2020

Conflicts of Interest HANDBOOK

Summary of the Major Provisions and Requirements of Principal Conflicts of Interest Laws and Regulations

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INTRODUCTION

This Handbook is prepared to provide you with a summary of the major provisions of California's principal conflicts of interest laws and regulations. The text of the laws and regulations referenced in this Handbook can be found on the websites for the California Legislature (http://leginfo.legislature.ca.gov/faces/codes.xhtml) and the Fair Political Practices Commission ("FPPC") (http://www.fppc.ca.gov/the-law.html).

This Handbook is designed to familiarize city officials and staff with California's principal conflicts of interest laws and regulations. Because the laws and regulations change frequently, we recommend that you use this Handbook to become familiar with the basic principles of the conflict laws and regulations, but we also recommend that you contact your city attorney or agency counsel as soon as you think that you may have a potential conflict of interest. We would be glad to help you analyze a potential conflict of interest and/or contact the FPPC for guidance.

We hope you find this Handbook useful. Should you have any questions about the information included in this Handbook, please do not hesitate to contact us.

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Summary of the Major Provisions and Requirements of Principal Conflicts of Interest Laws and Regulations

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Summary of the Major Provisions and Requirements of Principal Conflicts of Interest Laws and Regulations

I. LAWS AND REGULATIONS AFFECTING DECISION-MAKING

A. The Political Reform Act

In 1974, California voters approved Proposition 9, a statewide initiative titled "the Political Reform Act" (the "Act" or the "PRA"). Gov't Code § 81000 *et seq.*[1] At the time, the measure was the most detailed disclosure law in the nation, and it included new requirements for reporting campaign and lobbying activities. Although the Act was initially written before the Watergate scandal broke, by the time Proposition 9 appeared on the ballot, the drama had unfolded, and nationwide reform proposals were being drafted.

The Act passed by an overwhelming majority, and one of its provisions created a new state agency called the Fair Political Practices Commission ("FPPC"). The FPPC was charged with interpreting and enforcing the Act, and pursuant to this authority, the agency drafted a series of regulations. Since the Act went into effect in 1975, the FPPC has issued new regulations and amendments to existing regulations almost every year.

The Act covers numerous topics germane to ethical behavior in public office—financial data reporting obligations, lobbying restrictions, required campaign disclosures, limitations on campaign financing, proscriptions on mass mailings, restrictions on gifts and honoraria, and most significantly, prohibitions on conflicts of interest in the making of governmental decisions. The Act also contains reporting procedures for financial interests and campaign contributions, as well as disqualification requirements when certain financial interests or campaign contribution standards are satisfied.

Please note that this Handbook is general in nature and may not cover all aspects of an actual conflicts of interest issue. Thus, it is not intended to constitute advice on specific conflicts of interest questions. In the event you have concerns about a possible conflict of interest, you should contact your city attorney or agency counsel for further advice.

[1] All statutory references are to the California Government Code unless otherwise indicated. Regulations of the FPPC are referred to as "Regulation."

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1. Disclosure Requirements Under the Political Reform Act

a. Statements of Economic Interests

The Act requires public officials to disclose assets and income that may be materially affected by their official actions by filing a "Statement of Economic Interests" (also known as a "Form 700"). § 87202; Regulation 18115. The requirement applies to council members, judges, elected state officers, members of planning commissions, members of boards of supervisors, district attorneys, county counsels, city managers, city attorneys, city treasurers and other public officials who manage public investments, and to candidates for any of these offices at any election. § 87200.

Officials must file the Form 700 within 30 days after assuming office, and candidates must file no later than the final filing date of a declaration of candidacy. §§ 87201-02. An official must file annually thereafter until he or she leaves office, at which point he or she must file a final statement. §§ 87202-03. The required disclosures on the Form 700 include:

- Investments in business entities (e.g., stock holdings, owning a business, a partnership) that are located or do business in the jurisdiction;
- Interests in real estate (real property) in the jurisdiction, but not including the official's home address;
- Sources of personal income,[2] including gifts, loans, and travel payments;[3] and
- Positions of management or employment with business entities that do business in the jurisdiction.

§ 87203. If the official no longer holds certain investments and real property interests at the time of filing, but held them during the 12 months prior to filing, he or she must still disclose those interests on the Form 700. *Id*. The Form 700 is a public document open to inspection and duplication.

For public officials not covered by the requirements of Section 87203, including employees of state and local government agencies, it is up to the agencies that employ them to decide what their disclosure requirements are. Each state and local agency must adopt a conflicts of interest code tailoring the disclosure requirements for each position within the agency to the types of governmental decisions a person holding that position would make. For example, an employee who approves contracts for goods or services purchased by his or her agency would not be required to disclose

[2] In some instances, an official may need to disclose the sources of income to a business entity in which the official has an ownership interest if the official owns at least 10 percent of a business. In that case, the official would be required to disclose a source of income to the business as a source of income to the official if the official's pro rata share of gross receipts from that source exceeds $10,000 in aggregate during the reporting period. § 87207(b). In those cases, the official must report the name, address, and a general description of the business activity of the business entity, as well as the name of the source of income that aggregates to $10,000 or more.

[3] As of January 1, 2016, if an official receives a gift that is a travel payment, advance, or reimbursement valued at $50 or more, the official must also disclose the travel destination. § 87207(a)(4).

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real estate interests, but would be required to disclose investments in and income from individuals and entities that supply equipment, materials, or services to the agency. §§ 87301-02.

A city that maintains an internet website must post a list of the elected officers who file a Form 700 with that city. A statement must also be posted on the website indicating that these Form 700s may be obtained by visiting the FPPC office or the city clerk's office. The statement must include the physical address for both the FPPC and the city clerk's office. Finally, a link to the FPPC website must be posted with a statement that indicates that Form 700 "for some state and local government agency elected officers may be available in electronic format" on the FPPC's internet website. § 87505.

A local agency may establish a system for the electronic filing of Form 700s, in accordance with State law. § 87500.2. Public officials should seek guidance from the local filing officer as to the appropriate procedure and format for filing a Form 700.

b. Behested Payments

There are also disclosure requirements for certain fundraising activities that elected officials perform for others, including in their capacity as employees or board members of nonprofit organizations. Elected officials who successfully solicit one or more contributions for "legislative, governmental, or charitable purposes" that equal or exceed $5,000 in the aggregate from the same source during a single calendar year must file a report with the official's agency (typically the city clerk) within 30 days of reaching the $5,000 threshold. § 84224(a). The report must contain the following information:

- The contributor's name and address;
- The amount of the contribution;
- The date or dates on which the payments were made;
- The name and address of the contribution recipient;
- If goods or services were contributed, a description of those goods and services; and
- A description of the purpose or event for which the contribution was used.

The statute does not define the term "legislative, governmental, or charitable purposes," but charitable purposes typically involve 501(c)(3) organizations. Examples of "governmental" purposes include fundraising for a new city hall roof, an inaugural celebration committee,[4] litigation expenses,[5] a breakfast honoring public safety personnel,[6] and youth conferences.[7] The term "legislative purpose," in turn, refers to a

[4] *Sutton* Advice Letter, No. A-05-256, 2005 WL 3693740 (2005).
[5] *Stoen* Advice Letter, No. A-03-185, 2004 WL 334564 (2004) (district attorney's expenses in suing a private company when governing body withdrew funding for effort).
[6] *Gallegos* Advice Letter, No. A-00-059, 2000 WL 311529 (2000).

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1996 FPPC opinion in which a state senator asked a private party to pay for a witness's airfare and expenses to testify at a legislative hearing.[8]

These reporting requirements also apply if the payment is "made at the behest of" the elected officer, even if the officer did not actively solicit contributions. §§ 82004.5, 82041.3. A payment is "made at the behest of" an elected officer when it is made "under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of" that officer. *Id*.

This disclosure requirement does not apply to a behested payment made by a local, state, or federal governmental agency for a principally legislative or governmental purpose. § 84224(b)(4).

2. Conflicts of Interest Under the Political Reform Act

In addition to the disclosure requirements, the Act requires public officials to disqualify themselves from making, participating in making, or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. § 87100; Regulation 18700. An official has a disqualifying financial interest in a decision if the decision will have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, directly on the official or a member of the official's immediate family, or on certain listed financial interests. The listed financial interests are:

- Any business entity in which the public official has a direct or indirect investment worth $2,000 or more.
- Any real property in which the public official has a direct or indirect interest worth $2,000 or more.
- Any source of income, including commission income or incentive income, aggregating to at least $500 within 12 months prior to the time when the decision is made. The $500 must be provided or promised to, or received by, the official during the 12 months before the decision.
- Any business entity (excluding nonprofit corporations) in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating $500 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.

[7] *Gallegos* Advice Letter, No. A-98-192, 1998 WL 671296 (1998).
[8] *Schmidt* Advice Letter, No. A-96-098, 1996 WL 779579 (1996).

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§ 87103; Regulations 18700 and 18940.2. The FPPC regulations interpret and provide guidance for most of the terms used in the Act. The FPPC also provides standards for determining if each element of the Act's prohibitions has been satisfied.

3. The FPPC's Test for Analyzing Conflicts of Interest

In the past few years, the FPPC has reorganized and revised the conflict of interest regulations in a comprehensive manner. Under the old regulations, a public official was advised to follow an eight-part test to analyze a potential conflict of interest. The newly revised regulations establish a new four-part test, as stated in Regulation 18700(d).

The new FPPC four-part test assumes that an official already has determined whether he or she is a public official within the meaning of the Act. The new test also assumes that the official has identified the financial interests that may be affected by a particular governmental decision. Since these two steps are necessary for a complete analysis, we recommend that public officials follow the seven steps described below, which incorporate these two initial steps as well as the FPPC's new four-part test.

STEP ONE: IS A PUBLIC OFFICIAL INVOLVED?

Determine whether the individual is a public official within the meaning of the Act.

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

- A "member" does not include an individual who performs duties as part of a committee, board, commission, group, or other body that does not have decision-making authority. A board or commission possesses decision-making authority if: (i) it may make a final governmental decision, (ii) it may compel or prevent a governmental decision by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden, or (iii) it makes substantive recommendations, which, over an extended period of time, have been regularly approved without significant amendment or modification by another official or agency. Regulation 18700(c)(2).

- A "consultant"[9] includes an individual who, pursuant to a contract with a state or local government agency, makes specific kinds of governmental decisions or serves in a staff capacity with the agency and either

[9] For more on who constitutes a "consultant" subject to the Act, see, e.g., *Ennis* Advice Letter, FPPC No. A-15-006, 2015 WL 1781144 (2015).

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participates in governmental decisions or performs the same or substantially all of the same duties that would otherwise be performed by a person in a position listed in the agency's conflict of interest code. Regulation 18700.3.

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

Identify the public official's financial interests.

A public official's financial interests include certain business entities, real property, sources of income, and donors of gifts (as well as intermediaries and agents of such donors). Regulation 18700(c)(6). More specifically, a public official has a financial interest in any of the following:

- A business entity in which the official has a direct or indirect investment worth at least $2,000.[10] (Note: In certain situations, this can include a parent,[11] subsidiary,[12] or otherwise related[13] business entity.[14])
- Any real property in which the public official has a direct or indirect interest worth at least $2,000.[15] Real property interests include all leases except month-to-month leases and leases with terms shorter than a month. Regulation 18233.
- Any "source of income" of at least $500 that is provided or promised to the public official, or received by the public official within 12 months prior to a governmental decision, not including gifts and loans by banks available to the general public. Income is "promised to" the official if he

[10] The FPPC has determined that membership in a country club is a financial interest in the club as a business entity when the membership is transferrable and can be resold for profit or loss. *Gee* Advice Letter, FPPC No. A-17-249, 2018 WL 723401 (2018).

[11] A business entity is a "parent" if it is a corporation that controls more than 50 percent of the voting stock of another corporation; the parent corporation is also a parent to any subsidiaries of the corporation that it controls. Regulation 18700.2 (b)(1).

[12] A business entity is a "subsidiary" if it is a corporation whose voting stock is more than 50 percent controlled by another corporation; the subsidiary corporation is also a subsidiary to any corporation that controls its parent corporation. Regulation 18700.2 (b)(2).

[13] Business entities, other than a parent corporation, are "otherwise related" if (1) the same person or persons together direct or control each business entity, or (2) the same person or persons together have a 50 percent or greater ownership interest in each business entity. Regulation 18700.2 (b)(3).

[14] An official with a financial interest in a business entity also has an interest in a parent or subsidiary of the business entity or an otherwise related business entity, unless (1) the official's only interest is that of a shareholder and the official is a passive shareholder with less than 5 percent of the shares of the corporation, and (2) the parent corporation is required to file annual Form 10-K or 20-F Reports with the Securities and Exchange Commission and has not identified the subsidiary on those forms or its annual report. Regulation 18700.2 (c)-(d).

[15] The FPPC has determined that membership in a country club is a financial interest in real property when the member would be entitled to a proportionate share of the value of the club's assets if the club were dissolved. *Gee* Advice Letter, FPPC No. A-17-249, 2018 WL 723401 (2018).

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or she has a "legally enforceable right to the promised income." Regulation 18700(c)(6)(C). The term "source of income" may include individuals, organizations, and businesses. If the "source of income" is a business that provides or promises the official at least $500 within 12 months prior to a governmental decision, the official also has a source-of-income interest in: (1) any individual owning at least a 50 percent interest in that business, and (2) any individual who has the power to direct or cause the direction of management and policies of the business. Regulation 18700.1(a)(2).

- Any business entity in which the public official is a director, officer, partner, trustee, or employee, or holds any position of management. (Note: Again, this may include a parent, subsidiary, or otherwise related business entity.)

- Any donor of gifts, or any intermediary or agent for a donor of gifts, amounting to at least $500 where that amount is provided to, received by, or promised to the official in the 12 months prior to a governmental decision. Regulation 18700(c)(6)(E).

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

§§ 82047, 87103; Regulations 18700, 18940.2. The terms "indirect investment" and "indirect interest" are used to indicate investments and interests owned by the spouse or dependent child of the public official, an agent of the public official, or a business entity or trust in which the official, or his or her agent(s), spouse, or dependent children, has at least a 10 percent ownership interest. Regulation 18700(c)(6)(F).

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

Determine whether the governmental decision will have a reasonably foreseeable financial effect on any of the public official's financial interests.

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Regulation 18701 draws a distinction between a financial interest that is "explicitly involved" in a decision, on the one hand, and a financial interest that is not "explicitly involved" in a decision, on the other hand.

Financial interests are considered to be explicitly involved in a decision if the interest is a "named party in, or the subject of, a governmental decision before the official or the official's agency." Regulation 18701(a). A financial interest is the "subject" of a proceeding "if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1) – (6)." Regulation 18701(a). In those cases, the financial effect is presumed to be reasonably foreseeable.

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

The FPPC also provides the following list of non-exclusive factors that should be considered when determining whether a governmental decision will have a reasonably foreseeable effect on a financial interest that is not explicitly involved in the decision:

- The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

- Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

- Whether the public official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has a financial interest.

- Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interest might compromise a public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

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- Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision.

- Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position.

Possession of a real estate, brokerage license, or other professional license does not automatically constitute a reasonably foreseeable effect on the official's financial interest. Regulation 18701.1. The official's likely business activity must be considered to determine whether the governmental decision will have a reasonably foreseeable effect on one of the official's financial interests.

If it is not reasonably foreseeable that the governmental decision will have a financial effect on any of the official's financial interests, there is no conflict under the Act. If it is determined that it is reasonably foreseeable that the governmental decision will have a financial effect, however, the official must determine whether the effect is material.

STEP FOUR: WILL THE REASONABLY FORESEEABLE EFFECT BE MATERIAL?

Determine whether the reasonably foreseeable financial effect will be material.

If the effect is "nominal, inconsequential, or insignificant," the financial effect will not be considered material. Regulation 18702(b). Otherwise, however, the provisions in Regulations 18702.1 through 18702.5 determine – for each type of financial interest – whether the effect is material. Regulation 18702(a).

a. <u>Business Entities</u>

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

- Initiates the proceeding by filing an application, claim, appeal, or other request for action concerning the entity with the official's agency;

- Offers to sell a product or service to the official's agency;

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

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

- The decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or more than:
  - ✓ $1,000,000; or
  - ✓ Five percent of the entity's annual gross revenues and the increase or decrease is at least $10,000.
- The decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than:
  - ✓ $250,000; or
  - ✓ One percent of the entity's annual gross revenues and the change in expenses is at least $2,500.
- The official knows, or has reason to know, that the entity has an interest in real property and:
  - ✓ The property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) - (6); or
  - ✓ There is clear and convincing evidence the decision would have a substantial effect on the property.

The FPPC also created a new "small shareholder" exception that allows officials to participate in decisions explicitly involving a business entity where the official's only interest in that business entity is an investment interest worth no more than $25,000.

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Regulation 18702.1(b). To qualify for this exception, the interest also must be less than one percent of the business entity's shares. However, meeting these thresholds does not automatically allow the official to participate in the decision. The official still must analyze the decision's potential effect on the business entity's annual gross revenues, assets and liabilities, expenses, and real property interests. Under this rule, even where an official has only a small investment in a business entity, the impact of a decision might be so significant that the official still has a conflict of interest.

b. Real Property – Modified "500-Foot Rule" and Other Criteria

The traditional "500-foot" rule has been replaced with an extensive list of criteria that must be analyzed to determine whether a decision will have a material financial effect on an official's real property interest. Regulation 18702.2. There are now eight materiality standards that must be evaluated when an official has an ownership interest in real property, and four materiality standards that must be evaluated when an official has a leasehold interest in real property (i.e., as the lessee of the property).

Regulation 18702.2 now provides that the reasonably foreseeable financial effect of a governmental decision on an official's real property economic interest, other than a leasehold interest, is material whenever the governmental decision:

- Involves the adoption of, or amendment to, a development plan or criteria applying to the parcel;
- Determines the parcel's zoning or rezoning, other than a zoning decision applicable to all properties designated in that category; annexation or de-annexation; inclusion in, or exclusion from, any city, county, district, or local government subdivision or other boundaries, other than elective district boundaries;
- Would impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel;
- Authorizes the sale, purchase, or lease of the parcel;
- Involves the issuance, denial or revocation of a license, permit, or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, that real property;
- Involves construction of, or improvements to, streets, water, sewer, storm drainage, or similar facilities, and the parcel will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services;
- Involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property; or

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- Involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel's:
  - ✓ Development potential;
  - ✓ Income producing potential;
  - ✓ Highest and best use;
  - ✓ Character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or
  - ✓ Market value.

Regulation 18702.2(b) clarifies that the financial effect of a governmental decision on a parcel of real property in which an official has an ownership interest is presumed not to be material whenever the governmental decision involves property located 1,000 feet or more from the property line of the official's property. This presumption may be rebutted, however, with clear and convincing evidence that the governmental decision would have a substantial effect on the official's property.

The FPPC has relaxed the rules with respect to real property economic interests that stem from having an ownership interest in the common area of a common interest development. Previously, in addition to evaluating whether the decision concerned a project located within 500 feet of the public official's real property, it was necessary to evaluate whether the decision was within 500 feet of any homeowner association common area in which the official had an ownership interest. Now, Regulation 18702.2 excludes common areas in common interest developments from the definition of "real property" for the purpose of conducting a conflict of interest analysis. Thus, the proximity of homeowner association common areas to a project is no longer a factor in the conflict of interest analysis.

With respect to an official's leasehold interests, i.e., where the official is the lessee of the property, Regulation 18702.2(c) now provides that the reasonably foreseeable financial effect of a governmental decision on an official's real property economic interest is material only if the governmental decision will:

- Change the termination date of the lease;
- Increase or decrease the potential rental value of the property;
- Change the official's actual or legally allowable use of the property; or
- Impact the official's use and enjoyment of the property.

There are a few exceptions in Regulation 18702.2(d) by which the effect of a decision on an official's real property interest will not be considered material. The following

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decisions will not be considered to have a material effect on an official's real property interest:

- The decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage, or similar facilities.
- The decision solely concerns the adoption or amendment of a general plan and all of the following apply:
  - ✓ The decision only identifies planning objectives or is otherwise exclusively one of policy. A decision will not qualify under this subdivision if the decision is initiated by the public official, by a person that is a financial interest to the public official, or by a person representing either the public official or a financial interest to the public official.
  - ✓ The decision requires a further decision or decisions by the public official's agency before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent.
  - ✓ The decision does not concern an identifiable parcel or parcels or development project. A decision does not "concern an identifiable parcel or parcels" solely because, in the proceeding before the agency in which the decision is made, the parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency's jurisdiction and the economic interests of the official are not singled out.
  - ✓ The decision does not concern the agency's prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.

These rules replace the old "500-foot rule" that applied before 2014. Of special interest to many local public officials, these provisions appear to allow public officials to participate in most decisions relating to slurry sealing, asphalt paving, curb and sidewalk repairs, or tree replacement, even if the work occurs within 500 feet of their property, due to the exception for repairs and replacement of existing infrastructure.

c. <u>Sources of Income</u>

The FPPC regulations also provide materiality standards for sources of income. Regulation 18702.3. A "source of income," as discussed above, is any person from whom a public official has received at least $500 in the twelve months prior to the

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relevant governmental decision. Regulation 18700.1. A "person" includes individuals, organizations, and business entities. § 82047.

The regulations provide that any reasonably foreseeable financial effect on an individual, organization, or business entity[16] that is a source of income to an official or an official's spouse is material if:

- The source is a named party in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party; or
- The decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official, or the official's spouse, receives or is promised the income for achieving the purpose or goal. This is known as the "Nexus" test.

Regulation 18702.3(a)(1), 18702.3(b). In addition to these general standards, the regulations provide further guidance that separately analyzes a source of income depending on whether the source is an individual, non-profit organization, or business entity. If the source is an ***individual***, a reasonably foreseeable financial effect on the source is material if:

- The decision may affect the individual's income, investments, or other assets or liabilities (other than an interest in a business entity or real property) by $1,000 or more;
- The official knows, or has reason to know, that the individual has an interest in a business entity that will be financially affected under the materiality standards in Regulation 18702.1; or
- The official knows, or has reason to know, that the individual has an interest in real property, and either:
  - ✓ The property is a named party in, or the subject of, the decision as defined in Regulations 18701(a) and 18702.2(a)(1) - (6); or
  - ✓ There is clear and convincing evidence the decision would have a substantial effect on the property.

If the source is a ***nonprofit organization***, a reasonably foreseeable financial effect on the source is material if:

- The decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or more than (1) $1,000,000, or (2) five percent of

[16] The materiality standards for sources of income provided in this section do not apply where a government entity qualifies as a source of income, including where a public official is paid by the entity as a consultant or contractor. Regulation 18702.3(d). An official with an interest in a governmental entity is disqualified from taking part in a decision only if there is a unique effect on that official. *Id.*

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the organization's annual gross receipts and the increase or decrease is equal to or greater than $10,000;

- The decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than (1) $250,000, or (2) one percent of the organization's annual gross receipts and the change in expenses is equal to or greater than $2,500; or

- The official knows, or has reason to, know that the organization has an interest in real property and either:

  ✓ The property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) - (6); or

  ✓ There is clear and convincing evidence the decision would have a substantial effect on the property.

If the source is a ***business entity***, a reasonably foreseeable financial effect on the source is material if that business entity will be financially affected under the standards as applied to a financial interest in Regulation 18702.1 (see ***Business Entities*** above). Regulation 18702.3(a). The regulation also includes additional provisions to help officials who receive income from retail sales of a business entity in determining when a retail customer becomes a source of income to the public official directly. § 87103.5. This regulatory provision, which is intended to replace prior Regulation 18707.5, provides that:

- The retail customers of a business entity constitute a significant segment of the public generally if the business is open to the public, and provides goods or services to customers that comprise a broad base of persons representative of the jurisdiction; and

- Income from an individual customer is not distinguishable from the amount of income received from other customers when the official is unable to recognize a significant monetary difference between the business provided by the individual customer and the general clientele of the business. An official is unable to recognize a significant monetary difference when: (1) the business is of the type that sales to any one customer will not have a significant impact on the business's annual net sales; or (2) the business has no records that distinguish customers by amount of sales, and the official has no other information that the customer provides significantly more income to the business than an average customer.

Regulation 18702.3(c). If you own 10 percent or more of a business entity that is engaged in the retail sale of goods or services, we recommend that you review this provision in order to determine whether individual retail customers will be considered sources of income to you for the purpose of analyzing conflicts under the Act.

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d. Sources of Gifts

The FPPC regulations also provide materiality standards for sources of gifts. Regulation 18702.4. For the purpose of analyzing potential conflicts under the Political Reform Act, a donor becomes a "source of gifts" by providing or promising a public official with gifts valued at $500 or more in the aggregate in the 12 months prior to a governmental decision. Regulations 18700(c)(6)(E), 18940.2. A person may also be a source of a gift by being an "intermediary or agent for a donor of" a similar gift. Regulation 18700(c)(6)(E).

Under the FPPC regulations, a financial effect on a source of a gift is material if:

- The source is a claimant, applicant, respondent, contracting party, or otherwise named or identified as the subject of the proceeding;
- The source is an individual that will be financially affected under the standards applied to an official in Regulation 18702.5 (see ***Personal Finances*** below), or the official knows, or has reason to know, that the individual has an interest in a business entity or real property that will be financially affected under the standards applied to a financial interest in Regulation 18702.1 or 18702.2, respectively;
- The source is a nonprofit organization that will be financially affected under the materiality standards applied to a nonprofit source of income interest in Regulation 18702.3 (see ***Sources of Income*** above); or
- The source is a business entity that will be financially affected under the standards as applied to a financial interest in Regulation 18702.1 (see ***Business Entities*** above).

Regulation 18702.4. Like with sources of income, the analysis of materiality for sources of gifts may depend on whether the source is an individual, a nonprofit, or a business entity. If the source of a gift is the "claimant, applicant, respondent, contracting party, or … otherwise named or identified as the subject of the proceeding," the financial effect will be deemed material, regardless of whether the source is an individual, a nonprofit, or a business entity. If the source of a gift is not the "claimant, applicant, respondent, contracting party, or … otherwise named or identified as the subject of the proceeding," the official will need to apply the other standards in Regulation 18702.4(b) – (d), depending on whether the source of the gift is an individual, a nonprofit, or a business entity.

e. Personal Finances

Finally, the regulations provide materiality standards for effects on personal finances. Regulation 18702.5. A reasonably foreseeable financial effect on an official's or his or her immediate family's personal finances is considered material if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of $500 or more in any 12-month period due to the decision. Regulation 18702.5(a).

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However, a financial effect is ***not*** considered material under Government Code Section 87103 if the decision would do any of the following:

- Affect only the salary, per diem, or reimbursement for expenses of the public official, or a member of his or her immediate family receives from a federal, state, or local government agency unless the decision is to appoint (other than an appointing decision otherwise permitted under Regulation 18702.5), hire, fire, promote, demote, suspend without pay, or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family member is the only person in the job classification or position.

- Appoint the official to be a member of any group or body created by law or formed by the official's agency for a special purpose. However, if the official will receive a stipend for attending meetings of the group or body aggregating $500 or more in any 12-month period, the effect on the official's personal finances is material unless the appointing body posts specified information on its website.[17]

- Appoint the official to be an officer of the governing body of which the official is already a member, such as a decision to appoint a city councilmember to be the city's mayor.

- Establish or change the benefits or retirement plan of the official or the official's immediate family member, and the decision applies equally to all employees or retirees in the same bargaining unit or other representative group.

- Result in the payment of any travel expenses incurred by the official or the official's immediate family member while attending a meeting as an authorized representative of an agency.

- Permit the official's use of any government property, including automobiles or other modes of transportation, mobile communication devices, or other agency-provided equipment for carrying out the official's duties, including any nominal, incidental, negligible, or inconsequential personal use while on duty.

- Result in the official's receipt of any personal reward from the official's use of a personal charge card or participation in any other membership

[17] Specifically, the appointing body must post all of the following information on its website: (1) a list of each appointed position and its term; (2) the amount of the stipend for each appointed position; (3) the name of the official who has been appointed to the position; and (4) the name of any official who has been appointed to be an alternate for the position. Regulation 18702.5(b)(2).

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rewards program, so long as the reward is associated with the official's approved travel expenses and is no different from the reward offered to the public.

Regulation 18702.5(b). Any effect on the interests noted above would not constitute a material effect on personal finances for the purpose of the Political Reform Act.

Regulation 18702.5 clarifies that if a decision only affects a business entity or real property in which the official has a financial interest, the regulation regarding personal finances does not apply. Regulation 18702.5(c). Under those circumstances, the official should analyze the applicable materiality standards for those types of interests in Regulations 18702.1 and 18702.2 to determine whether a conflict exists.

STEP FIVE: DOES THE "PUBLIC GENERALLY" EXCEPTION APPLY?

Determine if the official can demonstrate that the material financial effect on the official's interest is indistinguishable from the decision's effect on the public generally.

Once it is determined that it is reasonably foreseeable that a decision will have a material financial effect on an official's financial interest, it is necessary to evaluate whether an exception to the disqualification requirement is applicable. One exception, known as the "public generally" exception, provides that even if a governmental decision will have a reasonably foreseeable material financial effect on the official's financial interest, disqualification will not be required if the effect on the public official's financial interest is indistinguishable from the decision's effect on the financial interests of the public generally. Regulation 18703.

In order to use this exception, the official must be able to demonstrate two core elements. First, the governmental decision must affect a "significant segment" of the public in the jurisdiction of the public agency. Second, the governmental decision's effect on the official's financial interest must not be unique as compared to the effect on the significant segment. Regulation 18703.

The FPPC has simplified the regulation to determine what constitutes a sufficiently "significant segment" of the public. Regulation 18703(b). A significant segment of the public is "at least 25 percent of" any of the following:

- All businesses or nonprofit entities within the official's jurisdiction;
- All real property, commercial real property, or residential real property within the official's jurisdiction; or

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- All individuals within the official's jurisdiction.

Regulation 18703(b).

To determine whether a decision's effect on the official's financial interest is "unique" as compared to the effect on the significant segment of the public, the FPPC requires that an official determine whether the decision has a "disproportionate" effect on:

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

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

- An official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests[18] in similar entities or properties that is substantially greater than the effect on a single interest.

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

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

- An official's personal finances or those of his or her immediate family.

Regulation 18703(c).

The official's "jurisdiction" for the purposes of this regulation constitutes the "jurisdiction of the state or local government agency as defined in Section 82035, or the designated geographical area the official was elected to represent, or the area to which the official's authority and duties are limited if not elected." Regulation 18703(d). Real property is considered to be within a "jurisdiction" if the "property or any part of it is located within, or not more than, two miles outside the boundaries of the jurisdiction or within two miles of any land owned or used by the local government agency." § 82035.

The FPPC Regulations include a number of specialized "public generally" exceptions. Regulation 18703(e). The financial effect on an official's financial interest is deemed indistinguishable from that of the public generally if the official establishes:

- The decision establishes or adjusts assessments, taxes, fees, or rates for water, utility, or other broadly provided public services or facilities that are applied equally, proportionally, or by the same percentage to the

[18] Ownership of only two residential properties apparently would not constitute "multiple interests … in properties that is substantially greater than the effect on a single interest." *Wagner* Advice Letter, FPPC No. A-15-227, 2015 WL 9680333 (2015).

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official's interest and other businesses, properties, or individuals subject to the assessment, tax, fee, or rate.

- The decision affects the official's personal finances as a result of an increase or decrease to a general fee or charge, such as parking rates, permits, license fees, application fees, or any general fee that applies to the entire jurisdiction.

- The decision affects residential real property limited to a specific location, and the decision establishes, amends, or eliminates ordinances that restrict on-street parking, impose traffic controls, deter vagrancy, reduce nuisance or improve public safety, provided the body making the decision gathers sufficient evidence to support the need for the action at the specific location.

- The decision affects all renters of residential property within the official's jurisdiction and only interests resulting from the official's leasehold interest in his or her residence are affected.

- The decision is made by a board or commission and the law that establishes the board or commission requires certain appointees have a representative interest in a particular industry, trade, or profession or other identified interest, and the public official is an appointed member representing that interest. This provision applies only if the effect is on the industry, trade, or profession or other identified interest represented and there is no unique effect on the official's interest.

- The decision is made pursuant to an official proclamation of a state of emergency when required to mitigate against the effects directly arising out of the emergency and there is no unique effect on the official's interest.

- The decision affects a federal, state, or local governmental entity in which the official has an interest and there is no unique effect on the official's interest.

Regulation 18703(e).

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

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

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

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

- A public official "participates in" a governmental decision when the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review. Regulation 18704(b).

- A public official "uses his or her official position to influence" a decision if the official: (i) contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or (ii) contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.

Regulation 18704(c).

There are limited exceptions to this rule. A public official is not making, participating in making, or influencing a government decision when the official acts in a solely ministerial, secretarial, or clerical manner. Regulation 18704(d)(1).

[19] A public official's "determination not to act" does not constitute participating in "making" a governmental decision when the public official is abstaining from a decision due to a personal financial interest.

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In addition, an official is not making, participating in making, or influencing a government decision when the official appears before the public agency as a member of the general public to represent specific and limited "personal interests" or when the official negotiates his or her compensation or terms of employment. Regulation 18704(d). With respect to negotiating the terms of employment, however, "an official may not make a decision to appoint, hire, fire, promote, demote, or suspend without pay or take disciplinary action with financial sanction against the official or his or her immediate family, or set a salary for the official or his or her immediate family different from salaries paid to other employees of the government agency in the same job classification or position." Regulation 18704(d)(3).

Making, participating in, or influencing a governmental decision also does not include communications to either the press or the general public. Regulation 18704(d)(4). Nor does it include academic decisions. Regulation 18704(d)(5). Limited actions in an official's professional capacity as an architect or engineer also are not considered to be making, participating in, or influencing a governmental decision. Regulation 18705(d)(6). Finally, an official who serves as a consultant will not be participating in a decision by making a recommendation regarding additional services if the agency has already contracted with the consultant – for an agreed upon price – to make recommendations concerning services of the type offered by the consultant. Regulation 18704(d)(7).

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

Determine if the public official's participation is legally required despite a conflict of interest.

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

This exception is applied when a quorum of a legislative body cannot be convened due to the disqualifying conflicts of interests of its members. In that situation, as many members as are needed to create the minimum number for the quorum may be selected at random to participate. In these situations, stringent disclosure requirements apply, not only regarding the basis of the selected member's conflict of interest, but also the reason why there is no alternative source of decision-making authority. Regulation 18705(b). For the purposes of this section, a "quorum" means "the minimum number of members required to conduct business and when the vote of a supermajority is required to adopt an item, the "quorum" shall be that minimum number of members needed for that adoption." Regulation 18705(d).

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Note that this rule is construed narrowly and may not be invoked to permit an official who is otherwise disqualified to vote to break a tie or to vote if a quorum can be convened of other members of the agency who are not disqualified, whether or not such other members are actually present at the time of the decision. Regulation 18705(c).

4. Abstention

When a public official has a conflict of interest under the Act, he or she is required to abstain from making, participating in making, or using or attempting to use his or her official position to influence the local agency's decision. Abstention avoids a violation of the conflict of interest provisions of the Act.

The Act establishes specific procedures that most public officials must follow when they have a conflict of interest and are required to abstain from a decision. § 87105; Regulation 18707. Immediately prior to the consideration of the matter, the official must: (i) identify each financial interest that gives rise to the conflict in detail sufficient to be understood by the public (except that disclosure of the exact street address of a residence is not required); (ii) publicly state his or her recusal from the matter; and (iii) leave the room until after the disposition of the matter unless the matter appears on a consent calendar, or other similar portion of an agenda for uncontested matters, or the official is speaking as a member of the public regarding an applicable personal interest. § 87105; Regulations 18707, 18704(d)(2). The FPPC recently clarified the procedure required and precise information that must be disclosed, as described in new Regulation 18707. This includes additional information regarding rules for closed sessions and matters on the consent calendar.

The procedure stated in Regulation 18707(a) must be followed by all council members, judges, elected state officers, members of planning commissions, members of boards of supervisors, district attorneys, county counsels, city managers, city attorneys, city treasurers and other public officials who manage public investments, and to candidates for any of these offices at any election. §§ 87105, 87200. The Act does not require other public officials who must file financial disclosure forms under local conflict of interest codes to follow the same procedure, but the FPPC has now prescribed specific rules for those public officials. Regulation 18707(b).

Depending on the nature of his or her interest, a public official who must abstain from a decision may comment on the item as a member of the public during the public comment period on a matter related to his or her "personal interests." The term "personal interest" is defined to include an interest in real property or a business entity that is wholly owned by the official or his or her immediate family. Regulations 18704(d)(2)(A) and (B). It also includes business entities over which the official, or the official and his or her immediate family, exercise sole direction and control. Regulation 18704(d)(2)(C).

If a public official wishes to speak on a matter related to his or her "personal interests," the official must publicly identify the financial interest (including all of the specific details required by the regulation). Regulation 18707(a)(1)(A). The public identification must

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be made orally and be included in the official public record. Regulation 18707(a)(1)(B). Subsequently, the official must recuse himself or herself and leave the dais to speak from the same area as the members of the public. Regulation 18707(a)(3)(C). Like other members of the public, the official may listen to the comments of other speakers on the matter. Regulation 18704(a)(3)(C).

Note that when a public official abstains from a decision, his or her presence does not count toward achieving a quorum. Regulation 18707. Accordingly, if several officials must abstain from a decision under the Political Reform Act, there may not be sufficient members of the body present to consider a matter under the Brown Act. In such a circumstance, it may be possible to use the exception for legally required participation, as discussed above.

5. Penalties for Violation

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

Civil penalties include injunctive relief that may be sought by the district attorney or any person residing in the jurisdiction. § 91003. In the event a court finds that the actions would not have been taken but for the action of the official with the conflict of interest, the court is empowered to void the decision. § 91003. Misdemeanor criminal penalties are provided in situations where a knowing or willful violation of the act occurs, and generally, persons convicted of violating the Act may not be a candidate for elective office or act as a lobbyist for four years after the conviction. §§ 91000, 91002. The statute of limitations for civil and criminal enforcement actions is four years from the date of the violation. §§ 91000(c), 91011(b). The statute of limitations for administrative actions brought by the FPPC is five years from the date of the violation. § 91000.5.

6. Seeking Advice on Conflict of Interest Questions

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

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time to gather all relevant facts, draft a letter to the FPPC, and respond to the advice once given.

B. Government Code Section 1090

Government Code Section 1090 provides in relevant part: "[m]embers 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."

The purpose of the prohibition contained in Section 1090 is to preclude a public official from using his or her position to obtain business or financial advantage through the approval of contracts by the public entities which he or she serves. As more fully explained below, the prohibition applies to not only preclude a member of the body or board that approves the contract from directly contracting with that same public entity, but it also applies when the public official has a financial or other specified relationship to the entity that seeks to contract with the public entity. The intent of the law is to remove the possibility of any personal influence that might bear on an official's decision-making activities on contracts executed by his or her public entity.

Upon the enactment of the Act in 1974, questions arose as to whether that new law impliedly repealed or preempted the provisions of Section 1090. The California Attorney General addressed this issue first, concluding in a 1976 opinion that the Act did not implicitly repeal or preempt Section 1090. 59 Ops. Cal. Att'y Gen. 604, 671 (1976). Since that time, the courts and the Attorney General have consistently considered Section 1090 as having continuing effect. For example, in *People v. Honig*, 48 Cal. App. 4th 289, 328-29 (1996), the defendant in a criminal case for violations of Section 1090 argued that the Act superseded Section 1090. The California Court of Appeal declined to so rule, holding instead that the term "financially interested" in Section 1090 has a different meaning than the term "material financial effect" in the Act. In another case, the California Court of Appeal again held that the Act and Section 1090 are "two different statutory schemes." *City of Vernon v. Central Basin Mun. Water Dist.*, 69 Cal. App. 4th 508, 513 (1999); see also *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201 (1977); *People v. Vallerga*, 67 Cal. App. 3d 847 (1977); *City Council v. McKinley*, 80 Cal. App. 3d 204 (1978); *City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191 (1980); *Thomson* v. Call, 38 Cal. 3d 633 (1985); *Campagna v. City of Sanger*, 42 Cal. App. 4th 533 (1996); 67 Ops. Cal. Att'y Gen. 369, 375 (1984); 69 Ops. Cal. Att'y Gen. 102 (1986); 70 Ops. Cal. Att'y Gen. 45, 47 (1987); 73 Ops. Cal. Att'y Gen. 191, 194-95 (1990).

Both the Act and the common law (meaning court-made) doctrine against conflicts of interest require the public official with a conflict of interest to abstain from participation in the decision. Section 1090, by contrast, also prohibits the public entity from entering into a contract in which one of its officers or employees has a financial interest, unless certain exceptions apply.

If the conflicted official is a member of a board or commission that 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*, 38 Cal. 3d at 649. This absolute prohibition

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applies regardless of whether the contract is found to be fair and equitable or the official abstains from all participation in the decision. *Thomson*, 38 Cal. 3d at 649-50; *Fraser-Yamor Agency*, 68 Cal. App. 3d at 211-12; *City of Imperial Beach*, 103 Cal. App. 3d at 195. The only way a public entity could still enter into such a contract – i.e., in which an official who is a member of the board or commission that executes the contract has a financial interest – would be if that interest qualifies as a "remote interest" or "non-interest" within the meaning of specified provisions discussed below.

1. Three Principal Components of Section 1090

The prohibition contained in Section 1090 involves three principal components: (1) the person subject to the prohibition must be an officer or employee of one of the types of governmental entities listed in Section 1090; (2) the public officer or employee must be "financially interested" in a contract; and (3) the contract must be made by either the public official in his or her official capacity or by the body or board of which the official is a member.

a. Officer or Employee of Listed Government Entity

The first element is whether the person subject to the prohibition is a member of the Legislature or an officer or employee of the state, a county, a district, a judicial district, or a city. Virtually every officer or employee of a municipality or local governmental district is subject to the prohibition of Section 1090. In 2018, the Attorney General concluded that a California charter school's governing body is also subject to Section 1090. 101 Ops. Cal. Atty. Gen. 92.

In recent years, the courts also have concluded that consultants may be considered "employees" for the purpose of civil liability under Section 1090. In 2017, the California Supreme Court held that Section 1090 applies to independent contractors "when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." *People v. Superior Court (Sahlolbei)*, 3 Cal. 5th 230 (2017); see also, *California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc*., 148 Cal. App. 4th 682, 691 (2007); see also, *Hub City Solid Waste Services, Inc. v. City of Compton*, 186 Cal. App. 4th 1114, 1124-1125 (2010). Moreover, the courts have held that even private companies may be subject to Section 1090 where the company has the potential to exert considerable influence over the agency's contracting decision. *Davis v. Fresno Unified School District*, 237 Cal. App. 4th 261 (2015); *McGee v. Balfour Beatty Construction*, LLC, 247 Cal. App. 4th 235, 261 (2016). In 2019, the California Court of Appeal clarified that a consultant's mere provision of services to a public agency does not create a *per se* conflict of interest precluding future contracts, if, in the initial transaction, the consultant was not entrusted with acting on behalf of the public agency. *California Taxpayers Action Network v. Tabor Construction, Inc.*, 42 Cal. App. 5th 824 (2019).

As such, we advise that both public agencies and independent contractors carefully evaluate whether their duties and obligations include engaging in or advising on public contracting. If so, their involvement in those contracting decisions must be evaluated for compliance with Section 1090.

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b. Financial Interest in a Contract

The second element of the prohibition is the existence of a direct or indirect financial interest in a contract. The courts have interpreted the term "financially interested" as including any direct interest, such as that involved when a public official enters directly into a contract with the body of which he is a member. *Thomson v. Call*, 38 Cal. 3d 633 (1985). The courts have also interpreted "financially interested" as including indirect financial interests in a contract, where, for example, a public official has a business relationship with the entity that would be contracting with the public entity, or when the public official would gain something financially by the making of the contract. *Fraser-Yamor Agency*, 68 Cal. App. 3d 201 (1977); *Finnegan v. Schrader*, 91 Cal. App. 4th 572, 579 (2001). In *Thomson v. Call*, the California Supreme Court described the breadth of the statute this way:

> "Section 1090 forbids city officers . . . from being 'financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.' The proscribed interest certainly includes any direct interest, such as that involved when an officer enters directly into a contract with the body of which he is a member. California courts have also consistently voided such contracts where the public officer was found to have an indirect interest therein. . . . Neither the absence of actual fraud nor the possibility of a 'good faith' mistake on [the officer's] part can affect the conclusion that this contract violates section 1090 and is therefore void."

38 Cal. 3d at 645-46 (citations omitted).

In *Thomson*, a council member sold certain real property to a third party, knowing that the city was negotiating a deal to acquire multiple parcels of property in that area for a public park. The third party then conveyed the council member's property to the city, in an apparent attempt to evade the provisions of Section 1090. The court essentially "unwound" and invalidated the entire transaction based on the council member's interest in the transaction. The court refused to focus on the isolated contract between the city and the third party that bought the property from the council member, but rather viewed all of the successive contracts as one complex multi-party agreement. The court ordered the council member to disgorge all funds he received in the transaction and ordered that the city retain title to the property. The court noted that this type of severe remedy was necessary to discourage violations of Section 1090.

Other decisions have followed this same broad reading of "indirect interests." In *People v. Vallerga*, the California Court of Appeal summarized court decisions addressing financial interests under Section 1090 as follows: "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." 67 Cal. App. 3d 847, 867 (1977); see also *People v. Honig*, 48 Cal. App. 4th 289, 315 (1996) (stating the same rule). The scope of indirect interests that could form a "devious and winding chain" back to a public contract is broad, but this reflects the judicial stance of vigilant enforcement of Section 1090. See, e.g., *Thomson*, 38 Cal. 3d at 652 ("[T]he policy of strict enforcement

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of conflict-of-interest statutes . . . provides a strong disincentive for those officers who might be tempted to take personal advantage of their public offices, and it is a bright-line remedy which may be appropriate in many different factual situations."); *Berka v. Woodward*, 125 Cal. 119, 128 (1899) (noting the need for "strict enforcement" of the conflict of interest statutes).

Although Section 1090 traditionally has been interpreted broadly, a California appellate decision warned against an overly broad interpretation of the term "financial interest" for the purpose of Section 1090. See *Eden Township Healthcare District v. Sutter Health*, 202 Cal. App. 4th 208, 228 (2011). The court acknowledged the general principle that the "defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interest the official is charged with protecting." *Id.* at 221. The court concluded that the salaried CEO of a non-profit medical center, who also served on the board of a hospital district, was not financially interested in contracts between the medical center and the hospital district, despite the clear potential effect on his employer. *Id.* at 222. The court noted that there was "nothing in the record to support the inference that the [agreements] bear any relationship to [the CEO's] continued employment" with the medical center. *Id.* at 223-224. Moreover, the court noted that there was "no evidence that [the CEO would] derive any financial benefit arising from the" agreements in question. *Id.* at 226. The court stated broadly:

> In our view, if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract and any explicit legislative exemption for such a circumstance would be unnecessarily redundant.

Id. at 228. The court distinguished the case of *Miller v. City of Martinez*, 28 Cal. App. 2d 364 (1938), in which the complaint alleged that a council member had a financial interest in a contract with a company that employed him and in which he also held stock. *Id.* at 226.

The ruling in *Eden Township* could be construed to suggest that an official is only "financially interested" in a contract that affects the official's compensation or continued employment.[20] In light of subsequent FPPC advice letters, however, there is continued uncertainty regarding the application and interpretation of the court's holding in *Eden Township*.[21] As such, we recommend that public officials seek legal assistance whenever a potential Section 1090 conflict arises.

In addition to a "financial interest," there must be a contract in order for Section 1090 to apply, as described below. General contract principles apply to this determination and include such arrangements as purchase and service contracts as well as development agreements between a city and a developer (78 Ops. Cal. Att'y Gen. 230 (1995)); 82

[20] See also, *Ansolabehere* Advice Letter, FPPC No. A-15-180, 2015 WL 9680325 (2015); *Devaney* Advice Letter, FPPC NO. A-15-213, 2015 WL 7252462 (2015); but cf. Carney Advice Letter, FPPC No. A-16-073, 2016 WL 3212417 (2016) and *Diaz* Advice Letter, FPPC No. A-16-214, 2016 WL 7033000 (2016).

[21] See, e.g., *Diaz* Advice Letter, FPPC No. A-16-214, 2016 WL 7033000 (2016) and *Roy* Advice Letter, FPPC No. A-16-157, 2016 WL 6565871 (2016).

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Ops. Cal. Att'y Gen. 126, 129 n.4 (1999)), joint powers agreements (*People v. Gnass*, 101 Cal. App. 4th 1271, 1301 (2002)), and payments for conference attendance expenses (75 Ops. Cal. Att'y Gen. 20 (1992)).

c. **A Contract "Made" by the Official or by a Body or Board of which the Official Is a Member**

The third element necessary for a Section 1090 violation is that the contract has to be "made" either by the official or employee acting in his or her official capacity, or by any body or board of which the official is a member. The "making" of a contract is most commonly implicated by a city council's approval of a simple purchase order as part of the approval of a demand warrant registrar; this is likely to constitute the making of a contract within the scope of Section 1090. The courts have construed the term "made" as encompassing such elements in the formation of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, and drawing of plans or specifications and solicitation for bids. *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 237 (1968). For example, in *City Council of San Diego v. McKinley*, 80 Cal. App. 3d 204, 212 (1978), a court of appeal found a Section 1090 violation when a city council entered into an agreement with a landscape architectural firm, of which the president, a stockholder, was also a member of the city's parks and recreation board. The board investigated and advised the city council on parks and recreation development issues, and it approved plans for a Japanese garden for which the board member's company ultimately received the development contract. Even though the board member was not a member of the city council, which awarded the contract to his company, the board member's participation in the planning for the garden was sufficient to constitute participation in "making" the contract:

> "[T]here is ample authority 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 omitted.] Thus, the final execution of a contract, which is the time when the contract is technically made, is not the only time when a conflict of interest may be presented."

80 Cal. App. 3d at 212.

Similarly, in *Stigall v. City of Taft*, 58 Cal. 2d 565, 569-70 (1962), the California Supreme Court held that an impermissible conflict existed in a contract with a plumbing company owned by a council member, even though the council member resigned before the plumbing company's bid was accepted. The court recognized that activities prior to the signing of a contract can be integral to the decision to accept the contract. *Id.* at 569; see also *Campagna v. City of Sanger*, 42 Cal. App. 4th 533, 538 (1996).

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2. Exceptions to Section 1090

a. "Remote Interest" Exception

There are two categories of exceptions to Section 1090. The first, encompassing what are commonly referred to as "remote interests," is set forth in Section 1091. If an official has only a remote interest in a contract, then the local agency may enter into the contract as long as the official abstains from participating in the making of the contract in any way. Although this is not an exhaustive list of the "remote interest" exceptions, a few examples of "remote interest" exceptions include the following:

- Remote interest exception for a compensated officer or employee of a nonprofit corporation (Section 1091 (b)(1));
- Remote interest exception for a person receiving a government salary, per diem, or reimbursement for expenses, even when the contract involves the department of the government entity that employs the board member (Section 1091 (b)(13));
- Remote interest exception for a litigation settlement agreement between an officer that is a party to litigation involving the body or board of which the officer is a member (Section 1091 (b)(15); and
- Remote interest exception for the owner or partner of a firm who serves as an appointed member of an unelected board or commission of the contracting agency if the owner or partner recuses himself or herself from: (1) providing any advice to the contracting agency regarding the contract between the firm and the contracting agency; and (2) any participation in reviewing a project that results from that contract (Section 1091 (b)(17)).

The "remote interest" exception applies only if the interest is disclosed to the body that approves the contract, the disclosure is noted in that body's official records, and the official abstains from voting. Further, members with a "remote interest" may not attempt to influence any other member of the body or board of which they are members to enter into the contract.

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b. "Non-Interest" Exception

The second category of exceptions is found in Section 1091.5. These are called "non-interest" exceptions and apply to a type of interest that is completely exempt from Section 1090 and, if held by the official, does not require abstention. Unlike the "remote interest" exceptions in Section 1091, most of the "non-interest" exceptions listed in Section 1091.5 are available to both board members and employees who are covered by the general prohibition in Section 1090. Although this is not an exhaustive list, examples of some of those exceptions are listed below:

- Non-interest exception for government salary, per diem, or reimbursement of expenses when the contract does not involve the department of the government entity that employs the officer or employee (Section 1091.5 (a)(9));
- Non-interest exception for government salary to an officer's or employee's spouse when the spouse was employed by the government entity for at least one year prior to the officer's or employee's election or appointment (Section 1091.5 (a)(6));
- Non-interest exception for a non-compensated officer of a nonprofit corporation that supports the functions of the public entity or to which the public entity is required to give particular consideration (Section 1091.5 (a)(8));
- Non-interest exception for non-salaried members of a nonprofit corporation (Section 1091.5 (a)(7));
- Non-interest exception involving the receipt of public services on the same terms as would be provided if the officer were not a member of the governmental body or board (Section 1091.5(a)(3)); and
- Non-interest exception for contracts for public services between a special district and its board members if the special district requires board members to be landowners or representatives of a landowner and the contract is made on the same terms and conditions granted to everyone else. (Section 1091.5(a)(14)). For purposes of the exception, "public services" include the powers and purposes generally provided pursuant to provisions of the Water Code relating to irrigation districts, California water districts, water storage districts, or reclamation districts.

3. A Contract Made in Violation of Section 1090 is Void and Officials Violating Section 1090 Are Subject to Severe Penalties

Finally, it is important to note the extreme consequences of a Section 1090 violation and thus the caution with which persons must act to ensure compliance with this law. A public official who willfully violates any of the provisions of Section 1090 "is punishable

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by a fine of not more than $1,000, or by imprisonment in the state prison, and is forever disqualified from holding any office in this state." § 1097. The civil fines applicable to Section 1090 violations now can be up to the greater of $10,000 or three times the value of the financial benefit received by the defendant for each violation. § 1097.3(a). In addition, a contract made in violation of Section 1090 is void under Section 1092. *People ex rel. State v. Drinkhouse*, 4 Cal. App. 3d 931, 935 (1970) ("[A] contract in which a public officer is interested is void, rather than voidable as the statute indicates."). As with the Political Reform Act, acting on the advice of counsel is not a defense to a Section 1090 violation. See *People v. Chacon*, 40 Cal. 4th 558 (2007); *Chapman v. Superior Court*, 130 Cal. App. 4th 261 (2005).

Given these consequences, it is advisable for public officials to be very cautious in deciding whether they may participate in a contracting decision based on the existence of a "non-interest exception," whether they must abstain from those decisions based on the application of a "remote interest" exception, or whether their financial interest lies outside any exception and therefore precludes the public entity from entering into the contract altogether.

4. Aiding and Abetting Section 1090 Violations

In 2014, the California Legislature adopted Senate Bill 952, which added a subsection (b) to Government Code Section 1090, which now reads: "An individual shall not aid or abet a Member of the Legislature or a state, county, district, judicial district, or city officer or employee in violating subdivision (a)" of Section 1090. The Legislature added a similar provision to Section 1093 such that a person "shall not aid or abet the Treasurer, Controller, a county or city officer, or their deputy or clerk" in purchasing or selling "warrants, scrip, orders, demands, claims, or other evidences of indebtedness" for personal gain. § 1093. The Legislature also added a penalty for these crimes to Section 1097, which applies when a person "willfully aids or abets an officer or person in violating" Section 1090 or certain other conflict provisions. In light of these new provisions, city officers and employees must be careful to avoid "aiding and abetting" a Government Code Section 1090 violation.

5. Seeking FPPC Advice on Section 1090

In 2013, the State Legislature adopted Assembly Bill 1090, which amended the enforcement provisions applicable to Government Code Section 1090. With the adoption of AB 1090, a person who is subject to the prohibition in Government Code Section 1090 may request advice and/or a formal opinion from the FPPC. § 1097.1(c). Opinions or advice must be requested prior to any action being taken, as the FPPC cannot issue options or advice based on past conduct. § 1097.1(c)(2). Such advice is admissible as evidence of good faith conduct by the requester if the requester truthfully disclosed all material facts and relied on the advice or opinion of the FPPC. § 1097.1(c). In addition, the FPPC is now authorized to enforce the prohibition in Government Code Section 1090 through administrative or civil actions. § 1097.1(a).

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6. Statute of Limitations for Section 1090 Violations

The statute of limitations for bringing a criminal prosecution under Section 1090 is three years from the discovery of the violation. *People v. Honig*, 48 Cal. App. 4th 289, 304 (fn. 1) (1996); Penal Code §§ 801, 803(c). However, under Government Code Section 1092, a four-year statute of limitations applies to actions brought under Section 1090 to invalidate a contract. This four-year statute of limitations begins to run from the date that the plaintiff has discovered the violation, or in the exercise of reasonable care, should have discovered the violation. A four-year statute of limitations also applies to civil actions brought by the FPPC. § 1097.3(c).

C. Common Law Doctrine Against Conflicts of Interest

The common law doctrine against conflicts of interest constitutes the courts' expression of the public policy against public officials using their official positions for their private benefit. See *Terry v. Bender*, 143 Cal. App. 2d 198, 206 (1956). This doctrine provides an independent basis for requiring public officials and employees to abstain from participating in matters in which they have a financial interest. Violation of the doctrine can amount to official misconduct and can result in loss of office. *Nussbaum v. Weeks*, 214 Cal. App. 3d 1589 (1989).

By virtue of holding public office, an elected official "is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928). An elected official bears a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of a private interest. *Id.*

The common law doctrine against conflicts of interest has been primarily applied to require a public official to abstain from participation in cases where the official's private financial interest may conflict with his or her official duties. 64 Ops. Cal. Att'y Gen. 795, 797 (1981). However, the doctrine also applies when specific circumstances preclude a public official from being a disinterested, unbiased decision maker for a quasi-judicial matter. In one case, a council member who voted to deny permits for a condominium project near his house was deemed to have a common law conflict of interest (i.e., bias) due to his interest in preserving his ocean view and his personal animosity toward the applicants. *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996).

However, a more recent court decision creates some uncertainty as to whether the common law doctrine should be applied when statutory conflict of interest laws already address the particular situation. In *BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1233 (2000), the court declined to construe allegations of an official's bias in a decision to constitute a conflict of interest at common law when the applicable statutes already had been construed not to create a conflict of interest in that situation. In *BreakZone*, the court indicated, "[w]e continue to be cautious in finding common law conflicts of interest . . . . We reject the application of the doctrine in this case, assuming, arguendo, it exists." 81 Cal. App. 4th at 1233.

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II. OTHER SPECIALIZED CONFLICTS OF INTEREST LAWS AND REGULATIONS

A. Doctrine Against Holding Incompatible Offices

1. The Common Law Doctrine Against Holding Incompatible Offices

In addition to Government Code Section 1099 (discussed below), a common law doctrine (that is, legal principles established over time by court decisions) applies to prevent public officials from holding multiple public offices simultaneously. The common law doctrine against incompatibility of offices arose from a concern that the public interest would suffer when one person holds two public offices which might possibly come into conflict. The California Supreme Court set forth the following test for incompatibility of offices in People ex rel. *Chapman v. Rapsey*, 16 Cal. 2d 636 (1940):

> "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."

16 Cal. 2d at 641-42. Incompatibility of offices is not measured only by conflicts which do exist, but also by those conflicts which might arise. *Chapman*, 16 Cal. 2d 636, 641-42 (1940); 66 Ops. Cal. Att'y Gen. 382, 384 (1983); 64 Ops. Cal. Att'y Gen. 288, 289 (1981).

In order to determine whether two positions are in conflict, it is necessary to determine first whether the two positions are both public offices within the scope of the doctrine. No statutory definition is given to the term "public officer." However, in *Chapman*, the court stated:

> "[A] public office is said to be 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 . . . .
>
> One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public."

16 Cal. 2d at 640 (citation omitted).

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Incompatibility can be triggered if the duties of the two offices "overlap so that their exercise may require contradictory or inconsistent action, to the detriment of the public interest." People ex rel. *Bagshaw v. Thomson*, 55 Cal. App. 2d 147, 150 (1942). Only one significant clash of duties and loyalties is required to make offices incompatible. 37 Ops. Cal. Att'y Gen. 21, 22 (1961). The policy set forth in *Chapman* includes prospective as well as present clashes of duties and loyalties. 63 Ops. Cal. Att'y Gen. 623 (1980).

Abstention has not been recognized as a remedy for incompatible offices. The general rule provides:

> "The existence of devices to avoid . . . [conflicts] neither changes the nature of the potential conflicts nor provides assurances that they would be employed. Accordingly, the ability to abstain when a conflict arises will not excuse the incompatibility or obviate the effects of the doctrine."

66 Ops. Cal. Att'y Gen. 176, 177 (1983) (citation omitted).

The effect of the doctrine of incompatibility of offices is that a public official who enters into the duties of a second office is deemed to have automatically vacated the first office if the two are incompatible. *Chapman*, 16 Cal. 2d at 644.

A list of some of the offices that the California Attorney General has found to be incompatible are as follows:

- County board of supervisors member and community college board member. 78 Ops. Cal. Att'y Gen. 316 (1995).
- Fire chief and board of supervisors member. 66 Ops. Cal. Att'y Gen. 176 (1983).
- Public utility district member and county board of supervisors member. 64 Ops. Cal. Att'y Gen. 137 (1981).
- School district trustee and council member. 73 Ops. Cal. Att'y Gen. 354 (1990).
- School board member and council member. 65 Ops. Cal. Att'y Gen. 606 (1982).
- County planning commissioner and council member. 63 Ops. Cal. Att'y Gen. 607 (1980).
- Fire chief and council member. 76 Ops. Cal. Att'y Gen. 38 (1993).
- County planning commissioner and city planning commissioner. 66 Ops. Cal. Att'y Gen. 293 (1983).

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- County planning commissioner and county water district director. 64 Ops. Cal. Att'y Gen. 288 (1981).
- City planning commissioner and school district board member. 84 Ops. Cal. Att'y Gen. 91 (1997).
- City manager and school district board member. 80 Ops. Cal. Att'y Gen. 74 (1997).
- School district board member and community services district board member. 75 Ops. Cal. Att'y Gen 112 (1992).

2. The Statutory Codification of the Common Law Doctrine of Incompatible Offices – Government Code Section 1099

Government Code Section 1099 is intended to create a statutory rule against holding incompatible offices. This section is not intended to expand or contract the common law rule and is intended to be interpreted based on precedent created through court decisions under the common law doctrine. Stats. 2005, c. 254 (S.B. 274), § 2.

Section 1099 provides that a public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee or other body, shall not simultaneously hold two public offices that are incompatible as defined by the statute. Section 1099 provides that offices are incompatible when:

- Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;
- Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties and loyalties between the offices; or
- Public policy considerations make it improper for one person to hold both offices.

As is the case under the common law doctrine, Section 1099 provides that when two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second office. However, Section 1099 recognizes that certain state laws or possibly local ordinances may expressly provide for the simultaneous holding of particular offices and that result would not be precluded by Section 1099.[22] Section 1099 does not apply if one of the positions is a mere position of

[22] See, e.g., *People ex rel. Lacey v. Robles*, 2020 WL 467582 (2020), which held that Section 1099's exception to the rule against holding incompatible offices if "simultaneous holding of the particular offices is compelled or expressly authorized by law" did not apply to an official serving as a mayor and a member of the board of directors for a water replenishment district, despite the fact that the city council and the water replenishment district adopted an ordinance and resolution, respectively, authorizing the official to simultaneously hold both offices. The court reasoned that (1) the Legislature's reference to "law" is "best understood as a reference to state, not local, law"; and (2) even if the reference to "law" could be understood to allow local jurisdictions to deem offices compatible notwithstanding a possible conflict in duties or loyalties, the water replenishment district lacked the authority to authorize its board members to hold incompatible offices.

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employment rather than a public office. It also does not apply when one of the positions is a member of a legislative body that has only advisory powers. § 1099(c), (d).

B. Incompatible Outside Activities

Government Code Section 1126(a) provides, in relevant part:

> "[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 provisions of Section 1126 prohibit officials and employees of a local government agency from engaging in outside employment or activities where any part of the employment or activity will be subject to approval by any other officer, employee, board or commission of the local agency. Exceptions are created to permit a public official to engage in outside employment by a private business, and to permit an attorney employed by a local agency in a non-elective position to serve on an appointed or elected governmental board of another agency. §§ 1127, 1128.

However, the court in *Mazzola v. City and County of San Francisco*, 112 Cal. App. 3d 141 (1980) ruled that Section 1126 provides only authorization to implement standards for incompatibility pursuant to paragraph (b) of Section 1126. The court ruled that the restrictions of Section 1126 are not self-executing because existing and future employees should have notice that specific outside activities are, or are not compatible with their duties as an officer or employee of the local agency. Thus, Section 1126 would not bar a public official from holding a position outside his or her public agency unless the public agency in which he or she serves as a public official adopts an ordinance in compliance with the requirements of Section 1126 that specifies that the two positions or activities are incompatible. Many cities have not adopted such ordinances.

In light of the court's decision in *Mazzola*, the Attorney General ruled that Section 1126 did not apply to any elected official, such as a council member, since elected officials do not have an "appointing power" that can promulgate guidelines for their activities pursuant to Section 1126. However, if a local agency adopts such guidelines, they can be made applicable to officers and employees subordinate to the legislative body of the local agency, including members of advisory boards and commissions. § 1126(a).

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C. Successor Agency and Oversight Board Conflicts

1. Form 700s for Successor Agency and Oversight Board Members

Regarding any city that adopted a resolution establishing a successor agency to the former redevelopment agency as a separate legal entity, an official who already files an annual Form 700 in his or her capacity as a city official does not need to file an Assuming Office Statement ("Assuming Office Form 700") within 30 days of assuming his or her position with the successor agency as long as these same city officials are already required to disclose all categories of economic interests. The successor agency official or employee will, however, have to file an Assuming Office Form 700 if he or she is not already required to disclose as a city official all categories of economic interests.

With respect to those successor agency officers and employees who do have an obligation to file an Assuming Office Form 700, the 30-day deadline for completing those filings is likely 30 days from the date he or she was appointed rather than 30 days after the officer or employee is sworn in to office or starts to perform duties. This means that if the successor agency was formed as a separate governmental entity, the date that the official was appointed to his or her position would be the date that the successor agency adopted its rules and regulations, established successor agency positions in those rules, and designated specific city officials to fill those positions. However, if the successor agency appointed certain city officials to those positions at a later point in time, that later date would be the date from which the 30-day period would commence to run.

Members of an oversight board are subject to the Political Reform Act. This means oversight board members must comply with both the Act's conflict of interest disqualification and disclosure requirements. Oversight board members who do not also hold a concurrent city position need to file an Assuming Office Form 700 within 30 days of their appointment. For example, the appointees of the county, superintendent of schools, and other non-city representatives who do not concurrently hold a city position, should file an Assuming Office Form 700 as an oversight board member with the city clerk. Similarly, if one or both of the mayor's appointees do not concurrently hold a position with the city requiring disclosure of economic interests in all categories, they should file an Assuming Office Form 700 within 30 days of their appointment. However, if a person appointed by the mayor to represent the city on the oversight board or any other appointee to the oversight board concurrently holds a position with the city that is already required to broadly disclose in all categories, these persons would not be required to file an Assuming Office Form 700 under the FPPC staff rationale noted above.

2. Obligation of Successor Agencies to Adopt Conflict of Interest Codes

The Act requires that local government agencies must adopt a conflict of interest code. An exception applies for those agencies where all of its officials and employees are already required to file Statements of Economic Interests as city officials. In the

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case of a successor agency, some members of its oversight board will not be city officials or employees. For example, the county, school district, county superintendent, and community college appointees are most likely not going to be current city officials or employees. Consequently, the successor agency must adopt a conflict of interest code that includes the oversight board.

3. City Councils are the Code Reviewing Bodies for the Successor Agency's Conflict of Interest Code

Section 82011(c) provides that for "city agencies," the code reviewing body is the city council.

The term "city agencies" is not defined in the Act but has been interpreted by the FPPC to mean local government agencies located solely within the boundaries of one city. In the past, the FPPC has interpreted a redevelopment agency as being a "city agency" and the city council as being the code reviewing body for the redevelopment agency. In the case of a successor agency of a former redevelopment agency that operates solely within the boundaries of one city, the successor agency will not have a jurisdictional boundary that extends beyond the boundary of the city. Consequently, the city council of the city in which the former redevelopment agency operated will be the code reviewing body for the successor agency.

The city council, as the code reviewing body, is required to review and approve the successor agency's conflict of interest code not later than six months from the date the successor agency came into existence. § 87303. However, we recommend that this step be completed prior to that deadline for reasons mentioned below. Thus, it is appropriate to place the successor agency's conflict of interest code on a city council agenda for approval soon after the successor agency has adopted it.

4. The City Council May Designate the City Clerk as the Filing Officer for the Successor Agency's Statements of Economic Interests

The term "filing officer" is defined in the Act to be the office or officer with whom any statement or report is required to be filed under this title. § 82027. In determining where Form 700s are to be filed for officials of a successor agency, the city council, as the code reviewing body, may designate whether the "agency" (successor agency) or the "code reviewing body" (city council) is to be the entity with which Form 700s are filed. § 87500(p). Once that designation is made, the duty to perform the functions of filing officer must be delegated to an individual in either entity such as the city clerk, pursuant to Regulation 18227. The person designated becomes the "filing officer." Regulation 18227 provides that every entity with whom forms are filed shall assign to a specific official the responsibility for receiving and forwarding reports filed pursuant to Section 87500 (including Form 700s). Once assigned, the filing officer has a duty to supply Form 700s, review submitted Form 700s for completeness, and notify all persons who have failed to file forms and report violations to appropriate agencies. See § 81010.

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Thus, the city clerk or the successor agency secretary will most likely be the filing officer for the successor agency but such designation will ultimately be determined by the city council when acting as the code reviewing body for the successor agency's conflict of interest code. In the action to approve the successor agency's conflict of interest code, the city council should approve the successor agency's designation of the city clerk or successor agency secretary to be the filing officer for the successor agency's officials. In the meantime, it is appropriate for the city clerk or successor agency secretary to begin performing the duties of the filing official for the successor agency even though such designation will not be finalized until approved by the city council as the code reviewing body.

It is recommended that one of the first steps for the city clerk or successor agency secretary to undertake is to make a record of the appointment date for each officer of the successor agency and each member of the oversight board. With respect to those officials of the successor agency and oversight board that are not otherwise exempt from filing Assuming Office Form 700s for their position with the successor agency, city clerks should provide forms to those persons and facilitate the filing of those forms within the 30-day time period required.

D. Discount Passes on Common Carriers

Article XII, Section 7 of the California Constitution states:

> "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."

The Attorney General has explained this provision applies in the following manner:

- The prohibition applies to public officers, both elected and non-elected, but not employees.
- The prohibition applies to interstate and foreign carriers as well as domestic carriers, and to transportation received outside California.
- The prohibition applies irrespective of whether the pass or discount was provided in connection with personal or public business.
- Violation of the prohibition is punishable by forfeiture of office.

There have only been a few decisions that address this constitutional prohibition. In one opinion, the Attorney General granted leave to sue two members of a city council who accepted free airline tickets to London given by Laker Airlines as part of the airline's promotion of its new Los Angeles to London service. Despite the fact that the council members were unaware of the prohibition, the Attorney General allowed a quo

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warranto suit that subsequently settled before judgment. *See, e.g.,* 76 Ops. Cal. Atty. Gen. 1, 3 (1993).

In another opinion, the mayor of a city received an upgrade from a coach seat to a first class seat on Hawaiian Airlines. 76 Ops. Cal. Atty. Gen. 1 (1993). There, the mayor's ticket was one of 20 first-class upgraded tickets that the airline was allowed to provide to "high profile, prominent members of the community." At issue was whether that situation fit within an exception to the constitutional prohibition for situations when the free transportation or discount is provided to a public officer as a member of a larger group unrelated to the official's position. The Attorney General ruled that the facts did not satisfy the exception and that a violation of the prohibition had occurred.

The exception considered in that opinion stemmed out of a 1984 opinion of the Attorney General which held that a public officer could accept first-class ticket upgrades by virtue of the airline's policy to do so for all persons on their honeymoon. In 67 Ops. Cal. Atty. Gen. 81 (1984), the Attorney General concluded that a public officer, whose spouse was a flight attendant, could accept a free transportation pass or discount when such was offered to all spouses of flight attendants without distinction to the official status of the recipient.

Consequently, if the pass or discount is provided to the official because of his or her position as a governmental official, the prohibition applies. If it is provided to the official as a member of a larger group that is not related to the functions of his or her office, the prohibition may not be applicable.

E. Conflicts upon Leaving Office – the "Revolving Door"

Former elected officials and former city managers are restricted from receiving compensation for lobbying their city for one year after they leave public office. This restriction also applies to elected county and district officials and their chief administrative officers or general managers, but not to department directors or other public officials and employees. § 87406.3(a). A violation of the statute constitutes a misdemeanor, and the FPPC is authorized to impose administrative fines and penalties for its violation. § 91000.

The type of lobbying subject to the ban includes both formal and informal appearances before a local agency and making any oral or written communication to the agency. The statute proscribes the appearances and communications if they are made to influence administrative or legislative action, or affect the issuance, amendment, awarding or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. § 87406.3(a).

The term "administrative actions" within the scope of the lobbying ban includes "the proposal, drafting, development, consideration, amendment, enactment, or defeat by any local government agency of any matter, including any rule, regulation, or other action in any regulatory proceeding, whether quasi-legislative or quasi-judicial." However, matters that are "solely ministerial" are expressly excluded from the

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prohibition. § 87406.3(d)(1). The type of "legislative action" within the scope of the ban includes:

> "the drafting, introduction, modification, enactment, defeat, approval, or veto of any ordinance, amendment, resolution, report, nomination, or other matter by the legislative body of a local government agency or by any committee or subcommittee thereof, or by a member or employee of the legislative body of the local government agency acting in his or her official capacity."

§ 87406.3(d)(2). The lobbying ban does not apply to any public official who is appearing or communicating on behalf of another local governing body or public agency of which the individual is a board member, officer or employee. § 87406.3(b)(1). Therefore, if such former elected city official or former city manager is contacting his or her city on behalf of the state, a county, a school district or some other governmental entity (in his or her capacity as a board member, officer, or employee), such activity is not precluded by the ban. Effective January 1, 2018, however, the lobbying ban ***does*** apply for the initial year if the former elected city official or former city manager serves another public agency ***as an independent contractor*** and appears or communicates on behalf of that agency in front of the agency that the person originally served. § 87406.3(b)(2). Such activity would be prohibited for the first year after leaving office or employment with the original agency.

Some cities have their own preexisting "revolving door" ordinances that regulate the lobbying activities of their former public officials. This state law expressly does not preempt those ordinances or prevent cities from adopting additional ordinances on the subject in the future, provided those ordinances are more restrictive than the state law. § 87406.3(c). Thus, the law merely sets a new minimum standard applicable to all cities.

F. Laws Prohibiting Bribery

A number of state statutes prohibit bribery of public officials. Specifically, it is illegal to give or offer to give a bribe to a public official, or for a public official to ask for, receive, or agree to receive any bribe. Penal Code §§ 67, 68. Under a strict reading of these statutes, Penal Code Section 68 applies to bribery of a "ministerial officer, employee, or appointee," and Penal Code Section 67 applies only to bribery of an "executive officer in this state," but the courts have interpreted both statutes as having a broad scope applicable to public officials generally. *People v. Hallner*, 43 Cal. 2d 715, 717 (1954) (observing that Penal Code Section 67, despite its wording, is "all inclusive" and includes city officials, and that "[b]y the sixty-seventh section the offense defined is that of one who offers; by the sixty-eighth, that of one who receives a bribe"); *People v. Strohl*, 57 Cal. App. 3d 347, 360 (1976) ("Numerous California Supreme Court and appellate court decisions since 1954 have held that 'executive officers' of various levels of local government, including the county level, as herein involved, come within [Penal Code] Section 67.").

The Legislature also expressly made bribery of council members and supervising officials a crime, as well as solicitation of bribes by council members and supervisors. Penal Code § 165. Another statute makes it a crime for anyone to attempt to bribe "any

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person who may be authorized by law to hear or determine any question or controversy." Penal Code § 92. Considered together, these statutes cover the spectrum of public officials.

The term "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity. Penal Code § 7(6). Note that under all of the bribery statutes, it is not only the actual giving or accepting of a bribe that is criminal; merely offering to give or receive a bribe constitutes a violation of law. See, e.g., *People v. Pic'l* (1982) 31 Cal. 3d 731, 739 (noting that a "meeting of the minds" is unnecessary for a bribery conviction).

A public officer forfeits his office if he requests, receives, or agrees to receive a bribe. Penal Code § 68. In addition, every officer convicted of any crime defined in the Penal Code sections pertaining to bribery and corruption is forever disqualified from holding any office in the state. Penal Code § 98.

Note also that bribery and soliciting bribery potentially violate not only the Penal Code, but also the conflict of interest statutes. For example, in *Terry v. Bender*, 143 Cal. App. 2d 198 (1956), a court of appeal held that a council member violated Government Code Section 1090 when he solicited and received a bribe from an attorney in exchange for the council member's vote to employ the attorney with the city. 143 Cal. App. 2d at 207 (observing that by accepting the bribe, the council member "had placed himself in a position of economic servitude" in violation of Section 1090). Because the bribe "restricted the free exercise of the discretion vested in him for the public good," there was an impermissible conflict of interest.

G. Campaign Contributions

1. Conflicts of Interests Arising on Appointed Boards and Commissions

The Political Reform Act contains restrictions on the receipt and solicitation of campaign contributions. Under a portion of the Act known as the "Levine Act," a public agency official may not participate in decisions affecting individuals or entities who have given the official more than $250 in campaign contributions within the past 12 months. § 84308. However, a city council is not considered an "agency" for purposes of the statute. § 84308(a)(3). This disqualification therefore does not apply to a council member when participating in a decision of the council. It also does not apply to a council member who sits on the board of another agency of the city if the governing board of that agency is made up entirely of members of the city council when that member is participating in a decision of that agency. Regulation 18438.1 (a)(1). However, it does apply to a council member when that person is serving on the board of a joint powers authority. Importantly, this prohibition applies to planning commissioners and other officers of the public entity who are not directly elected by

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the voters. Thus, planning commissioners must comply with the restrictions in Government Code Section 84308.

The Act also classifies campaign contributions differently than other financial interests. As discussed previously, the Act requires that public officials abstain from government decisions in which they have a financial interest, with certain exceptions. § 87100. A public official generally has a proscribed financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on (among other things): (i) a source of income aggregating $500 or more in value during the 12 months prior to the decision; or (ii) a donor of a gift or gifts aggregating $500 or more in value during the 12 months prior to the decision. § 87103(c), (e); Regulations 18700, 18940.2. Campaign contributions, however, are not considered a "financial interest" for purposes of this disqualification because they are neither "income" nor a "gift" within the meaning of the statute. §§ 82028(b)(4), 82030(b)(1). This disqualification therefore is not triggered as a result of a council member's receipt of a campaign contribution.

In other words, council members acting in their capacity as elected council members are not prohibited from acting on a matter which involves someone who has given them a political contribution. Regulation 18438.1(a). For example, the California Supreme Court ruled that Los Angeles City Council members were not disqualified from voting on a subdivision map by reason of receiving campaign contributions from the applicants and their agents. *Woodland Hills Residents Ass'n, Inc. v. City Council*, 26 Cal. 3d 938, 945 (1980) ("Plaintiffs' accusation that receipt of a campaign contribution inevitably results in an appearance of bias or prevents a fair hearing is unwarranted."). Similarly, a court of appeal concluded that Torrance City Council members were not disqualified from voting on a conditional use permit application by reason of receiving campaign contributions from a party alleged to be in opposition to the application. *BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205 (2000).

Receipt of a campaign contribution can, however, disqualify a public official who serves on more than one public body. For example, under the Levine Act, a council member acting on behalf of an agency other than the city must abstain from a license, permit or other use entitlement decision involving an applicant, proponent or opponent who has made a contribution to the council member's campaign in excess of $250 within the preceding 12 months. The fact of the campaign contribution must also be disclosed prior to the abstention. This disqualification is inapplicable, however, if the campaign contribution is returned within 30 days of receipt. § 84308(c).

2. Application of Federal Corruption Laws to the Offer or Solicitation of Illegal Campaign Contributions Tied to an Official Act

Another exception to the general rule that campaign contributions do not preclude an official from voting on a matter affecting a campaign contributor is the application of federal corruption laws to situations where the receipt of illegal, laundered or unreported campaign contributions are tied to an official act. In one case arising out of the City of San Diego, two council members were charged and convicted of wire fraud for conspiring to change the city's ordinance regulating adult-oriented businesses in exchange for campaign contributions from an adult-oriented business that had been

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illegally "laundered" through contributions made by residents of the city or which had been unreported and which constituted bribes. See *United States v. Inzunza*, 303 F. Supp. 2d 1041, 1043 (S.D. Cal. 2004) for a list of the charges; the case was referred to in the press as the San Diego "Strippergate" case. The charges included the alleged use of wire communications in interstate commerce in furtherance of the alleged conspiracy to defraud the public of their intangible right to honest service, in violation of 18 U.S.C. §§ 1951 (the Hobbs Act) and 1952 (Interstate Transportation in Aid of Racketeering). One of those convictions was later overturned. However, the case points out that direct connections between official acts and illegal or unreported campaign contributions may result in charges of bribery under California law and a violation of certain federal wire fraud and racketeering laws.

3. Ban on Local Agency Officials and Employees Soliciting Campaign Contributions from Officials and Employees of the Same Agency

In an effort to avoid local agency public employees being drawn into local political campaigns or having their positions become the subject of political reward or retribution, California law contains a prohibition on the solicitation of campaign contributions by a local agency official or employee of other officials or employees within the same local agency. Section 3205 prohibits an officer or employee of a local agency from soliciting political contributions from an officer or employee of that same local agency. The prohibition applies to incumbents seeking re-election and to non-incumbent candidates for local agency office. An exception exists for broad general public solicitations to a "significant segment of the public" that also include some local agency officials and employees of that agency. § 3205(c). No definition exists as to what constitutes a significant segment of the public. In the context of conflict of interest provisions in the Political Reform Act, that term now is defined to include segments of the local agency population such as 25 percent of all individuals within an official's jurisdiction (Regulation 18703), and, in the absence of any court interpretation of the law, that standard provides some guidance on what may be a sufficiently broad solicitation to come with the scope of the exception. Violation of the prohibition is punishable as a misdemeanor and may be prosecuted only by the County District Attorney. § 3205(d).

4. Nepotism

One other potential source of a conflict of interest is a governmental decision that affects a family member. If a public official's relative has an application before the government agency on which the public official serves, the public official would potentially have an improper incentive to approve the relative's application. Because the financial interests of a public official's spouse and dependent children (children under 18 years of age who are dependent financially on their parents) are attributed to the public official under the Political Reform Act and Section 1090, participation in decisions financially benefiting spouses and dependent children is limited. §§ 82030, 87103; *Thorpe v. Long Beach Community College Dist.*, 83 Cal. App. 4th 655 (2000) (holding that Section 1090 prohibited a community college district board from voting to approve the promotion of the spouse of a board member). If the approval did not

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require a decision by the legislative body, however, the public entity could still potentially approve an application or make a decision if the related public official did not participate.

With respect to adult children and more extended family members, the Political Reform Act and Section 1090 would not automatically apply in the absence of some financial relationship between the public official and the adult child or extended family members.[23] Currently, state law only prohibits such "extended family" interests for the governing boards of school districts. Educ. Code § 35107(e). Under that statute, a school board member must abstain from participating in personnel matters that uniquely affect his or her relative. "Relative" is defined as an adult who is related to the official by blood or affinity within the third degree, or in an adoptive relationship within the third degree. There is no comparable statute for cities and counties, but some local governments have established similar restrictions through ordinances or policies.

The issue of familial relations comes up more frequently in the context of personnel decisions, as when a public entity prohibits the hiring of relatives of public officials or employees. Such anti-nepotism policies are generally upheld by the courts. For example, in *Parsons v. County of Del Norte*, 728 F. 2d 1234 (9th Cir. 1984), the Ninth Circuit upheld a county policy prohibiting spouses from working in the same department. The Ninth Circuit held that the policy did not violate the Equal Protection and Due Process clauses of the U.S. Constitution and was rationally related to a legitimate government interest: avoidance of conflicts of interest and favoritism in employee hiring, supervision and allocation of duties. See also *Kimura v. Roberts*, 89 Cal. App. 3d 871, 875 (1979) (upholding a policy prohibiting spouses from serving on both the city council and planning commission, reasoning that "the finding of the mayor and the city council that an actual or implied conflict of interest existed, is eminently rational, practical and legally sound").

Note, however, that state law prohibits the application of anti-nepotism rules to spouses in some circumstances. The Fair Employment and Housing Act prohibits an employer from making an employment decision based on whether an employee or applicant has a spouse presently employed, except in two specific situations:

- For business reasons of supervision, safety, security or morale, an employer may refuse to place one spouse under the direct supervision of the other spouse.
- For business reasons of supervision, security or morale, an employer may refuse to place both spouses in the same department, division or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons.

2 C.C.R. § 11057(a) (emphasis added).

[23] *Davies* Advice Letter, No. I-90-329, 1990 WL 698051 (1990).

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Accordingly, any anti-nepotism policy that a city or county adopts must not apply to the hiring of spouses, except in cases of direct supervision, where greater conflicts or hazards occur for married persons, or where a conflict of interest statute applies.

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III. LAWS AND REGULATIONS AFFECTING RECEIPT OF GIFTS, HONORARIA AND LOANS

The PRA provisions and other conflict of interest laws discussed above do not prohibit a public official from having an interest in a business or real property. Instead, they merely limit the official's ability to participate in governmental decisions that would materially affect those interests.

There are additional restrictions in the PRA, however, with regard to certain gifts, honoraria and loans. The statute precludes local officials (including council members and planning commissioners) from receiving certain gifts, honoraria and loans. These prohibitions apply whether or not the source of the gift, honorarium or loan is or will ever be affected by a decision of the official's agency. This section outlines these prohibitions.

A. Limitations on Receipt of Gifts

1. General Gift Limitation

Government Code Section 89503(a) provides: "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 [$500]." (The gift limit amount has been adjusted in accordance with Regulation 18940.2.) Officials listed in Section 87200, in turn, include mayors, council members, planning commissioners, city managers, city attorneys, city treasurers, chief administrative officers and other public officials who manage public investments, and candidates for any of these offices.

A similar limitation prohibits a city employee designated in a local conflict of interest code from accepting gifts from a single source totaling more than $500 in value in any calendar year, if the gifts would be required to be reported on his or her statement of economic interests. § 89503(c).

2. Biennial Gift Limit Adjustment

The Act authorizes the FPPC to make an inflationary adjustment of the gift limitations set forth in Section 89503 every two years. § 89503(f). The most recent adjustment became effective on January 1, 2019, wherein the gift limit increased to $500. Regulation 18940.2. This figure will be further adjusted in future odd-numbered years.

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3. Exceptions to Gifts

None of the following is a gift and none is subject to any limitation on gifts (Regulation 18942):

a. Informational Materials

Informational materials such as books, reports, calendars, audio and video recordings, scale models, maps, free or discounted admission to informational conferences or seminars, and on-site demonstrations, tours or inspections that are provided to convey information for the purpose of assisting the official in the performance of official duties are not considered gifts. The cost of transportation for on-site demonstrations, tours or inspections may fall into this exception in particular situations. Regulations 18942(a)(1), 18942.1.

b. Returned Gifts

Except for passes and tickets as provided for in Regulation 18946.1, a gift that is not used and that, within 30 days of receipt, is returned, donated, or for which reimbursement is paid pursuant to Regulation 18941, is not a gift. The donation of a gift under this exception must be to either a 501(c)(3) charitable organization with which the official or a member of his or her family holds no position or to a government agency, without being claimed as a tax deduction. Regulation 18942(a)(2).

c. Family Gifts

A payment from an individual's family member is not considered a gift unless the donor is acting as an agent or intermediary for any other person. The family members included in this exception are a spouse or former spouse, child or step-child, parent, grandparent, grandchild, brother, sister, current or former parent-in-law, current or former brother-in-law, current or former sister-in-law, nephew, niece, aunt, uncle, grand nephew, grand niece, grand aunt, grand uncle, first cousin or first cousin once removed, or the current or former spouse of any such person other than a former in-law. Regulation 18942(a)(3).

d. Campaign Contributions

Campaign contributions that are reported in accordance with separate provisions of the Act are not considered gifts. Regulation 18942(a)(4).

e. Inherited Money or Property

Devises or inheritances of any kind are not considered gifts. Regulation 18942(a)(5).

f. Awards

A personalized plaque or trophy with an individual value of less than $250 is not a gift. Regulation 18942(a)(6).

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g. Home Hospitality

The cost of home hospitality is not considered a gift unless any part of the cost is paid directly or reimbursed by another person, any person deducts any part of the cost as a business expense on a tax return, or the host has an understanding with someone else that any amount of compensation the host receives from that person includes a portion to be utilized to provide gifts of hospitality. Regulation 18942(a)(7). "Home hospitality" is defined as any benefit received by the official, and the official's spouse and family members when accompanying the official, which is provided by an individual with whom the official has a relationship, connection, or association unrelated to the official's position and the hospitality is provided as part of that relationship, connection, or association in the individual's home when the individual is present. Home hospitality includes entertainment, occasional overnight lodging, and any food, including food provided by other guests at the event and benefits received by the official when the official serves as the host. In determining where this exception is available, the official is to presume that the cost of the hospitality is paid by the host unless the host discloses to the official or it is clear from the surrounding circumstances that someone other than the host paid the cost or part of the cost of the hospitality. Regulation 18942.2.

A "home" includes a vacation home owned, rented, or leased by the individual for use as his or her residence, including in some cases a timeshare or a motor home or boat owned, rented, or leased by the individual for use as his or her residence. "Home" also includes any facility in which the individual has a right-to-use benefit by his or her home residency, such as a community clubhouse. Regulation 18942.2.

h. Presents on Personal or Family Occasions

Benefits commonly exchanged between an official and an individual, other than a lobbyist, on holidays, birthdays, or similar occasions are not gifts as long as the presents exchanged are not substantially disproportionate in value. For purposes of this exception, "benefits commonly exchanged" includes food, entertainment, and nominal benefits provided to guests at an event by an honoree or other individual, other than a lobbyist, hosting the event. Regulation 18942(a)(8)(A).

i. Reciprocal Exchanges

Reciprocal exchanges made in a social relationship between an official and another individual who is not a lobbyist and with whom the official participates in repeated social events are not gifts where the parties typically rotate payments on a continuing basis so that, over time, each party pays for approximately his or her share of the costs of the continuing activities. The repeated social events may include lunches, dinners, rounds of golf, attendance at entertainment or sporting events, or any other such event so long as the total value of payments received by the official within the year is not substantially disproportionate to the amount paid by the official. If the official receives much more than what he or she paid, the official has received a gift for the excess amount. This exception does not apply to any single payment that is equal to or greater than $500. Regulation 18942(a)(8)(B).

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j. Leave Credits Donated to an Official

Leave credits, including vacation, sick leave, or compensatory time off, donated to an official in accordance with a bona fide catastrophic or similar emergency leave program established by the official's employer are not gifts as long as they are available to all employees in the same job classification or position. This exception does not include donations of cash. Regulation 18942(a)(9).

k. Disaster Assistance

Payments received under a government agency program or a program established by a 501(c)(3) organization designed to provide disaster relief or food, shelter, or similar assistance to qualified recipients are not gifts as long as such payments are available to members of the public regardless of official status. Regulation 18942(a)(10).

l. Admission when "Speech" Made

Payment of the official's admission by the organizer of an event is exempt from the gift limitations if the official makes a "speech" at the event. Regulation 18942(a)(11). This exemption applies if the official is "making a speech, participating on a panel, or making a substantive formal presentation at a seminar or similar event." Regulation 18950(b)(2). For the purpose of the exemption, the price of admission can include food and "nominal items" including things like pens, stress balls, note pads, etc. Regulation 18942(a)(11).

m. Campaign Travel

The payments made to an elected officer or candidate for his or her transportation, lodging, or subsistence provided in direct connection with campaign activities, including attendance at political fundraisers, are exempt from the gift limitations. Payments made during the six-month period prior to an election are considered "in direct connection" with the campaign activities if the payment is for necessary transportation, lodging, or subsistence and used for the officer's or candidate's participation in forums, debates or other speaking events or attendance at campaign strategy meetings with staff or consultants. Beyond this six-month period, the payment is considered a gift unless it is clear from the surrounding circumstances that the payment was made directly in connection with campaign activities. Regulations 18942(a)(12), 18950.3.

n. Ticket for Ceremonial Role

A ticket which is provided to an official and one guest of the official for his or her admission to an event where the official performs a ceremonial role on behalf of the agency is not a gift, so long as the agency reports the ticket on its Form 802. The term "ceremonial role" means an act performed at an event by the official as a representative of the official's agency at the request of the holder of the event where, for a period of time, the focus of the event is the act performed by the official. Examples include throwing out the first pitch at a baseball game, cutting a ribbon at a library opening, or presenting a certificate or award. A city may adopt specific policies

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to either limit or expand the permissible ceremonial roles for an official in that city, the full list of which must be forwarded to the FPPC. Any official who attends the event as part of his or her job duties to assist the official who is performing the ceremonial role has not received a gift or income by attending the event. Regulations 18942(a)(13), 18942.3.

o. Prize or Award in Bona Fide Contest or Competition

A prize or award received in a manner not related to the official's status in a bona fide contest, competition, or game of chance is not a gift. A prize or award that is not reported as a gift shall be reported as income unless the prize or award is received as a winning from the California State Lottery. Regulation 18942(a)(14).

p. Weddings Benefits

Benefits received as a guest attending a wedding or civil union are not gifts if the benefits are substantially the same as the benefits received by the other guests attending the event. Regulation 18942(a)(15).

q. Bereavement Offerings

Bereavement offerings typically provided in memory of and at the time of the passing of a spouse, parent, child, or sibling or other relative of the official are not gifts. Regulation 18942(a)(16).

r. Acts of Neighborliness

A service performed as an act of ordinary assistance consistent with polite behavior in a civilized society that would not normally be part of an economic transaction between like participants under similar circumstances is not a gift. Examples of such services include the loan of an item, an occasional needed ride, personal assistance in making a repair, bringing in the mail or feeding the cat while the official is away. Individuals need not be actual neighbors for this exception to apply. Regulation 18942(a)(17).

s. Bona Fide Date or Dating Relationship

Personal benefits commonly exchanged between people on a date or in a dating relationship are not gifts. However, such benefits are gifts if the individual providing the benefit to the official is a lobbyist or otherwise has particular interests in the official's role in the agency within 12 months of the date. Even if the benefit is from such an individual, the gift is still not reportable or subject to limits but the aggregate value is subject to the conflict of interest provisions if the value is $500 or greater. Regulation 18942(a)(18)(A).

t. Acts of Human Compassion

Payments provided to an official or his or her family member by an individual to offset family medical or living expenses that the official can no longer meet without private assistance because of an accident, illness, employment loss, death in the family, or

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other unexpected calamity are not gifts. Payments provided to an official or his or her family member to defray expenses associated with humanitarian efforts such as the adoption of an orphaned child are also not gifts. However, under this exception, the source of the donation must be an individual who has a prior social relationship with the official of the type where it would be common to provide such assistance (such as a relative, long-term friend, neighbor, co-worker or former co-worker, member of the same local religious or other similar organization, etc.), or the payment must be made without regard to official status under other circumstances in which it would be common to receive community outreach. In any case, the individual providing the benefit to the official cannot be a lobbyist or otherwise have particular interests in the official's role in the agency within 12 months of the payment. Regulation 18942(a)(18)(B).

u. Best Friends Forever

A payment provided to an official by an individual with whom the official has a long term, close personal friendship unrelated to the official's position with the agency is not a gift. However, the individual providing the benefit to the official cannot be a lobbyist or otherwise have particular interests in the official's role in the agency within 12 months of the payment. Regulation 18942(a)(18)(C).

v. Catch-All

Any other payment that would otherwise meet the definition of gift is not a gift where the payment is made by an individual who is not a lobbyist and it is clear that the payment was made because of an existing personal or business relationship unrelated to the official's position. Additionally, there can be no evidence whatsoever at the time the payment is made that the official makes or participates in the type of governmental decisions that may have a foreseeable material financial effect on the individual who is the source of the payment. Regulation 18942(a)(19).

4. Gifts to an Agency

Regulation 18944 provides a narrow exception to the normal gift reporting requirements and value limitations for gifts made directly to a public agency. A payment made to a state or local government agency that is used for official agency business is not considered a gift or income to an individual public official who is the end recipient, even though the official receives an incidental personal benefit from the payment. As such, the gift does not have to be reported by the individual and is not subject to the annual value limitation.

A payment shall be considered a gift to the public official's agency and not a gift to the public official if all of the following requirements are met: the payment must be used for official agency business; the agency head must determine and control the agency's use of the payment, including the selection of the official who will use the payment; and the agency must report the payment on a Form 801. The Form 801, which must be signed by the agency head and maintained as a public record in

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accordance with Government Code Section 81008, must include the following information:

- **Donor Information**: The reporting form requires not only the donor's name, but also his or her address, and must identify any other persons who contributed to the gift, as well as the amount each person contributed. If the donor is not an individual, the report must describe the business activity or nature of the entity giving the gift.

- **Description of Payment**: The form requires a description of the payment, the date it was received, the intended purpose and the amount of the payment or the actual or estimated fair market value of the goods or services provided, if the amount is unknown.

- **Recipient Information**: The form also requires that the agency specify the name, title, and department of the agency official who used the payment.

Regulation 18944(c)(3). For any quarter year period in which the payments received by the agency aggregate to $2,500 or more since the last filing, a local agency must submit a copy of the form or a detailed summary of the information to its filing officer within 30 days after the close of the quarter. Thereafter, the filing officer must post a copy of the form or the information in a "prominent fashion" on its website within 30 days after the close of the quarter. If the local agency does not maintain a website, the agency must send its Form 801 to the FPPC, which will post the document on its own website. Regulation 18944(d).

5. Gifts to an Official's Family

Regulation 18943 governs gifts to an official's or candidate's family. This regulation was substantially revised in late 2009 and again in 2011. Regulation 18943 adds new definitions and requirements that public officials should carefully review.

Regulation 18943 adds definitions for an official's "family member," which includes an official's spouse or registered domestic partner, a dependent child, and an official's child. "Dependent child" means a child (including an adoptive child or stepchild) of a public official who is under 18 years old and whom the official is entitled to claim as a dependent on his or her federal tax return. Regulation 18229.1. An "official's child" (including an adoptive child or stepchild) means a child who meets all of the following criteria:

- The child is at least 18 but no more than 23 years old and is a full-time or part-time student;

- The child has the same principal residence as the official. For purposes of this provision, a place, located away from the official's residence, at which the child resides for the purpose of attending school is not the child's "principal place of residence"; and

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- The child does not provide more than one-half of his or her own support.

Gifts to Both an Official and One or More Family Members. A single gift to both an official and one or more members of the official's family is a gift to the official for the full value of the gift. See "Wedding Gifts" section below for a particular exception to this rule.

Gifts Solely to Family Members. A gift given solely to a member of an official's family is a gift to the official, when there is no established working, social, or similar relationship between the donor and the official's family member that would suggest an appropriate association for making such a payment. A gift given to a member of an official's family is also a gift to the official if there is evidence to suggest the donor had a purpose to influence the official, such as when:

- The donor is a lobbyist, lobbying firm, lobbyist employer, or other similar person and is registered to lobby the official's state agency;

- The donor is involved in an action or decision before the local or state government agency in which the official will reasonably foreseeably participate, or in an action in which he or she has participated within the last 12 months; or

- The donor has a contract with the official's agency or the donor engages in a business that regularly seeks contracts with, or licenses, permits or other entitlements from, and the official may reasonably foreseeably make or participate in such a decision or has participated in such a decision within 12 months of the time the gift is made, unless the donor has less than 10 percent interest in the business contracting with or appearing before the agency.

6. Invitation-Only Events

When an official and one of his or her guests attends an invitation-only event such as a banquet, party, gala, celebration, or other similar function, other than a nonprofit or political fundraiser as set forth in Regulation 18946.4, the value received is the official's and the guest's pro-rata share of the cost of the food, catering services, entertainment, and any item provided to the official and guest that is available to all guests attending the event. Regulation 18946.2(b). A calculation of the pro-rata share means the total cost of the list expenses above, divided by the number of acceptances or the number of attendees at the event. Any other specific benefit provided to the official and guest at the event, such as golf green fees, is valued at fair market value. Regulation 18946.2(b).

a. Official or Ceremonial Functions

When an official performs an official or ceremonial function at an invitation-only event in which the official is invited to participate by the event's sponsor or organizer to perform an official or ceremonial function, the value received is the pro-rata cost of

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any meal provided to the official and guest, plus the value of any specific item that is presented to the official and his or her guest at the event. Regulation 18946.2(d).

b. Drop-In Visit

Except for an event sponsored by a lobbyist, lobbying firm, or lobbyist employer, if an official attends an invitation-only event and does not stay for any meal or entertainment otherwise provided at the event, receiving only minimal appetizers or drinks, the value of the gift received is the value of any specific item, other than food, that is presented to the official and his or her guest at the event. For purposes of this regulation, "entertainment" means a feature show or performance intended for an audience and does not include music provided for background ambiance. Regulation 18946.2(e).

c. Lobbyists, Lobbying Firms, and Lobbyist Employers

Where an official attends an invitation-only event sponsored by a lobbyist, lobbying firm, or lobbyist employer, the value of the gift is the pro-rata share of the cost of the event. Regulation 18946.2(b), 18640. If the official notifies the lobbyist, lobbying firm, or lobbyist employer that the official attended the event but that he or she did not stay for any meal or entertainment, receiving only minimal appetizers and drinks, the value of the gift received is the value of any specific item (other than food) that is presented to the official and the official's guest at the event. Regulation 18640(b). Again, the term "entertainment" means a feature show or performance intended for an audience and does not include music provided for background ambiance. Regulation 18640.

7. Tickets to Political and Charitable Fundraisers

Regulation 18946.4 provides special rules for tickets provided to public officials to fundraisers for nonprofit and political organizations. Such tickets are not considered gifts to a public official if certain requirements are met. This exception applies only to two tickets provided to an official, and only if it is provided directly by the charity or campaign committee; additional tickets are treated as gifts. The requirements vary depending on whether the organization is a 501(c)(3) nonprofit, a non-501(c)(3) nonprofit, or a political organization.

a. Non-501(c)(3) Nonprofit Fundraiser

Regulation 18946.4(a) provides that a ticket to a fundraising event for a nonprofit, tax-exempt organization that is neither a political campaign committee nor a 501(c)(3) nonprofit shall be valued as follows:

- Where the ticket to the fundraiser clearly states that a portion of the ticket price is a donation to the organization, or the organization provides information indicating the portion of the admission price that constitutes the donation, then the value of the gift is the face value of the ticket or admission reduced by the amount of the donation – i.e., the "nondeductible portion" of the price of admission.

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- If there is no ticket or other official information provided by the organization indicating the value of the nondeductible portion of admission, the value of the gift is the pro-rata share of the cost of any food, catering service, entertainment, and any other item provided to the official that is available to the other guests. A calculation of the pro-rata share means the total cost of the listed expenses, divided by the number of acceptances or the number of attendees. Any other specific benefit provided to the official at the event, such as golf green fees, is valued at fair market value.

b. Fundraiser for a 501(c)(3) Religious, Charitable, Scientific, Literary or Educational Organization

Where the event is a fundraising event for an organization exempt from taxation under Internal Revenue Code Section 501(c)(3), such an organization may provide two tickets per event to an official, and the ticket shall have no value. Regulation 18946.4(b). Any additional tickets or admissions provided by the 501(c)(3) organization, any tickets provided to or controlled by the official, and any tickets not provided directly by the 501(c)(3) are valued as tickets from a non-501(c)(3) nonprofit. Regulation 18946.4(b).

c. Political Fundraiser

For the gift of a ticket, pass, or other admission privilege to a political fundraising event for a "campaign committee" or a comparable committee regulated under federal law or the laws of another state, the committee or candidate may provide two tickets per event to an official that shall be deemed to have no value. A "campaign committee" is any person or persons who directly or indirectly receives contributions totaling two thousand dollars ($2,000) or more in a calendar year (note: this was increased from $1,000 in 2015), makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year, or makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees. Regulation 18406; § 82013.

8. Tickets or Passes to Events Given to Officials by their Agency

a. Gift Exception

FPPC Regulation 18944.1 provides that a ticket or pass to an event or function provided to an official by his or her agency and distributed and used in accordance with a written policy adopted by the agency is not a gift under the Political Reform Act if: (1) the ticket or pass is not earmarked by an outside source for use by a specific agency official; (2) the agency determines, in its sole discretion, who uses the ticket or pass; (3) the distribution of the ticket or pass is reported on Form 802 as described below; and (4) the distribution of the ticket or pass by the agency is made in accordance with a written policy adopted by the agency that meets all of the requirements as described below. Regulation 18944.1(a).

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- **Application**: FPPC Regulation 18944.1 applies only to the benefits the official receives from a ticket or pass to an event or function that are provided to all members of the public with the same class of ticket or pass, when the ticket or pass is provided by an agency to an official of the agency, or at the behest of an agency official. The regulation does not apply to: (1) an admission to an event or function in which the official performs a ceremonial role; or, (2) admission provided to a school, college or university district official, coach, athletic director or employee to attend an amateur event performed by students, which are neither gifts nor income. Regulation 18944.1(f).

b. <u>Written Policy for Distribution of Tickets</u>.

- **Policy Requirements**: The distribution of tickets and passes described above must be made pursuant to a written policy duly adopted by the agency's legislative or governing body that must contain the following: (1) a provision setting forth the public purposes of the agency for which tickets or passes may be distributed; (2) a provision requiring that the distribution of any ticket or pass to, or at the behest of, an official accomplish a stated public purpose of the agency; (3) a provision prohibiting the transfer of any ticket received by an agency official, except to his or her immediate family or no more than one guest solely for their attendance at the event; and (4) a provision prohibiting the disproportionate use of tickets or passes by a member of the governing body, chief administrative officer, political appointee, or department head. Regulation 18944.1(b).

- **Public Purpose**: The agency's legislative or governing body must determine whether the distribution of tickets or passes serves a legitimate public purpose of the agency, consistent with state law. Tickets or passes given to officials (other than a member of the governing body, chief administrative officer, political appointee or department head) to support general employee morale, retention or to reward public service is deemed to have a public purpose. Regulation 18944.1(e).

- **Public Record**: The policy must be maintained as a public record, subject to inspection and copying. The agency must post the policy on the agency website within 30 days of adoption or amendment and send to the FPPC, by email, the agency's website link that displays the policy for posting on the FPPC's website. Regulation 18944.1(c).

c. <u>Form 802 for Reporting Distribution of Tickets and Passes</u>.

Within 45 days of distributing a ticket or pass, the head of the agency must fill out and certify a Form 802 describing the distribution of tickets or passes to an official. The Form 802 requires: (1) the name of the official who received the ticket or pass, (2) a description and date of the event, (3) the fair value of each ticket or pass, (4) the number of tickets or passes distributed to the official, (5) if the ticket or pass is behested,

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the name of the official who behested the ticket, (6) if the official gave the ticket or pass to another person (limited to an immediate family member or no more than one guest), the name of that person, (7) the specific public purpose under which the distribution was made, and (8) a written inspection report of findings and recommendations by the official who received the ticket or pass if it was received for the oversight or inspection of facilities. This form must be maintained as a public record, subject to inspection and copying. The agency must post the form, or a summary of its contents, on its website and send the FPPC, by email, the agency's website link for posting on the FPPC's website. Regulation 18944.1(d).

d. <u>Other Exceptions</u>.

- **Reimbursement**. The ticket or pass is not considered a gift if the official reimburses the agency for the ticket within 30 days of receipt. Regulation 18944.1(h).

- **Treated as Income**. The ticket or pass is not considered a gift if the official treats the ticket or pass as taxable income. Regulation 18944.1(g).

9. Gifts from a Government Agency to an Official in That Agency

A payment by an agency that provides food, beverage, entertainment, goods or services of more than a nominal value to an official in that agency is a gift to that official, unless the payment is a "lawful expenditure of public moneys." Regulation 18944.3.

Several commentators have questioned the need or usefulness of this regulation because a public agency is already prohibited from making a payment that is not a "lawful expenditure of public moneys." Boiled down, the regulation states that it is illegal for an agency to give a gift unless the gift is legal. Until the FPPC issues some formal opinions or advice letters clarifying the regulation, or revises the text, its immediate application is unclear.

10. Wedding Gifts

The value to an official of a wedding gift given to an official and his or her spouse or spouse-to-be is one-half of the gift's total value. Regulation 18946.3. This is an exception to the general rule, described above in "Gifts to an Official's Family," that a single gift to both an official and one or more members of the official's family is a gift to the official for the full value of the gift. The value of a wedding gift may exceed the gift limit, currently set at $500. Regulation 18942(b)(2).

11. Certain Gifts of Travel

Payments for travel for a public official are generally subject to the annual gift limit, unless the payment is otherwise exempt. FPPC regulations define a "payment for travel" as "any payment that provides transportation to an official from one location to

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another location as well as a payment for lodging and food connected with the travel." Regulation 18950(b).

For reporting purposes, payments of air travel are valued in accordance with FPPC regulation 18946.5, as follows. Air travel is valued as the price the carrier charges the public for the same class seat on the flight provided to the official in the case of a commercial flight. The value of all other air transportation is the value of the normal and usual charter fare or rental charge for a comparable airplane of comparable size, divided by the number of passengers aboard the flight.

Exceptions for certain gifts of travel are found in both the Act and the FPPC regulations, which are discussed below. Public officials should review these exceptions closely and consult with the agency's legal counsel before relying on them.

a. Travel Payments Related to Speeches that Serve a Governmental Purpose

Section 89506(a)(1) exempts from the gift limit any payments, advances, or reimbursements for travel that are reasonably related to a legislative or governmental purpose or issue of public policy if made in connection with a speech given by the official in the U.S. § 89506(a)(1); Regulation 18950(b). These types of payments for travel are not subject to the gift limit, but they must still be reported on a public official's Form 700. § 89506(a)(1); Regulation 18950(a).

b. Travel Payments Related to a Governmental Purpose Made by Government Agencies and Certain Non-Profits

Section 89506(a)(2) exempts from the gift limit any payments, advances, and reimbursements for travel that are reasonably related to a legislative or governmental purpose or issue of public policy if provided by a governmental agency, a 501(c)(3) nonprofit,[24] and a few other limited organizations/persons. § 89506(a)(2). These types of payments for travel are generally not subject to the gift limit, but they must still be reported on a public official's Form 700. § 89506(a)(2); Regulation 18950(a). However, Section 89506(f)(3) now clarifies that if a nonprofit is acting as an intermediary or agent of a donor, then the $500 gift limitation would apply and the original donor must be listed as the source of the gift to the official, as well as considered a financial interest for the purpose of conflicts analysis. § 89506(f)(3).

[24] With respect to nonprofit organizations that regularly organize and host travel for elected officials and that make payments, advances, or reimbursements totaling more than $10,000 in a calendar year or $5,000 to an individual person, the Act now requires the nonprofits to disclose the names of donors responsible for funding the travel costs. § 89506(f). An organization "regularly organizes and hosts travel" if the organization's expenses for travel, study tours, or conferences constitutes more than one third of its total expenses. *Id.* In that case, the nonprofit must disclose the names of donors who contributed $1,000 or more to the nonprofit organization and who accompanied the elected official, either in person or through an agent, for any portion of the travel. § 89506(f).

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c. Travel for Education, Training, or Intra-Agency Purposes

Any payment for travel and per diem expenses received from a state, local, or federal agency is not a gift or income if used by the official for "education, training, or other inter-agency programs or purposes." Regulation 18950(c)(2).

d. Travel in a Vehicle or Plane Owned by Another Official or Agency

Regulation 18950(c)(3) provides that "transportation provided to an official in a vehicle or aircraft owned by another official or agency when each official is traveling to or from the same location for an event as a representative of their respective offices" does not constitute a "payment" and therefore does not count as a gift. Regulation 18950(c)(3).

e. Travel Made in Conjunction with Official Agency Business

Regulation 18950.1 provides an exception for travel payments that do not confer a personal benefit on an official, when made by sources other than local, state, or federal agencies, are for the purpose of facilitating the public's business, and are therefore not gifts or income because the payment is made for an official agency purpose in lieu of using agency funds. This exemption applies only to travel payments that meet all of the following requirements:

(1) The payment is made directly to or coordinated with the government employer and not made to the employee using the travel;

(2) The payment is used for official agency business;

(3) The government employer determines which official will use the payment for travel;

(4) The payment provides no personal benefit to the official who uses the payment;

(5) The duration of travel is limited to that necessary to accomplish the purposes for which the travel was provided; and

(6) The government employer reports the payment, as specified below.

The first requirement above – that the payment is made directly to or coordinated with the government employer – is satisfied if the payment is made directly to the government employer or by arranging with the government employer any payments for transportation and lodging that are made directly to the provider of those services. Food may be accepted for attendance at an event where food is provided as part of the admission to the event. All other payments for food must be made to the government employer pursuant to the employer's per diem travel policy. Regulation 18950.1(b).

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The second requirement above – that the payment be used for official agency business – is satisfied under any of the following circumstances:

- The payment is made pursuant to a provision in a contract requiring the contracting party to pay any expenses associated with any required governmental travel resulting from the government agency's participation in the contract and the payment is used for that purpose;

- The payment is made for the travel expenses of an official for the purpose of performing a regulatory inspection or auditing function that the governmental employer is mandated to perform;

- The payment is made for the travel expenses of an official and the official is attending solely for purposes of providing training or educational information directly related to the governmental employer's functions or duties under the laws that it administers for individuals who are affected by those laws, and the payment is made by an organization to provide such training for its members;

- The payment is made for the travel expenses of an official to an educational conference directly related to the governmental employer's functions or duties under the laws that it administers, the official is a named presenter at the conference, and the payment is made by the organizers of the event;

- The payment is made for the travel expenses of an official for the purpose of receiving training directly related to the official's job duties and the payment is provided by an organization that commonly provides such training;

- The payment is made for food provided to all attendees at a working group meeting in which the agency official participates as a representative of his or her agency in a working group meeting under his or her officially assigned job duties and the agency is authorized to provide an official to attend the meeting; or

- The payment is for travel expenses that are required to attend a location to view an in place operation, structure, facility, or available product where the viewing would substantially enhance an official's knowledge and understanding in making an informed decision to enter into a contract regarding a similar operation, structure, facility or purchase of the product pursuant to the jurisdictional authority of the official's governmental employer. Regulation 18950.1(c).

The third requirement is satisfied if the governmental employer selects the official who will make use of the payment. However, if the payment is for expenses related to an oral presentation to either provide training on a subject on which the governmental employer provides training, or discuss policy and direction in implementing the

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functions of the governmental employer, the donor may request the official who is most qualified to make the presentation. Regulation 18950.1(d).

The fourth requirement above – that the payment of travel does not provide a personal benefit to the official – is satisfied under Regulation 18950.1(e) if both of the following requirements are met:

- The travel is for purposes approved by the governmental employer under the same requirements applicable to travel using its own funds, and the official is representing his or her governmental employer in the course and scope of his or her official duties; and

- Travel expenses are limited to no more than the expenses allowable for travel for agency business that would reasonably be paid at agency expense.

The latter requirement does not apply to either of the following:

- Payment for food where food is provided as part of the admission to the event. Otherwise, any payments for food must be made to the government employer pursuant to the employer's per diem travel policy. Regulation 18950.1(b).

- Payment for any lodging or food if the lodging and food is provided at a site where the official attends a widely attended meeting or conference and the value is substantially equivalent in value to the lodging or food typically made available to the other attendees. Regulation 18950.1(g).

The sixth requirement above – that the payment is reported – is satisfied by the agency reporting the payment on a quarterly basis on a form prescribed by the FPPC. Regulation 18950.1(f). All such forms must be maintained as a public record and subject to inspection and copying under Government Code Section 81008, and posted on the agency's website, if it has one.

f. Travel in Connection with Bona Fide Business

The FPPC regulations reiterate the general rule in Government Code Section 89506(d)(3), whereby a payment for transportation, lodging, or food, made in connection with a bona fide business, trade, or profession, and which satisfies the criteria for federal income tax deductions for business expenses specified in Internal Revenue Code Sections 162 and 274, is not an honorarium or gift, unless the sole or predominant activity of the business, trade, or profession is making speeches. Regulation 18950.2.

g. Travel Paid from Campaign Funds

A payment made to an official who is a candidate to cover his or her transportation, lodging or food, in connection with campaign activities, is a contribution to the campaign committee of that official. Regulation 18950.3(a). A payment made to an

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official by or at the behest of a committee for the official's actual travel expenses (including food and lodging), or for other actual and allowable campaign expenses, is neither income nor a gift to the official so long as the expenses are reportable by the committee under the relevant sections of the Political Reform Act (Government Code Sections 84100 *et seq.*) or applicable federal law. Regulation 18950.3(b). Any other payment for travel from a committee to an official that is not covered by Regulation 18950.3(a) and (b) described above is considered income or a gift. Regulation 18950.3.

B. Prohibitions on Receipt of Honoraria

Government Code Section 89502 provides that an elected officer of a local government agency and any official listed in Section 87200 shall not accept an honorarium. This prohibition also applies to candidates for elective office in a local government agency. § 89502(b). An "honorarium" means 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. § 89501.

1. Exceptions to the Prohibition on Honoraria

a. Earned Income Exception

"Honorarium" does not include income earned for personal services if:

- The services are provided in connection with an individual's business or the individual's practice of or employment in a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting; and
- The services are customarily provided in connection with the business, trade, or profession.

Regulation 18932.

b. Informational Materials

"Honorarium" does not include informational materials such as books, calendars, videotapes, or free or discounted admission to educational conferences that are provided to assist the official in the performance of official duties. Regulation 18932.4(a).

c. Family Payments

"Honorarium" does not include a payment received from one's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle or first cousin or the spouse of any such person. However, a payment from any such person is an honorarium if the donor is acting as an agent or intermediary for any person not listed in this paragraph. Regulation 18932.4(b).

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d. Campaign Contributions

"Honorarium" does not include a campaign contribution that is required to be reported. Regulation 18932.4(c).

e. Personalized Plaque or Trophy

"Honorarium" does not include a personalized plaque or trophy with an individual value of less than $250. Regulation 18932.4(d).

f. Admission and Incidentals at Place of Speech

"Honorarium" does not include free admission, refreshments and similar non-cash nominal benefits provided to an official during the entire event at which the official gives a speech, participates in a panel or seminar, or provides a similar service, and actual intrastate transportation and any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar, or service, including but not limited to meals and beverages on the day of the activity. Regulation 18932.4(e).

g. Incidentals at Private Conference

Likewise, "honorarium" does not include any of the following items, when provided to an individual who attends any public or private conference, convention, meeting, social event, meal, or like gathering without providing any substantive service:

- Benefits, other than cash, provided at the conference, convention, meeting, social event, meal, or gathering; or
- Free admission and food or beverages provided at the conference, convention, meeting, social event, meal, or gathering.

However, the foregoing may be reportable as gifts. Regulation 18932.4(f).

h. Travel that Is Exempt from Gifts

Any payment made for transportation, lodging, and subsistence that is exempt by the gift exceptions listed in Section 89506 and Regulation 18950 *et seq.* also does not constitute an honorarium. Regulation 18932.4(g).

C. Prohibitions on Receipt of Certain Types of Loans

1. Prohibition on Loans Exceeding $250 from Other City Officials, Employees, Consultants, and Contractors

Elected officials and other city officials specified in Section 87200, including council members, may not receive a personal loan that exceeds $250 at any given time from an officer, employee, member, or consultant of their city or any local government agency over which their city exercises direction and control. § 87460(a), (b). In

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addition, elected officials and other city officials specified in Section 87200 may not receive a personal loan that exceeds $250 at any given time from any individual or entity that has a contract with their city or any agency over which their city exercises direction and control. § 87460(c), (d).

2. Requirement for Loans of $500 or More from Other Persons and Entities to be in Writing

Elected local officials may not receive a personal loan of $500 or more unless the loan is made in writing and clearly states the terms of the loan. The loan document must include the names of the parties to the loan agreement, as well as the date, amount, interest rate, and term of the loan. The loan document must also include the date or dates when payments are due and the amount of the payments. § 87461.

3. Exceptions to Loan Limits and Documentation Requirements

The following loans are not subject to the limits and documentation requirements specified in paragraphs 1 and 2 above:

- Loans received from banks or other financial institutions, and retail or credit card transactions, made in the normal course of business on terms available to members of the public without regard to official status.
- Loans received by an elected officer's or candidate's campaign committee.
- Loans received from the elected or appointed official's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any such person unless he or she is acting as an agent or intermediary for another person not covered by this exemption.
- Loans made, or offered in writing, prior to January 1, 1998.

4. Loans that Become Gifts are Subject to the Gift Prohibition

Under the following circumstances, as stated in Government Code Section 87462, a personal loan received by any public official (elected and other officials specified in Section 87200, as well as any other local government official or employee required to file a Statement of Economic Interests) may become a gift and subject to gift and reporting limitations:

- If the loan has a defined date or dates for repayment and has not been repaid, the loan will become a gift when the statute of limitations for filing an action for default has expired.
- If the loan has no defined date or dates for repayment, the loan will become a gift if it remains unpaid when one year has elapsed from the

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later of: the date the loan was made; the date the last payment of $100 or more was made on the loan; or the date upon which the official has made payments aggregating to less than $250 during the previous 12-month period.

5. Exceptions – Loans that Do Not Become Gifts

The following loans will not become gifts to an official:

- A loan made to an elected officer's or candidate's campaign committee.
- A loan on which the creditor has taken reasonable action to collect the balance due.
- A loan described above on which the creditor, based on reasonable business considerations, has not undertaken collection action. (However, except in a criminal action, the creditor has the burden of proving that the decision not to take collection action was based on reasonable business considerations.)
- A loan made to an official who has filed for bankruptcy and the loan is ultimately discharged in bankruptcy.
- A loan that would not be considered a gift as outlined in paragraph 3 above (e.g., loans from family members).

§ 87462.

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IV. PROHIBITION AGAINST MASS MAILINGS

The Political Reform Act also prohibits the sending of newsletters and other so-called "mass mailings" at public expense. §§ 89001, 89002.[25] A "mass mailing" is defined as the mailing or distribution at public expense of 200 or more items within a calendar month featuring the name, office, photograph or other reference to an elected officer of the agency. § 82041.5. The Government Code also prohibits a mass mailing from being sent within the 60 days preceding an election by or on behalf of a candidate whose name appears on the ballot. § 89003. The underlying intent of the Government Code provision and the implementing FPPC Regulation is to preclude elected officials from using public agency newsletters as indirect campaign flyers for themselves. The law and regulations are intended to clamp down on prior abuses of newsletters so that elected officials cannot use publicly funded newsletters to bolster their name or accomplishments while in office.

A. Test for Prohibited Mass Mailing

The FPPC regulations previously included a four prong test to determine the legality of mass mailings. Under the statutory text, which now incorporates the requirements from the prior regulation, a mass mailing is prohibited if each of the following elements is present:

- It includes the delivery of a tangible item;
- It "features" an elected officer, or includes a reference to, an elected officer and is sent in cooperation with the elected officer;
- It is sent at public expense; and
- A quantity of more than 200 substantially similar items are sent in a single calendar month.

§ 89002. Most public agencies that publish newsletters attempt to avoid the prohibition by ensuring that the newsletter does not meet the second element of the test. Each of the four elements is discussed in numerical order below.

1. Delivery of Tangible Item

First, a court will determine whether any "item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. The item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document." § 89002(a)(1). This means that if a city intends to deliver a written document, such as a city newsletter, by U.S. mail or by hand to residents or businesses, this element is satisfied.

[25] Section 89002 incorporates Regulation 18901 into the statutory language to clarify the circumstances when a mailing would be prohibited by the general rule in Section 89001 and to identify certain situations when the prohibition would not apply. The FPPC has repealed Regulation 18901 now that the statute includes the same text.

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2. Features or Includes Reference to an Elected Official

The second part of the test is the most important and requires that the item sent either:

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

§ 89002(a)(2). The term "features an elected officer" is defined to mean that "the item mailed includes the elected officer's photograph or signature or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, type face, or type color." § 89002(c)(2). And the term "elected officer affiliated with the agency" in this manner means "an elected officer who is a member, officer, or employee of the agency, or of a subunit thereof such as a committee, or who has supervisory control over the agency or appoints one or more members of the agency." § 89002(c)(1).

This means that if the written document includes the photograph of a council member, even if it just shows the council member cutting a ribbon on a civic project or giving out a plaque to a member of the community, this element would be satisfied. It also precludes articles about an elected city official or articles in which they are "singled out" for discussion or reference.

The other way this second part of the mass mailing test can be satisfied is if an elected city official's "name, office, photograph, or other reference" is included in a written document and the document, or any part of it "is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer." This restriction presents elected officials with a choice. If the elected official involves him or herself in the preparation of the document, then even the official's name is excluded from appearing in the document pursuant to this second subpart. If, on the other hand, the elected official does not involve him or herself in the preparation of the document, his or her name may appear in the document, but not in a way that it is "featured" by way of headlines, captions, type size, type face, or type color.

3. Public Expense

The third part of the test is whether:

- Any of the costs of distribution are paid for with public money, or
- Costs of design, production, and printing exceeding $50 are paid with public money, and the design, production, or printing is done with the intent of sending the item other than as permitted by the statute.

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§ 89002(a)(3). This part of the test precludes the city from either paying the costs of mailing a mass mailing, or paying more than $50 of the cost of having it produced if another person or entity pays for the cost of distributing the mailing.

4. More than 200 Copies of the Item

The fourth and final element of the test to determine whether a mass mailing is prohibited is whether "[m]ore than 200 substantially similar items are sent in a single calendar month, excluding any item sent in response to an unsolicited request…" § 89002(a)(4). This means that if more than 200 copies of the same written document, such as a city newsletter, are sent to the public in the same month, this element will be satisfied, with minor exceptions discussed below.

A city newsletter is particularly prone to violating the mass mailing proscriptions, especially the first, third and fourth elements of the test. The key to a lawful newsletter is to ensure that each issue of the newsletter fully avoids meeting the criteria of the second element of the test. This means that the newsletter cannot "feature" an elected city official and cannot include an elected official's name or reference if that official participates in the preparation of the newsletter, as discussed above. For example, many cities issue proclamations and awards at council meetings, and it is customary for an honoree to be photographed with the mayor. In order to comply with the mass mailing restrictions, the cities take two photographs: one of the honoree shaking the mayor's hand, for distribution to non-city publications such as a local newspaper, and one of the honoree standing alone, for publication in the city newsletter.

B. Exceptions to the Mass Mailing Prohibition

The statute now contains a list of certain types of documents that are exempt from the prohibition of mass mailings. The first of these documents is a letter on city letterhead where the elected official's name only appears in the letterhead along with a list of all other elected officers of the city and the letter does not contain other references to the elected official. § 89002(b)(1). Under this exemption, a non-elected official, such as the city manager, may send a letter on city letterhead at city expense to members of the community but an elected officer, such as the mayor, cannot do the same because the signature on the letter will be considered a separate reference to the elected official. If a letter signed by the mayor is to be sent to the community, a private individual or group would have to pay for the cost of producing and sending that letter.

Other exemptions include press releases to the media, inter-agency communications, intra-agency communications, tax statements and bills, telephone directories, limited meeting or event announcements, and meeting agendas. § 89002(b). All of these items are subject to their own specific limitations, as set forth in the statutory text.

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V. EXPENDITURES TO SUPPORT OR DEFEAT A BALLOT MEASURE

A local government may not spend public funds to assist with the passage or defeat of an initiative or other ballot measure or to contribute to a campaign for or against a candidate. § 54964. Public monies may not be spent on commercials, announcements, banners or any other promotional materials. This is based on the theory that it would be unfair to voters with opposing views to use public funds in this way. The prohibition also serves to prevent elected officials from using government funds to promote themselves or their allies in office. *Stanson v. Mott*, 17 Cal. 3d 206, 217 (1976); *League of Women Voters v. County-Wide Criminal Justice Coordinating Comm'n*, 203 Cal. App. 3d 529 (1988). However, this section does not prohibit the expenditure of city funds to provide information to the public about the possible effects of the ballot measure on the activities, operations, or policies of the city, as long as these activities are otherwise allowed under California law, and the information is factual, accurate, fair, and impartial. § 54964(c).

The leading California case setting forth the basic rule with respect to government involvement in political campaigns is *Stanson v. Mott*, 17 Cal. 3d 206 (1976). In *Stanson*, the California Supreme Court addressed the question of whether the State Director of Beaches and Parks was authorized to expend public funds in support of certain state bond measures for the enhancement of state and local recreational facilities. The court concluded that the Director lacked such authority and set forth the basic rule that "in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign." Only impartial "informational" communications would be permissible, such as a fair presentation of the facts in response to a citizen's request for information.

The *Stanson* Court also recognized that the line between improper "campaign" expenditures and proper "informational" activities is not always clear. "[T]he determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor, and timing of the publication; no hard and fast rule governs every case." *Id.* at 221-22. The *Stanson* test was reaffirmed by the California Supreme Court in *Vargas v. City of Salinas*, 46 Cal. 4th 1 (2009).

Prior to *Vargas*, courts attempting to interpret and apply *Stanson* used varying tests to determine the permissibility of expenditures. For example, in *California Common Cause v. Duffy*, an appellate court held that a local sheriff's use of public facilities and personnel to distribute postcards critical of then-Supreme Court Justice Rose Bird was "political" and not "informational" as permitted by *Stanson* because the cards presented only one side of Justice Bird's fitness to be retained in office. 200 Cal. App. 3d 730, 746-747 (1987). In another appellate decision, *Schroeder v. City Council of Irvine*, the court of appeal upheld Irvine's "Vote 2000" Program. 97 Cal. App. 4th 174 (2002). The program encouraged voter registration, without specifically advocating a particular position on any measure. Although the city had taken a public position in

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favor of the proposed ballot measure, the materials it distributed did not advocate any particular vote on the measure and rarely mentioned the measure at all. The *Schroeder* court held that the funds spent on the Vote 2000 Program would be political expenditures and unlawful under *Stanson* only if the communications expressly advocated, or taken as a whole unambiguously urged, the passage or defeat of the measure. Because the city presented a neutral position on "Measure F," at least in the campaign materials, the court upheld the program as valid.

However, in *Vargas v. City of Salinas*, the California Supreme Court decided that "express advocacy" is an insufficient standard. In *Vargas*, proponents of a local ballot initiative to repeal the city's utility users tax ("Measure O") sued the city alleging improper government expenditures, the court held that even if a communication does not expressly advocate for either side of an issue, a *Stanson* analysis must nonetheless be conducted to determine whether the activity was for informational or campaigning purposes based on its style, tenor, and timing. Although the court did not specifically refer to the *Schroeder* analysis in its opinion, the court clearly stated that the "express advocacy" standard does not meaningfully address potential constitutional problems arising from the use of public funds for campaign activities that were identified in *Stanson*. Thus, local governments must look to *Vargas* rather than *Schroeder* for the proper standard to evaluate whether an expenditure is permissible.

A variety of factors led to the *Vargas* court's conclusion that the communications were informational, including the fact that the publications avoided argumentative or inflammatory rhetoric and did not urge citizens to vote in a particular manner. The challenged expenditures were made pursuant to general appropriations in the city's regular annual budget pertaining to the maintenance of the city's website, the publication of the city's regular quarterly newsletter, and the ordinary provision of information to the public regarding the city's operations. The Supreme Court found that in posting on the city's website the minutes of city council meetings relating to the council's action along with reports prepared by various municipal departments and presented by officials at city council meetings, the city engaged in informational rather than campaign activity. Similarly, the city did not engage in campaign activity in producing a one-page document listing the program reductions that the city council voted to implement should Measure O be approved, or in making copies of the document available to the public at the city clerk's office and public libraries. The court reasoned that viewed from the perspective of an objective observer, the document clearly constituted an informational statement that merely advised the public of specific plans that the city council voted to implement should Measure O be approved.

Finally, the court found that the city engaged in permissible informational activity by mailing to city residents the fall 2002 "City Round-Up" newsletter containing articles describing proposed reductions in city services. Although under some circumstances the mailing of material relating to a ballot measure to a large number of voters shortly before an upcoming election would constitute campaign activity, a number of factors supported the court's conclusion that the mailing of the newsletter constituted informational rather than campaign activity: it was a regular edition of the newsletter that was mailed to all city residents as a general practice, the style and tenor of the

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publication was entirely consistent with an ordinary municipal newsletter and readily distinguishable from traditional campaign material, and the article provided residents with important information about the tax in an objective and nonpartisan manner.

The Supreme Court illustrated the insufficiency of the "express advocacy" standard by suggesting that if the city were to post billboards throughout the city prior to an election stating, "IF MEASURE O IS APPROVED, SIX RECREATION CENTERS, THE MUNICIPAL POOL, AND TWO LIBRARIES WILL CLOSE," it would defy common sense to suggest that the city had not engaged in campaign activity even though such advertisements would not have violated the express advocacy standard.

Vargas and *Stanson* reflect that local agencies must exercise caution when communicating to voters about local measures. Unfortunately, there is no hard and fast rule to assist public officials in distinguishing improper partisan campaign expenditures from permissible expenditures for "informational activities." Whether a communication is permissible will be based on a combination of these factors, and public officials should therefore seek the advice of the city attorney on a case-by-case basis. Assistance may also be obtained from the FPPC.

Last, public officials should also be aware of a fairly new mass mailing rule that regulates communications pertaining to candidates and ballot measures. In 2009, the FPPC adopted a new regulation to prohibit government agencies from paying for mass mailings that expressly advocate or "unambiguously urge" a particular result in an election. Regulation 18901.1 prohibits a mailing if all of the following criteria are met:

- A delivery of a tangible item such as a written document, video tape, record, or button and is delivered to the recipient at his or her residence, place of employment or business, or post office box;

- The item sent expressly advocates or unambiguously urges a particular result in an election;

- The public agency (1) pays to distribute the item or (2) pays costs, exceeding $50, reasonably related to designing, producing, printing or formulating the content of the item including, but not limited to, payments for polling or research and payments for the salary, expenses, or fees of the agency's employees, agents, vendors, or consultants with the intention of sending the item; and

- More than 200 substantially similar items are sent during the course of the election including items sent during the qualification drive or in anticipation of an upcoming election.

A mailing "unambiguously urges a particular result in an election" if the communication can be reasonably characterized as campaign material or activity and is not a fair presentation of facts serving only an informational purpose when taking into account the style, tenor, and timing of the communication.

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There are exceptions to this rule, and the following are not considered campaign related mass mailings: (1) an agency report providing the agency's internal evaluation of a measure sent to a member of the public upon the individual's request; (2) a written argument sent to a voter in the voter information pamphlet; and (3) a communication clearly and unambiguously authorized by law. Essentially, this regulation utilizes the standards articulated by the Supreme Court in the *Vargas* case and provides that communications that violate those standards are prohibited mass mailings.

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VI. PROHIBITION ON GIFTS OF PUBLIC FUNDS

Article XVI, Section 6 of the California Constitution prohibits state and local governments from making gifts of public funds or property. A transfer of property without consideration is a gift. Civ. Code § 1146. However, where property is transferred for a "public purpose" it will not be considered a gift of public funds. There, "[t]he benefit to the government from an expenditure for a 'public purpose' is in the nature of consideration and funds expended are therefore not a gift even though private persons are benefited therefrom." 69 Ops. Cal. Att'y Gen. 168 (1986) (citing *California Employment Stabilization Comm'n v. Payne*, 31 Cal. 2d 210, 216 (1947); *Alameda County v. Janssen*, 16 Cal. 2d 276, 281 (1940)).

In determining whether a legislative body has made a gift of public funds, courts will look first at "whether the money is to be used for a public or private purpose." *Oakland v. Garrison*, 194 Cal. 298, 302 (1941). "If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift." *Id.* As the California Court of Appeal explained in *Board of Supervisors v. Dolan*, "[i]t is settled that if a public purpose is served by the expenditure of public funds, the constitutional prohibition is not violated even though there may be incidental benefits to private persons." 45 Cal. App. 3d 237, 243 (1975). However, to avoid violating the constitutional prohibition, public financial assistance must be tailored or "directly related" to a public purpose. *California Housing Finance Authority v. Elliott*, 17 Cal. 3d 575 (1976). Thus, financial assistance that does not directly further the proffered public purpose may still be found to be unconstitutional.

Courts defer to the legislative body's determination of what constitutes a "public purpose." The concept of public purpose has been "liberally construed by the courts," and a city council's determination of public purpose will be upheld unless it is "totally arbitrary." *County of Alameda v. Carleson*, 5 Cal. 3d 730, 746 (1971). Where a city acts pursuant to a state statute or in furtherance of a state statute, courts will defer to the state legislature in determining whether a public purpose exists.

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VII. CONCLUSION

More often than not, determining the application of conflicts of interest laws in particular circumstances requires complicated analysis. Because the consequences for a violation of these laws can be very serious, it is important that potential conflicts be identified as soon as possible to ensure that the appropriate analysis can be performed. To that end, we recommend that public agency staff prepare maps of council member residences and other real property interests (and those of other public officials, such as planning commissioners) so that such officials may be alerted to projects that are located within 500 and 1,000 feet of their real property interests. Even though the materiality standards for real property interests have changed over the years, this is still an important starting point for a conflicts analysis.

We encourage all public officials to keep in mind that it is the individual responsibility of each public official to determine whether he or she has a conflict in a particular decision.

We encourage officials and staff to seek advice from the city attorney when in doubt about a conflicts of interest issue. Because only a formal, written opinion from the FPPC can immunize someone from prosecution, we strongly encourage officials and staff to seek advice from the city attorney as early as possible, so that, if necessary, the public agency may request a formal opinion from the FPPC prior to any participation in a decision where a public official may have a conflict.

In addition, the Legislature has enacted a statute that requires public officials to take at least two hours of ethics training every two years if the local agency provides that official with any type of compensation, salary, or stipend or provides reimbursement for necessary and reasonable expenses incurred by that official in the performance of his or her official duties. § 53235(a). Ethics training would also be required of any employee designated by the local agency to receive such training. § 53234(c). Please seek advice from the city attorney regarding further details about ethics training.

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