel does not include any of the following:

(1) Travel that is paid for from campaign funds, as permitted by Article 4 (commencing with Section 89510), or that is a contribution.

(2) Travel that is provided by the agency of a local elected officeholder, an elected state officer, member of a state board or commission, an individual specified in Section 87200, or a designated employee.

(3) Travel that is reasonably necessary in connection with a bona fide business, trade, or profession and that satisfies the criteria for federal income tax deduction for business expenses in Sections 162 and 274 of the Internal Revenue Code, unless the sole or predominant activity of the business, trade, or profession is making speeches.

(4) Travel that is excluded from the definition of a gift by any other provision of this title.

(e) This section does not apply to payments, advances, or reimbursements for travel and related lodging and subsistence permitted or limited by Section 170.9 of the Code of Civil Procedure.

APPENDIX E

Government Code Section 84308

§ 84308.

(a) The definitions set forth in this subdivision shall govern the interpretation of this section.

(1) "Party" means any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.

(2) "Participant" means any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7. A person actively supports or opposes a particular decision in a proceeding if he or she lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.

(3) "Agency" means an agency as defined in Section 82003 except that it does not include the courts or any agency in the judicial branch of government, local governmental agencies whose members are directly elected by the voters, the Legislature, the Board of Equalization, or constitutional officers. However, this section applies to any person who is a member of an exempted agency but is acting as a voting member of another agency.

(4) "Officer" means any elected or appointed officer of an agency, any alternate to an elected or appointed officer of an agency, and any candidate for elective office in an agency.

(5) "License, permit, or other entitlement for use" means 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.

(6) "Contribution" includes contributions to candidates and committees in federal, state, or local elections.

(b) No officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars ($250) from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer knows or has reason to know that the participant has a financial interest, as that term is used in Article 1 (commencing with Section 87100) of Chapter 7. This prohibition shall apply regardless of whether the officer accepts, solicits, or directs the contribution for himself or herself, or on behalf of any other officer, or on behalf of any candidate for office or on behalf of any committee.

(c) Prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars ($250) from a party or from any participant shall disclose that fact on the record of the proceeding. No officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use

pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars ($250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision, as that term is described with respect to public officials in Article 1 (commencing with Section 87100) of Chapter 7.
If an officer receives a contribution which would otherwise require disqualification under this section, returns the contribution within 30 days from the time he or she knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, he or she shall be permitted to participate in the proceeding.

(d) A party to a proceeding before an agency involving a license, permit, or other entitlement for use shall disclose on the record of the proceeding any contribution in an amount of more than two hundred fifty dollars ($250) made within the preceding 12 months by the party, or his or her agent, to any officer of the agency. No party, or his or her agent, to a proceeding involving a license, permit, or other entitlement for use pending before any agency and no participant, or his or her agent, in the proceeding shall make a contribution of more than two hundred fifty dollars ($250) to any officer of that agency during the proceeding and for three months following the date a final decision is rendered by the agency in the proceeding. When a closed corporation is a party to, or a participant in, a proceeding involving a license, permit, or other entitlement for use pending before an agency, the majority shareholder is subject to the disclosure and prohibition requirements specified in subdivisions (b), (c), and this subdivision.

(e) Nothing in this section shall be construed to imply that any contribution subject to being reported under this title shall not be so reported.

APPENDIX F

Government Code Sections 87400, 87401, 87402, 87403, 87404, 87405, 87406, and 87407

§ 87400.
Unless the contrary is stated or clearly appears from the context, the definitions set forth in this section shall govern the interpretation of this article.

(a) "State administrative agency" means every state office, department, division, bureau, board and commission, but does not include the Legislature, the courts or any agency in the judicial branch of government.

(b) "State administrative official" means 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 a purely clerical, secretarial or ministerial capacity.

(c) "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

(d) "Participated" means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.

§ 87401.
No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

§ 87402.
No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

§ 87403.

The prohibitions contained in Sections 87401 and 87402 shall not apply:

(a) To prevent a former state administrative official from making or providing a statement, which is based on the former state administrative official's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received other than that regularly provided for by law or regulation for witnesses; or

(b) To communications made solely for the purpose of furnishing information by a former state administrative official if the court or state administrative agency to which the communication is directed makes findings in writing that:

(1) The former state administrative official has outstanding and otherwise unavailable qualifications;

(2) The former state administrative official is acting with respect to a particular matter which requires such qualifications; and

(3) The public interest would be served by the participation of the former state administrative official; or

(c) With respect to appearances or communications in a proceeding in which a court or state administrative agency has issued a final order, decree, decision or judgment but has retained jurisdiction if the state administrative agency of former employment gives its consent by determining that:

(1) At least five years have elapsed since the termination of the former state administrative official's employment or term of office; and

(2) The public interest would not be harmed.

§ 87404.
Upon the petition of any interested person or party, the court or the presiding or other officer, including but not limited to a hearing officer serving pursuant to Section 11512 of the Government Code, in any judicial, quasi-judicial or other proceeding, including but not limited to any proceeding pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code may, after notice and an opportunity for a hearing, exclude any person found to be in violation of this article from further participation, or from assisting or counseling any other participant, in the proceeding then pending before such court or presiding or other officer.

§ 87405.
The requirements imposed by this article shall not apply to any person who left government service prior to the effective date of this article except that any such person who returns to government service on or after the effective date of this article shall thereafter be covered thereby.

§ 87406.
(a) This section shall be known, and may be cited, as the Milton Marks Postgovernment Employment Restrictions Act of 1990.

(b) No Member of the Legislature, for a period of one year after leaving office, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person by making any

formal or informal appearance, or by making any oral or written communication, before the Legislature, any committee or subcommittee thereof, any present Member of the Legislature, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing legislative action.

(c) No elected state officer, other than a Member of the Legislature, for a period of one year after leaving office, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or any officer or employee thereof, if the appearance or communication is for the purpose of influencing administrative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this subdivision, an appearance before a "state administrative agency" does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals Board.

(d) (1) No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by. making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals Board. The prohibition of this paragraph shall only apply to designated employees employed by a state administrative agency on or after January 7, 1991.

(2) For purposes of paragraph (1), a state administrative agency of a designated employee of the Governor's office includes any state administrative agency subject to the direction and control of the Governor.

(e) The prohibitions contained in subdivisions (b), (c), and (d) shall not apply to any individual subject to this section who is or becomes an officer or employee of another state agency, board, or commission if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission.

(f) This section shall become operative on January 1, 1991, but only if Senate Constitutional Amendment No. 32 of the 1989-90 Regular Session is approved by the voters. With respect to Members of the Legislature whose current term of office on January 1, 1991, began in December 1988, this section shall not apply until January 1, 1993.

§ 87407.

No state administrative official, elected state officer, or designated employee of the Legislature shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.

APPENDIX G

Government Code Sections 1090-1097

§ 1090.
Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

§ 1091.
(a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body of the board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

(1) That of an officer or employee of a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

(2) That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office.
For purposes of this paragraph, time of employment with the contracting party by the officer shall be counted in computing the three-year period specified in this paragraph even though the contracting party has been converted from one form of business organization to a different form of business organization within three years of the initial taking of office by the officer. Time of employment in that case shall be counted only if, after the transfer or change in organization, the real or ultimate ownership of the contracting party is the same or substantially similar to that which existed before the transfer or change in organization. For purposes of this paragraph, stockholders, bondholders, partners, or other persons holding an interest in the contracting party are regarded as having the "real or ultimate ownership" of the contracting party.

(3) That of an employee or agent of the contracting party, if all of the following conditions are met:

(A) The agency of which the person is an officer is a local public agency located in a county with a population of less than 4,000,000.

(B) The contract is competitively bid and is not for personal services.

(C) The employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party.

(D) The contracting party has 10 or more other employees.

(E) The employee or agent did not directly participate in formulating the bid of the contracting party.

(F) The contracting party is the lowest responsible bidder.

(4) That of a parent in the earnings of his or her minor child for personal services.

(5) That of a landlord or tenant of the contracting party.

(6) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(7) That of a member of a nonprofit corporation formed under the Food and Agricultural Code or a nonprofit corporation formed under the Corporations Code for the sole purpose of engaging in the merchandising of agricultural products or the supplying of water.

(8) That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.

(9) That of a person subject to the provisions of Section 1090 in any contract or agreement entered into pursuant to the provisions of the California Land Conservation Act of 1965.

(10) Except as provided in subdivision (b) of Section 1091.5, that of a director of or a person having an ownership interest of 10 percent or more in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor or creditor.

(11) That of an engineer, geologist, or architect employed by a consulting engineering or architectural firm. This paragraph applies only to an employee of a consulting firm who does not serve in a primary management capacity, and does not apply to an officer or director of a consulting firm.

(12) That of an elected officer otherwise subject to Section 1090, in any housing assistance payment contract entered into pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. Sec. 1437f) as amended, provided that the housing assistance payment contract was in existence before Section 1090 became applicable to the officer and will be renewed or extended only as to the existing tenant, or, in a jurisdiction in which the rental vacancy rate is less than 5 percent, as to new tenants in a unit previously under a Section 8 contract. This section applies to any person who became a public official on or after November 1, 1986.

(c) This section is not applicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which he or she is a member to enter into the contract.

(d) The willful failure of an officer to disclose the fact of his or her interest in a contract pursuant to this section is punishable as provided in Section 1097. That violation does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

§ 1091.1.
The prohibition against an interest in contracts provided by this article or any other provision of law shall not be deemed to prohibit any public officer or member of any public board or commission from subdividing lands owned by him or in which he has an interest and which subdivision of lands is effected under the provisions of Division 2 (commencing with Section 66410) of Title 7 of the Government Code or any local ordinance concerning subdivisions; provided, that (a) said officer or member of such board or commission shall first fully disclose the nature of his interest in any such lands to the legislative body having jurisdiction over the subdivision thereof, and (b) said officer or member of such board or commission shall not cast his vote upon any matter or contract concerning said subdivision in any manner whatever.

§ 1091.2.
Section 1090 shall not apply to any contract or grant made by private industry councils established pursuant to Chapter 4 (commencing with Section 15030) of Division 8 of the Unemployment Insurance Code, unless both of the following conditions are met:

(a) The contract or grant directly bears on services to be provided by any member of a private industry council or any business or organization which the member directly represents, or the contract or grant would financially benefit the member or business or organization which the member represents.

(b) The affected private industry council member fails to comply with Section 87100.

§ 1091.5.
(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

(2) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duty.

(3) That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the board.

(4) That of a landlord or tenant of the contracting party if such contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any

public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of such contract is the property in which such officer or employee has such interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.

(5) That of a tenant in a public housing authority created pursuant to Part 2 (commencing with Section 34200) of Division 24 of the Health and Safety Code in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 (commencing with Section 34100) of Division 24 of the Health and Safety Code.

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

(7) That of a nonsalaried member of a nonprofit corporation, provided that such interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that such interest is noted in its official records.

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that such interest is noted in its official records.
For purposes of this paragraph an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing duties of his or her office.

(9) That of compensation for employment with a governmental agency, other than the governmental agency that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

(10) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(11) Except as provided in subdivision (b), that of an officer or employee of or a person having less than a 10 percent ownership interest in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor, or creditor.

(b) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor.

§ 1092.
Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided

because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member.

§ 1092.5.
Notwithstanding Section 1092, no lease or purchase of, or encumbrance on, real property may be avoided, under the terms of Section 1092, in derogation of the interest of a good faith lessee, purchaser, or encumbrancer where the lessee, purchaser, or encumbrancer paid value and acquired the interest without actual knowledge of a violation of any of the provisions of Section 1090.

§ 1095.
Officers charged with the disbursement of public moneys shall not pay any warrant or other evidence of indebtedness against the State, county, or city when it has been purchased, sold, received, or transferred contrary to any of the provisions of this article.

§ 1096.
Upon the officer charged with the disbursement of public moneys being informed by affidavit that any officer, whose account is about to be settled, audited, or paid by him, has violated any of the provisions of this article, the disbursing officer shall suspend such settlement or payment, and cause the district attorney to prosecute the officer for such violation. If judgment is rendered for the defendant upon such prosecution, the disbursing officer may proceed to settle, audit, or pay the account as if no affidavit had been filed.

§ 1097.
Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

APPENDIX H

Public Contract Code Sections 10410, 10411, 10430

§ 10410.
No officer or employee in the state civil service or other appointed state official shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, or sponsored and funded, by any state agency or department through or by a state contract unless the employment, activity, or enterprise is required as a condition of the officer's or employee's regular state employment. No officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods.

§ 10411.
(a) No retired, dismissed, separated, or formerly employed person of any state agency or department employed under the state civil service or otherwise appointed to serve in state government may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by any state agency or department. The prohibition of this subdivision shall apply to a person only during the two-year period beginning on the date the person left state employment.

(b) For a period of 12 months following the date of his or her retirement, dismissal, or separation from state service, no person employed under state civil service or otherwise appointed to serve in state government may enter into a contract with any state agency, if he or she was employed by that state agency in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement, dismissal, or separation. The prohibition of this subdivision shall not apply to a contract requiring the person's services as an expert witness in a civil case or to a contract for the continuation of an attorney's services on a matter he or she was involved with prior to leaving state service.

§ 10430.
This chapter does not apply to any of the following:

(a) The Regents of the University of California.

(b) Transactions covered under Chapter 3 (commencing with Section 12100).

(c) Except as otherwise provided in this chapter, any entity exempted from the provisions of Section 10295. However, the Trustees of the California State University shall be governed by this chapter except with regard to transactions covered under the California State University and Colleges Contract Law, and except as provided in Sections 10295, 10335, 10356, and 10389.

(d) Transactions covered under Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

(e) Except as provided for in subdivision (c), members of boards or commissions who receive no payment other than payment of each meeting of the board or commission, payment for preparatory time, and payment for per diem.

(f) The emergency purchase of protective vests for correctional peace officers whose duties require routine contact with state prison inmates. This subdivision shall remain operative only until January 1, 1987.

(g) Spouses of state officers or employees and individuals and entities that employ spouses of state officers and employees, that are vendored to provide services to regional center clients pursuant to Section 4648 of the Welfare and Institutions Code; provided, however, that the vendor of services, in that capacity, does not receive any material financial benefit, distinguishable from the benefit to the public generally, from any governmental decision made by the state officer or employee.

APPENDIX I

Government Code Sections 1125, 1126, 1127, 1128

§ 1125.
"Local agency," as used in this article, means county, city, city and county, political subdivision, district, municipal corporation.

§ 1126.
(a) Except as provided in Sections 1128 and 1129, a local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed. The officer or employee shall not perform any work, service, or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board, or commission of his or her employing body, unless otherwise approved in the manner prescribed by subdivision (b).

(b) Each appointing power may determine, subject to approval of the local agency, and consistent with the provisions of Section 1128 where applicable, those outside activities which, for employees under its jurisdiction, are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees. An employee's outside employment, activity, or enterprise may be prohibited if it: (1) involves the use for private gain or advantage of his or her local agency time, facilities, equipment and supplies; or the badge, uniform, prestige, or influence of his or her local agency office or employment or, (2) involves receipt or acceptance by the officer or employee of any money or other consideration from anyone other than his or her local agency for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his or her local agency employment or as a part of his or her duties as a local agency officer or employee or, (3) involves the performance of an act in other than his or her capacity as a local agency officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit, or enforcement of any other officer or employee or the agency by which he or she is employed, or (4) involves the time demands

as would render performance of his or her duties as a local agency officer or employee less efficient.

(c) The local agency shall adopt rules governing the application of this section. The rules shall include provision for notice to employees of the determination of prohibited activities, of disciplinary action to be taken against employees for engaging in prohibited activities, and for appeal

by employees from such a determination and from its application to an employee. Nothing in this section is intended to abridge or otherwise restrict the rights of public employees under Chapter 9.5 (commencing with Section 3201) of Title 1.

(d) The application of this section to determine what outside activities of employees are inconsistent with, incompatible with, or in conflict with their duties as local agency officers or employees may not be used as part of the determination of compensation in a collective bargaining agreement with public employees.

§ 1127.
It is not the intent of this article to prevent the employment by private business of a public employee, such as a peace officer, fireman, forestry service employee, among other public employees, who is off duty to do work related to and compatible with his regular employment, or past employment, provided the person or persons to be employed have the approval of their agency supervisor and are certified as qualified by the appropriate agency.

§ 1128.
Service on an appointed or elected governmental board, commission, committee, or other body by an attorney employed by a local agency in a nonelective position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with, or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office.

APPENDIX J

Government Code Section 19990

§ 19990.
A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

Each 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. Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

(a) Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.

(b) Using state time, facilities, equipment, or supplies for private gain or advantage.

(c) Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.

(d) Receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.

(e) Performance of an act in other than his or her capacity as a state officer or employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the officer or employee.

(f) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee.

(g) Subject to any other laws, rules, or regulations as pertain thereto, not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

The department shall adopt rules governing the application of this section. The rules shall include provision for notice to employees prior to the determination of proscribed activities and for appeal by employees from such a determination and from its application to an employee. Until the department adopts rules governing the application of this section, as amended in the 1985-86 Regular Session of the Legislature, existing procedures shall remain in full force and effect.

If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

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