



State of California
Office of the Attorney General

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

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

If you suspect that a government official or a candidate may be involved in a conflict of interest, you can consult this pamphlet to familiarize yourself with the basic requirements of the law and of the enforcement remedies which are available to you. Although this pamphlet will be helpful to both officials and the public, it is no substitute for directly consulting the law in question, or a private or public attorney.

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

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

Sincerely,

BILL LOCKYER
Attorney General

CONFLICTS OF INTEREST

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
Attorney General



Prepared by the Division of Civil Law

James M. Humes
Chief Assistant Attorney General

Louis R. Mauro
Senior Assistant Attorney General

Ted Prim, Editor
Deputy Attorney General

Robert E. Leidigh, Editor
Deputy Attorney General

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INTRODUCTION

In preparing this pamphlet, we relied on a variety of legal resources. Obviously, California statutes and appellate court cases were consulted and are cited throughout the pamphlet. While most of the more significant cases are discussed, this pamphlet is not intended to be a compendium of all court cases in this area. In addition, we referred to published opinions and letter opinions issued by this office. Published opinions are cited by volume, page number and year (e.g., 59 Ops.Cal.Atty.Gen. 339 (1979)). Indexed letters or letter opinions are cited by year and page number (e.g., Cal.Atty.Gen., Indexed Letter, No. IL 75-255 (July 21, 1975)). Published opinions are available through law libraries and some attorneys' offices. As a general rule, indexed letters are available only in the Offices of the Attorney General. Copies may be obtained by a request to the editor.

We also referred to the regulations, published opinions and informal advice letters of the Fair Political Practices Commission (hereinafter "FPPC"). The regulations are found in title 2 of the California Code of Regulations in section 18000 et seq. The opinions of the FPPC may be found in publications of Continuing Education of the Bar and are cited by name, year of publication, volume and page number (e.g., *In re Lucas* (2000) 14 FPPC Ops. 15). We occasionally make reference to FPPC informal advice letters which are referred to by name and number (e.g., *Best Advice Letter*, No. A-81-032). Copies of these materials may be obtained from the FPPC, or online through LEXIS-NEXIS or WESTLAW in the CAL-ETH database.

The pamphlet is current through January 1, 2004 with respect to statutes, case law, Attorney General opinions, and opinions and regulations of the FPPC.

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

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

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

The Brown Act (open meetings for local legislative bodies)
Quo Warranto

ISSUE SPOTTER CHECKLIST

LAW

Financial Conflict of Interest
Political Reform Act
Gov. Code, § 87100 et seq.

Financial Interests in Contracts
Gov. Code, § 1090 et seq.

GUIDEPOSTS

Is a state or local official participating in a government decision?

Does the decision affect an interest in real property or an investment of \$2,000 or more held by the official? Or a source of income to the official of \$500 or more? Or gifts to the official of \$340 or more?

If so, is there a reasonable possibility that the decision will significantly affect any of the interests involved?

Are the official's interests affected differently than those of the general public or a significant segment of the public?

If the answer to these questions is yes, the official may have a conflict of interest and be required to disqualify himself or herself from all participation in that decision. (See ch. I.)

Does a member of a board have a direct or indirect financial interest in a contract being made either by the board or by any agency under the board's jurisdiction?

If so, the member may be subject to criminal sanctions and the contract may be void and any private gain, received by the official under the contract, may have to be returned.

Has any other state or local officer or employee participated in the making of a contract in which the official had a direct or indirect financial interest?

If so, the official may be subject to criminal sanctions and the contract may be void and any private gain received by the official under the contract may have to be returned. (See ch. VI.)

Limitations on State Contracts
Pub. Contract Code, § 10410

Is a state official (other than a part-time board member) involved in an activity, employment or enterprise, some portion of which is funded by a state contract?

Is a state official, while employed by the state, contracting with a state agency to provide goods or services as an independent contractor?

If the answer to any of these questions is yes, a prohibited activity may have occurred. (See ch. VI., sec. B.)

Conflict of Interest Resulting from Campaign Contributions
Gov. Code, § 84308

Is there a proceeding involving a license, permit or entitlement for use?

Is the proceeding being conducted by a board or commission?

Were the board members appointed to office?

Has any board member received contributions of more than \$250 from the applicant or any other person who would be affected by the decision:

- during the proceeding?
- within the previous 12 months prior to the proceeding?
- within 3 months following a final decision in the proceeding?

If the answer to any of these questions is yes, the board member may have to disqualify himself or herself from participating in the decision. (See ch. III.)

Appearance of Financial Conflict of Interest
Common Law

Court-made law, based on avoiding actual impropriety or the appearance of impropriety in the conduct of government affairs, may require government officials to disqualify themselves from participating in decisions in which there is an appearance of a financial conflict of interest. (See ch. XII.)

Receipt of Direct Monetary Gain or Loss
Gov. Code, § 8920

Will an officer receive a direct monetary gain or loss as a result of official action?

If an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity, the officer should disqualify himself or herself from the decision.

However, a conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member. (See ch. XIII.)

Public Reporting of Financial Interests
Political Reform Act
Gov. Code, §§ 87200-87313

Is the official a state or local officer or employee who participates in the making of government decisions?

If so, the official may be required to file a public report disclosing investments, real property, income and gifts. (See ch. II.)

Incompatible Activities
Gov. Code, § 1125 et seq. (local officials);
Gov. Code, § 19990 (state officials)

Is an official using his or her government position or using government information or property in an improper manner?

Has the official's agency or appointing authority adopted an incompatible activities statement?

If the activity has been prohibited by an incompatible activities statement, the official can be ordered to stop the practice and may be disciplined. (See ch. IX regarding local officials, and ch. X regarding state officials.)

Incompatible Offices
Common Law

Does a single official hold two offices simultaneously? (This common law doctrine applies only to public "officers" as opposed to "employees.")

Do the offices overlap in jurisdiction, such that the official's loyalty would be divided between the two offices?

Incompatible Offices
Common Law (continued)

If the answer to each of these questions is yes, the holding of the two offices may be incompatible and the first assumed office may have been forfeited by operation of law. (See ch. XI.)

Transportation, Gifts or Discounts
Cal. Const., art. XII, § 7

Is a state or local official, other than an employee, receiving a gift or discount in the price of transportation from a transportation company? (The prohibition covers inter and intrastate transportation in connection with both government or personal business.)

If the answer to this question is yes, the officer may have forfeited his or her office. (See ch. VIII.)

Former State Officials and Their Former Agencies
Political Reform Act
Gov. Code, §§ 87400-87405

Is a former state administrative official being compensated, by other than the State of California, to appear before any court or state administrative agency, in a judicial or quasi-judicial proceeding?

If so, did the official, while in office, participate personally and substantially in the same proceeding?

If so, the official may be prohibited from appearing in the proceeding. (See ch. IV, sec. B.)

Gov. Code, § 87406

Is a former state official receiving compensation for the purpose of communicating with a state agency within a year of his or her departure from state service? (See ch. IV, sec. C.)

Former State Officials and Their Contracts
Pub. Contract Code, § 10411

Is a former state official contracting with the former agency to provide goods and services?

If the answer to this question is yes, a prohibited activity may have occurred. (See ch. VII, sec. C.)

I.

CONFLICT-OF-INTEREST PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87100 Et Seq.*

A. OVERVIEW

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

One of the legislative declarations at the outset of the Act forms the foundation of the conflict-of-interest provisions: “Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (§ 81001(b).)

The stated intent of the Act was to set up a mechanism whereby “[a]ssets and income of public officials which may be materially affected by their official actions . . . [are] disclosed and in appropriate circumstances the officials . . . [are] disqualified from acting in order that conflicts of interest may be avoided.” (§ 81002(c).)

The Fair Political Practices Commission (hereinafter, the “FPPC”) is the agency primarily charged with the responsibility of advising officials, informing the public, and enforcing the conflict-of-interest provisions of the Act.

B. THE BASIC PROHIBITION

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

The disqualification provision of the Act hinges on the effect a decision will have on a public official’s financial interests. When a decision is found to have the requisite effect, the

*Selected statutory and regulatory materials appear in appendices A (at p. 126), B (at p. 127), C (at p. 129), and D (at p. 159).

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

official is disqualified from making, participating in making, or using his or her official position to influence the making of that decision at any stage of the decisionmaking process.

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

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

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

- STEP 1: Is the individual a public official? (See Section C of this chapter.)
- STEP 2: Is the public official making, participating in making, or influencing a governmental decision? (See Section D of this chapter.)
- STEP 3: Does the public official have one of the six qualifying types of economic interest? (See Section E of this chapter.)
- STEP 4: Is the economic interest directly or indirectly involved in the governmental decision? (See Section F of this chapter.)
- STEP 5: Will the governmental decision have a material financial effect on the public official's economic interests? (See Section G of this chapter.)
- STEP 6: Is it reasonably foreseeable that the economic interest will be materially affected? (See Section H of this chapter.)
- STEP 7: Is the potential effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public? (See Section I of this chapter.)
- STEP 8: Despite a disqualifying conflict of interest, is the public official's participation legally required? (See Section J of this chapter.)

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

It should be noted at the outset that the Act deals with conflict-of-interest situations on a transactional, or case-by-case, basis. This means that situations must be assessed for possible conflicts of interest in the light of their individual facts. The Act demands continual attention

on the part of officials. They must examine each transaction from the Act's perspective to determine if a conflict of interest exists which triggers the disqualification requirement. (See Section L of this chapter for a discussion of the limits on gifts and honoraria.)

C. STEP 1: IS A PUBLIC OFFICIAL INVOLVED?

By its terms, the Act applies to "public officials." (§ 87100.) As that term is used in the Act, it encompasses not only elected and appointed officials in the ordinary sense of the word, but also any "member, officer, employee or consultant of a state or local government agency." (§ 82048.) The term "public official" also encompasses individuals who hold an office or a position listed in Government Code section 87200, including "other public officials who manage public investments" as that term is defined in FPPC regulations. (Cal. Code Regs., tit. 2, § 18701(b)(1).) Officials of all special purpose districts in the state are included, along with virtually all officers and employees at every level of state and local government. The definition of "public official" also encompasses non-employees who are "consultants" because they perform certain duties much like employees. Note that judges of courts and certain other judicial officials and the State Bar are expressly not included within the disqualification provisions otherwise applicable to all public officials. (§ 82048.) Economic disclosure provisions are, however, applicable to judges and court commissioners, as discussed *post*. (§ 87200.)

Neither the Act nor FPPC regulations specifically defines the terms officer or employee. However, the FPPC has defined the term "member" and "consultant." As to "members," the FPPC has, in keeping with the broad scope of the Act, interpreted the Act to apply to the members of all boards or commissions with decisionmaking authority. (Cal. Code Regs., tit. 2, § 18701(a)(1).) It makes no difference whether such board members are salaried or unsalaried. (*Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Com.* (1977) 75 Cal.App.3d 716.) For example, the "public members" on boards and commissions are subject to the provisions of the Act. (Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975).) The FPPC has determined that a board or commission possesses decisionmaking authority whenever:

1. It may make a final governmental decision (Cal. Code Regs., tit. 2, § 18701(a)(1)(A); *In re Maloney* (1977) 3 FPPC Ops. 69; *In re Rotman* (1987) 10 FPPC Ops. 1; and *In re Vonk* (1981) 6 FPPC Ops. 1.)
2. It may compel or prevent the making of a governmental decision by its action or inaction (Cal. Code Regs., tit. 2, § 18701(a)(1)(B)); or
3. Its recommendations are regularly approved without significant modification (Cal. Code Regs., tit. 2, § 18701(a)(1)(C); *In re Rotman, supra*).

California Code of Regulations, title 2, section 18701, subsection (a)(1)(C) refers to bodies which are technically advisory, but which the FPPC views as decisionmaking, since their "advice" generally is followed by the recipient body. This standard involves the determination of whether the board or commission in question has established a track record of having its recommendations regularly approved. (See *Commission on Cal. State Gov.*

Org. & Econ. v. Fair Political Practices Com., supra, 75 Cal.App.3d 716; see also *In re Rotman, supra*, [for a discussion of redevelopment project area committees].)

The final category of officials affected by the Act is that of “consultant.” To qualify as a consultant, an individual must either be:

- delegated specified decisionmaking authority; or
- while acting in a “staff capacity,” either participate in the making of a decision or perform the duties of an officer or employee of a government agency.

Examples of the type of delegated decisionmaking authority that may make an individual a consultant include the power to approve a rule or regulation; adopt or enforce a law; issue, deny, or suspend a permit, license or entitlement; or grant agency approval to a contract, plan, or report.

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

Individuals who contract to provide services or advice to a government agency that do not satisfy the criteria set forth in the regulation are not consultants and, therefore, not public officials for purposes of the Act. If an individual is not a public official, no further inquiry is necessary as to the remaining seven steps.

D. STEP 2: IS THE OFFICIAL MAKING, PARTICIPATING IN THE MAKING OF, OR USING HIS OR HER OFFICIAL POSITION TO INFLUENCE THE MAKING OF A GOVERNMENTAL DECISION?

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

1. Actually Making A Decision

Decision making includes voting on a matter, appointing a person to a position, obligating one’s agency to a course of action on an issue, or entering into a contract for the agency. (Cal. Code Regs., tit. 2, § 18702.1(a)(1)-(4).) Determining not to act in any of those ways is also “making a decision” under the Act. (Cal Code Regs., tit. 2, § 18702.1(a)(5).)

2. Participation In Decision Making

The proscriptions of the Act encompass a broad range of activities beyond the most obvious actions such as voting or contracting, since the language “participate in making . . . a governmental decision” is included in the general prohibition. (§ 87100.) The FPPC has interpreted “participation” to include (1) negotiations without significant substantive review and (2) advice by way of research, investigations, or preparation of reports or analyses for the decision maker, if these functions are performed without significant intervening substantive review. (Cal. Code Regs., tit. 2, § 18702.2.)

Three areas of activity which would otherwise fall within the literal definition of participating in the making of a decision have been expressly excluded.

First, participation does not include actions which are solely ministerial, secretarial, manual, or clerical. (Cal. Code Regs., tit. 2, § 18702.4(a)(1).) These functions are excluded from the definition of participation because they do not involve policy making judgment or discretion. Since the official performing these activities has no substantive role in the decision, there is no fear that the decision will be affected as a result of his or her financial interests. Accordingly, there is no purpose in disqualifying the official from performing these functions.

Second, a public official may appear before his or her own public agency for the purpose of representing his or her personal interests. (Cal. Code Regs., tit. 2, § 18702.4(a)(2) and (b)(1).) The purpose of this exclusion is to allow citizens to exercise their constitutional rights to communicate with their government. However, the exclusion is limited in that it applies to situations in which the decision will solely affect the official’s personal interests (e.g., real property or business solely owned by the official or members of his or her immediate family). To the extent that there are other persons who have the same interest, e.g. other stockholders in a corporation, the official with the conflict is disqualified from addressing his or her agency in any way on that issue. With respect to appearing before one’s own agency or any other agency over which the official’s agency has appointment authority or budgetary control, see subsection 3, Influencing Decision Making, below, and Cal. Code Regs., tit. 2, § 18702.3(a).

Third, by necessity, participation also does not include actions by a public official with regard to his or her compensation for services or the terms or conditions of his or her employment or contract. (Cal. Code Regs., tit. 2, § 18702.4(a)(3).)

3. Influencing Decision Making

The Act, in section 87100, prohibits a public official from “in any way attempting to use his or her official position to influence a governmental decision” when the official has a financial interest. The addition of this final category of prohibited activity was intended to ensure that public officials do not act indirectly to affect their private economic interests by utilizing their official status or activities. It specifically

includes attempting to affect any decision within the official's own agency or any agency appointed by or subject to the budgetary control of his or her agency. (Cal. Code Regs., tit. 2, § 18702.3(a).) Contacts with agency personnel or other attempts to influence on behalf of an official's business entity, client or customers are prohibited. (Cal. Code Regs., tit. 2, § 18702.3(a).)

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

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

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

The prohibition contained in section 87104 is not applicable to local government officials unless they serve on a state body or state advisory body. However, the disqualification requirement contained in section 87100 generally would achieve the same result since local public officials may not make, participate in making, or use their official position to influence the making of government decisions which materially affect their sources of income. (Note: Section 87104 covers all state advisory bodies, whereas section 87100 covers only those advisory bodies with decisionmaking authority.) (See Cal. Code Regs., tit. 2, § 18701(a)(1)(C).)

When a decision is not before the official's own agency, nor an agency over which the official's agency has budgetary control, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official purports to act on behalf of his or her agency in communications with any official of another agency. Such actions include the use of official stationery. (Cal. Code Regs., tit. 2, § 18702.3(b).)

As noted at the outset (Chapter I, Section B, The Basic Prohibition, *ante*), several elements must be present for a conflict of interest to exist. Having discussed who is a covered public official and the types of actions (e.g., making decisions), that are

covered, we must still inquire: does the official have a statutorily defined economic interest; is it reasonably foreseeable that his or her governmental decision could affect that interest materially; and is that effect distinguishable from the effect of that decision on the public generally. If the answer to all three inquiries is yes, the official probably has a disqualifying financial interest under the Act.

E. STEP 3: DOES THE PUBLIC OFFICIAL HAVE ONE OF THE SIX QUALIFYING TYPES OF ECONOMIC INTEREST?*

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

Specifically, the Act addresses six kinds of interests: (1) investments in business entities, (2) interests in real property, (3) sources of income, (4) sources of gifts and their agents or intermediaries, (5) positions with business organizations, and (6) personal finances of the official and the official's immediate family. (§ 87103(a)-(e).) In the case of each category (except the fifth), the Act specifies the minimum amount of holdings, income or gifts which must exist before a qualifying interest is created. An official with a holding, income or gift which is less than the minimum, need not be concerned with the Act's disqualification provisions since such property or income does not constitute an "interest" under the Act. But a holding, income or gift equal to or greater than the minimum value creates the potential for a "material financial effect" on the official's economic interests, which affects the official's interest differently from the way the decision affects the public generally.

1. Investments In Business Entities

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

By opinion, the FPPC defined the investment relationship between limited and general partners. (*In re Nord* (1983) 8 FPPC Ops. 6.) If the limited partnership is "closely held" as defined by statute, a limited partner is deemed to have an "investment" in his or her general partner.

When the limited partner has such an investment, he or she must disqualify with respect to decisions affecting the general partner personally or through business entities controlled by the general partner. However, limited partners do not have an investment in other limited partners.

*Selected statutory materials appear in appendix B (at p. 127).

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

“Indirect investment” is defined to include investments owned by an official’s spouse (as either separate or community property), by dependent children, or by someone else on behalf of the official, i.e., a trust arrangement. (§ 82034; § 87103; Cal. Code Regs., tit. 2, §§ 18234, 18235.) Indirect investment also includes any investments held by a business entity in which the official, his or her spouse, and their dependent children collectively have a 10 percent or greater interest. (§ 82034.)

In Cal.Atty.Gen., Indexed Letter, No. IL 76-35 (February 13, 1976), this office advised that a member of the South Central Regional Coastal Commission had a conflict of interest and should disqualify from participation, where the official owned the requisite amount of stock in a corporation which was party to an appeal to the state commission. The stock had been placed in trust with the official’s spouse and children as income beneficiaries. The commissioner was trustor. The official thus had both an investment and an income interest which gave rise to a “financial interest” under the Act. (See also, *In re Biondo* (1975) 1 FPPC Ops. 54.)

2. Interests In Real Property

An official has an “interest in real property” when the official, spouse or dependent children have a direct or indirect equity, option, or leasehold interest of \$2,000 or more in a parcel of property (e.g., ownership, mortgages, deeds of trusts, options to buy, or joint tenancies) located in, or within two miles of, the geographical jurisdiction of the official’s agency (e.g., within two miles of city boundaries for city officials). (§§ 82033, 82035.) It should be noted that the \$2,000 threshold applies to the value of the official’s interest, based upon the fair market value of the property itself. Special provisions exist with respect to the disclosure of, or disqualification in connection with, leasehold interests. (See § 82033; Cal. Code Regs., tit. 2, §§ 18233, 18707.9(b) and 18729; *In re Overstreet* (1981) 6 FPPC Ops. 12.)

3. Source Of Income

A public official has an economic interest in any source of income that is either received by or promised to the official and totals \$500 or more in the 12 months prior to the decision in question. Income includes loans, other than loans from commercial lending institutions in the ordinary course of business made on terms available to the general public. (§ 87103(c).) The FPPC regulations make it clear that a conflict of interest results whenever either the amount or the source of an official’s income is affected by a decision. (Cal. Code Regs., tit. 2, §§ 18704.5, 18703.3(a), 18705.3,

18705.5(a)); see also *Witt v. Morrow* (1977) 70 Cal.App.3d 817.) Detrimental as well as positive effects on the amount or source of income can create a conflict of interest. For example, a decision which foreseeably will materially affect an official's employer would necessitate disqualification even if the amount of income to be received by the official were not affected. (*In re Sankey* (1976) 2 FPPC Ops. 157.) (See discussion *post* regarding affects on an official's personal finances.)

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

An elected officer may not accept personal loans of \$500 or more unless the officer complies with specified requirements set forth in section 87461. (See also section 87460 which prohibits certain high-level public officials from receiving personal loans from persons who contract with or are employed by the official's agency.)

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

This office interpreted the income provisions of the Act in Cal.Atty.Gen., Indexed Letter, No. IL 75-249 (November 10, 1975) and concluded that no conflict of interest existed where the wife of a deputy superintendent of schools was a supervisor in the same county. Her community property share of her husband's salary from the county was not "income" within the meaning of the Act because it was a government salary specifically exempted by section 82030(b)(2). This exemption does not apply to a decision to hire, fire, promote, demote or discipline the spouse, or to set a salary for the spouse that is different from salaries paid to other employees in the same job classification or position. (Cal. Code Regs., tit. 2, § 18705.5(b).)

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

4. Source Of Gifts

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

Section 87103(e) provides that a public official has a financial interest in the donor of gifts aggregating \$250 or more in the 12 months prior to the decision in question. However, the Legislature has provided that the \$250 threshold be adjusted on a biennial basis to correspond with the gift limit established in section 89503. For the years 2003 and 2004 the disqualification threshold has been raised to \$340. (Cal. Code Regs., tit. 2, § 18940.2.)

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

Ordinarily, the receipt of property or services by a public official without the payment of equal consideration constitutes a gift to the public official. However, under limited circumstances, a gift is made to a public agency rather than to a public official. (Cal. Code Regs., tit. 2, § 18944.2.) In order for a gift to qualify as a gift to an agency rather than an official, four criteria must be satisfied. First, the agency must receive and control the payment. (The payment can be monetary or non-monetary.) Second, the payment must be used for official agency business. Third, although the donor may identify a specific purpose for use of the gift, the agency in its sole discretion must determine the specific official or officials who will use the payment. Fourth, the agency must memorialize receipt of the payment in a written public record. (Cal. Code Regs., tit. 2, § 18944.2.) This writing must establish that the gift was made to the public agency reciting how the first three criteria were satisfied. Further, it must identify the donor and the officials receiving or using the payment, describe the use of the payment, and set forth the nature and amount of the payment. This writing must be filed within 30 days with the person charged with the responsibility of maintaining the agency's statements of economic interests. In addition to the requirements imposed by the FPPC, the Department of Finance has established procedures that state agencies must follow when accepting gifts. (77 Ops.Cal.Atty.Gen. 70 (1994).)

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

5. Business Positions

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

6. Personal Financial Effect

An official has an economic interest in his or her own finances and those of his or her immediate family (spouse, dependent children -- §§ 87103; 82029; Cal. Code Regs., tit. 2, § 18703.5). If it is reasonably foreseeable that a decision will have a financial effect on the official or a member of his or her immediate family that is distinguishable from the decision's effect on the public generally, then disqualification is required whenever the magnitude of the effect will be "material." (§ 87103; Cal. Code Regs., tit. 2 § 18703.5.) A financial effect includes increasing or decreasing the personal expenses, income, assets, or liabilities of the official or members of the official's immediate family. (Cal. Code Regs., tit. 2 § 18703.5.) This does not include effects on the official's real property interests or investment interests. Nor does it include an official's governmental salary, per diem, or benefits, unless the decision is to hire, fire, promote, demote, suspend without pay or other disciplinary action against the official or his or her immediate family member, or to set salary for the official or an immediate family member that is different from salaries paid to other employees of the same agency in the same job classification.

F. STEP 4: IS THE ECONOMIC INTEREST DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

The standard applied to determine whether a decision will have a material financial effect on the public official's interest depends upon whether the interest is directly or indirectly involved. If the interests are directly involved, materiality is generally presumed and the public official usually will have to disqualify himself or herself from the decision. If the interests are only indirectly involved, generally a graduated set of monetary thresholds will be applied to determine the material financial effect. (Cal. Code Regs., tit. 2, § 18704.1(b).)

1. Direct Involvement

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

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

In addition, FPPC regulations apply the "direct involvement" standard to decisions in which there is a "nexus" between the purpose for which the official receives income and the governmental decision. (Cal. Code Regs., tit. 2, § 18705.3(c).) If a person is paid to promote or advocate the policies or position of an individual or group, the official may not then participate in a governmental decision that involves that policy or position. Under the regulation, a "nexus" exists if the official receives income in his or her private capacity to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the governmental decision. (Cal. Code Regs., tit. 2, § 18705.3(c).)

The FPPC has advised that the executive director of an organization, who as a part of his or her duties advocates pro-growth positions endorsed by his or her organization, was disqualified from participating in any decisions in his or her capacity as a member of a board that would advance or inhibit the accomplishment of the organization's goals. (*Best Advice Letter*, No. A-81-032.)

California Code of Regulations, title 2, section 18704.2, subsection (a) clarifies when a governmental decision directly involves a public official's interest in real property. A public official is directly involved if the property in which the official has the interest is the subject of the decision that is before the official's agency or if the official's property is located within a 500-foot radius of the subject property. The regulation expressly provides that property is the subject of a decision if the decision involves the zoning, annexation, sale, lease, actual or permitted use of, or taxes or fees imposed on the property in which the official has an interest. It also includes major redevelopment decisions involving establishment or amendment of the redevelopment plan where the official owns property in the redevelopment area. (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.)

An official is also directly involved in a governmental decision that involves the construction of or improvements to public facilities such as water, sewer or streets, that will result in the property receiving new or substantially improved services. (Cal. Code Regs., tit. 2, § 18704.2(a)(6).)

When leasehold property in which a public official has an interest is directly involved in the governmental decision, it is presumed that the decision will have a material financial effect upon the official's interests. This presumption may be rebutted by

proof that it is not reasonably foreseeable that the governmental decision will have an effect on any of the various factors affecting the value of the leasehold. (Cal. Code Regs., tit. 2, § 18705.2(a)(2).)

California Code of Regulations, tit. 2, section 18704.5 provides that whenever a decision will affect the expenses, income, assets or liabilities of the official or his or her immediate family by any amount the official's personal finances are directly involved in the decision.

Finally, there is one overriding exception to the disqualification requirement where a public official's economic interests are directly involved -- the official need not disqualify himself or herself if it can be shown that the governmental decision will have no financial effect on the official or his or her economic interests. (Cal. Code Regs., tit. 2, §§ 18705(c); 18705.1-18705.5.)

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

2. Indirect Involvement

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

G. STEP 5: WILL THE GOVERNMENTAL DECISION HAVE A MATERIAL FINANCIAL EFFECT ON THE PUBLIC OFFICIAL'S ECONOMIC INTERESTS?*

1. Directly Involved Interests

As discussed in Step 4 above, materiality generally is presumed when the public official's economic interests are directly involved in the governmental decision unless the official can demonstrate that the decision will have no effect on the official or his or her interests. (Cal. Code Regs., tit. 2, § 18705(a).)

However, in the case of a personal financial effect on the finances of the official or a member of the official's immediate family, even if the official's interest is directly involved in the decision the effect must be at least \$250 in a 12-month period in

*Selected regulations appear in appendix C (at p. 129).

order to be considered “material” and require the official to disqualify. (Cal. Code of Regs., tit. 2 §§ 18704.5, 18705(a)(5), 18705.5(a).)

2. Indirectly Involved Interests

When an interest is indirectly involved, there is no presumption of materiality; rather, the public official must find and apply the applicable materiality regulation with its graduated thresholds to the governmental decision in question. (Cal. Code Regs., tit. 2, §§ 18705-18705.5.)

a. Business Entities

Materiality is present if the decision will:

- have the specified effects on the gross revenues, assets, or liabilities of the business entity in which the investment is held, or
- permit the business entity to avoid the expenditure of a designated amount of funds. (Cal. Code Regs., tit. 2, § 18705.1.)

Whether an effect on a business entity will be considered material depends on the financial size of the business entity. (Cal. Code Regs., tit. 2, § 18705.1(c).) For example, an effect of only \$20,000 on the gross revenues or assets is material to a small business (Cal. Code Regs., tit. 2, § 18705.1(c)(4)), while an effect of less than \$10 million on the gross revenues or assets may not be material on a Fortune 500 company (Cal. Code Regs., tit. 2, § 18705.1(c)(1).)

b. Real Property

As previously noted when the decision involves another’s real property located within a 500-foot radius of the official’s property, the official’s interest is presumed to be directly involved in the decision. Thus, a material financial effect is presumed unless the decision will have no financial effect on the official’s property. (Cal. Code Regs., tit. 2, §§ 18704.2(a) and 18705.2(a)(1).)

However, when a decision affects another’s property that is more than 500 feet from the official’s property, the official’s interest is only indirectly involved in the decision. When the official’s interest is indirectly involved, the regulation provides that the effect of the decision is presumed not to be material. This presumption may be overturned if it can be shown that the official’s property will be materially affected. Factors leading to such a conclusion include, among others, circumstances where the decision affects:

(1) the development potential of the property; (2) use of the property; and (3) character of the neighborhood. (Cal. Code Regs., tit. 2, § 18705.2(b)(1).)

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

c. Nonprofit Entity

California Code of Regulations, title 2, section 18705.3, subsection (b)(2) defines materiality in the context of a nonprofit entity that is indirectly affected by a decision. Like the regulation governing effects on business entities, it establishes a series of criteria based upon the monetary size of the nonprofit entity.

d. Individuals

California Code of Regulations, title 2, section 18705.3, subsection (b)(3) establishes standards for determining materiality when a governmental decision will have a material effect on an individual who is indirectly involved and who is a source of income or gift to an official. The regulation establishes a materiality threshold of \$1,000 and for real property incorporates the standards in California Code of Regulations, title 2, section 18705.2, subsection (b).

H. STEP 6: IS IT REASONABLY FORESEEABLE THAT THE ECONOMIC INTEREST WILL BE MATERIALLY AFFECTED?

An official is not required to disqualify from participating in a decision unless the effects of the decision that give rise to the conflict of interest are reasonably foreseeable under all of the circumstances at the time the decision is made. The concept of foreseeability hinges on the specific facts of each individual case. For the effect of a decision to be foreseeable, it need not be either certain or direct. However, the possibility that the contemplated effects will in fact occur must be more than merely conceivable. It must appear that there is a substantial likelihood, based on all the facts available to the official at the time of the decision, that the effects that would bring about the conflict of interest will occur. (Cal. Code Regs., tit. 2, § 18706; *Smith v. Superior Court of Contra Costa Co.* (1994) 31 Cal.App.4th 205; *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983; *Witt v. Morrow*, *supra*, 70 Cal.App.3d 817.)

In *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983, the court analyzed the issue of foreseeability in the context of an ordinance amending a city's redevelopment plan. Plaintiffs brought suit contending that the amendment was invalid

because a council member's property and business would be foreseeably affected by the amendment. The court stated at pages 991-992:

In determining the reasonably foreseeable effects of the adoption of the redevelopment plan, the court may justifiably consider that the very purpose of redevelopment is to improve the property conditions in the redevelopment area. (Health & Saf. Code, § 33037.) [Fn. omitted.] The fact that it might be possible to conceive of specific redevelopment projects which might fail to affect Mr. Santangelo's property and business does not show the trial court's decision was wrong. The test is whether it was reasonably foreseeable that the adoption of the plan would have a material financial effect on Santangelo's property and business, and we find the trial court's decision supported by reasonable inferences and the record.

. . . Not only did Mr. Santangelo own a valuable property in the amended area which was the site of a real estate business employing 32 persons of which he was the sole proprietor, and own 4 parcels of real property in the original redevelopment area, but also several of his properties were specifically mentioned in reports as possible areas for specific projects. [Fn. omitted.]

In an opinion to the Marin Municipal Water District (*In re Thorner* (1975) 1 FPPC Ops. 198), the FPPC discussed foreseeability in the context of granting exceptions to the county's water moratorium. In the case of one district director, the FPPC concluded that it was not foreseeable that a decision on the moratorium would affect the director's husband's private employer. The FPPC based its decision on the fact that her husband was on salary rather than commission, he was working outside the county, and his employer had only done one project in the county within the past 10 years.

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

In *In re Gillmor* (1977) 3 FPPC Ops. 38, the FPPC interpreted the foreseeability requirement in the context of property owned by Gillmor near a redevelopment area.

. . . Thus, it is intended and anticipated that redevelopment will have a financial impact on real property and business located in and near the redevelopment zone.

In the present case, we think it is 'reasonably foreseeable' that these types of positive financial consequences will occur if the property in question is rezoned and the senior citizens' housing complex constructed. . . .

In Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975), this office concluded that the decisions of a state board regulating certain advertising would not materially affect a board member's source of income. In that case, the board member, as a condition of his contract with a television station, recorded a series for an industry, some of whose advertising was regulated by the board. This office reasoned that it was too remote and speculative that a decision to regulate the advertising of a particular industry would materially affect the television station which was the board member's source of income.

By regulation, the FPPC has set forth some guidelines to assist in determining whether a particular decision's effects are "reasonably foreseeable." (Cal. Code Regs., tit. 2 § 18706.) The regulation sets forth certain factors to be considered in making the determination.

- The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction.
- The market share held by the official or the official's source of income in the jurisdiction.
- The extent to which the official or the official's source of income has competition for business in the jurisdiction.
- The scope of the governmental decision in question.
- The extent to which the occurrence of the material financial effect is contingent upon intervening events (not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency).

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

I. STEP 7: IS THE EFFECT OF THE GOVERNMENTAL DECISION ON THE PUBLIC OFFICIAL'S ECONOMIC INTERESTS DISTINGUISHABLE FROM ITS EFFECT ON THE GENERAL PUBLIC?

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

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

Recognizing that no decision will affect every member of the public in the same way, the FPPC, by regulation has defined the term "public generally" to mean a "significant segment" of the public. (Cal. Code Regs., tit. 2, §§18707 and 18707.1.) For a conflict of interest to be avoided, the official's interest must be affected in substantially the same manner as the interests of all members of the group that is determined to constitute a significant segment. If the interests of some members of the significant segment will be affected differently from the interests of others, the official may not avoid disqualification.

In general, the FPPC requires a group of people to be large in number and heterogeneous in nature for it to qualify as a significant segment of the public. (*In re Overstreet, supra*, 6 FPPC Ops. 12; *In re Ferraro* (1978) 4 FPPC Ops. 62.) To the extent it appears to be a narrow, special interest group, it generally would not qualify as a significant segment. (Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975); *In re Brown* (1978) 4 FPPC Ops. 19; *In re Legan* (1985) 9 FPPC Ops. 1.)

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

- Ten percent or more of the population in the jurisdiction of the official's agency or the district that the official represents. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(A)(i).)
- Ten percent or more of all property owners or homeowners in the jurisdiction of the official's agency or the district that the official represents. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(B)(i).)
- Twenty-five percent of all businesses (or 2,000 businesses) in the jurisdiction of the agency or the district which the official represents, so long as the businesses are comprised of other than a single industry, trade or profession. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(C).)
- Five thousand residents of the jurisdiction. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(A)(ii).)
- Five thousand property owners or homeowners in the jurisdiction of the official's agency. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(B)(ii).)

- With respect to an elected state officer, an industry, trade or profession is a significant segment of the general public; with respect to any other elected official, an industry, trade or profession that is predominant in the jurisdiction or district that the official represents is a significant segment of the general public. (Cal. Code Regs., tit. 2, § 18707.7.)

Under limited circumstances, a member of a board or commission may be appointed to represent the interests of a specific economic group or interest. In those circumstances, the group or interest constitutes a significant segment of the general public. (Cal. Code Regs., tit. 2, § 18707.4.) Accordingly, so long as the official's interests are affected in substantially the same manner as those of the group or interest in question, the conflict of interest is vitiated and the official may participate in making the decision. In order for a member to represent a specific economic group or interest, all of the following criteria must be met:

- The statute, ordinance, or other provision of law that creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.
- The member is required to have the economic interest the member represents.
- The board's or commission's decision does not have a material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.
- The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment (50% or more) of the persons the member was appointed to represent.

(Cal. Code. Regs., tit. 2, § 18707.4.)

If the statute creating the board or commission does not expressly provide that the member represents the industry, trade or profession and hold the economic interest, it may be inferred that the legislative body impliedly authorized such representation based upon the language of the enabling provision of law, the nature and purposes of the program, legislative history, and any other relevant circumstances. (Cal. Code Regs., tit. 2, § 18707.4(b).)

In addition to the foregoing, the FPPC has adopted special rules interpreting the "public generally exception" in connection with states of emergency (Cal. Code Regs., tit. 2, § 18707.6); and rate making decisions, including those by landowner/water districts (Cal. Code Regs., tit. 2, § 18707.2). Notwithstanding the specific thresholds established in the regulation, exceptional circumstances may nevertheless justify application of the "public generally exception." (Cal. Code Regs., tit. 2, § 18707.1(b)(1)(E).)

Section 87103.5 provides a special interpretation of the “public generally exception” that addresses specific problems concerning retailers in small communities. (See Cal. Code Regs., tit. 2, § 18707.5(b) for numerical thresholds.)

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

J. STEP 8: DESPITE A DISQUALIFYING CONFLICT OF INTEREST, IS THE PUBLIC OFFICIAL’S PARTICIPATION LEGALLY REQUIRED?

There is an exception in the Act itself to the general prohibition against an official’s participation in decisionmaking when a financial conflict of interest exists. The exception applies when the individual public official involved must act in order that a decision be made or official action be taken. Under such circumstances, and because of the necessity that government continue to function, the official may proceed despite the conflict, after following certain prescribed procedures. (Cal. Code Regs., tit. 2, § 18708.) The exception expressly does not include the situation in which the official’s vote is merely needed to break a tie. (§ 87101.) This exception is similar to, but is different in several important respects from, the common law rule of necessity.

The legally-required-participation provision has been narrowly construed by this office. In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that participation is legally required under the Act (and therefore the exception is applicable) only when the official is faced with the isolated, nonrecurring situation involving a conflict of interest. In reaching this conclusion, this office relied on Government Code section 81003 which provides, “[t]his title should be liberally construed to accomplish its purposes.” If the exception were broadly construed, the central purpose of the Act could be vitiated.

FPPC regulations provide that an official is “legally required to make or to participate” within the meaning of this section only if there is no reasonable alternative manner of decisionmaking. (Cal. Code Regs., tit. 2, § 18708(a).) In determining what is a “reasonable” alternative, the purposes and terms of the statute authorizing the decision must be examined. (Cal. Code Regs., tit. 2, § 18708(a); *Affordable Housing Alliance v. Feinstein* (1986) 179 Cal.App.3d 484; *Brown v. FPPC* (2000) 84 Cal.App.4th 137.) The regulations promulgated by the FPPC detail several steps to be taken by officials who wish to exercise the exception. (Cal. Code Regs., tit. 2, § 18708(b).) Initially, the official must disclose the existence and nature of the conflicting personal financial interest in the outcome of the particular action involved and make it a matter of public record. The official is prohibited from using his or her official position to influence any other public official with regard to the matter. Also, for the record, the official must state exactly why there is no alternative route by which action can be taken. And finally, the official must limit his or her participation to action that is legally required. (Cal. Code Regs., tit. 2, § 18708(b) and (c).) These steps must be closely adhered to in order for the action to be valid. (See *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511.)

Once a member of a body is disqualified, that member may be legally required to participate only if an insufficient number of members remain to constitute a quorum. If a sufficient number of disinterested members exist to form a quorum, their mere absence does not make participation by the disqualified member legally required. (Cal. Code Regs., tit. 2, § 18708(c).)

In *In re Hudson* (1978) 4 FPPC Ops. 13, the FPPC outlined its interpretation of the legally-required-participation exception when multiple members of a body are disqualified. The FPPC concluded that if a quorum of the body were still available to participate in the making of the decision, the disqualifications must stand. If the disqualifications leave less than a quorum of the board's membership available to act, the legally-required-participation exception is triggered. However, unlike the common law rule of necessity, all disqualified members do not return to voting and participating status; rather, only the number of members needed to constitute a quorum are brought back to participate. (See also *In re Brown, supra*, 4 FPPC Ops. 19, 25, fn. 4; *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050.) The process by which disqualified members may return for this limited role may be accomplished by a random drawing. (Cal. Code Regs., tit. 2, § 18708(c)(3).)

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

K. REQUIREMENT TO ANNOUNCE CONFLICT AND LEAVE MEETING

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

1. Public Officials Covered By Government Code Section 87105

For the very limited types of public officials who are covered by section 87200 and who also are subject to either the Brown Act or the Bagley-Keene Open Meeting Act, specific statutory requirements apply as set forth in detail in Government Code section 87105 and the FPPC's implementing regulation. The list of affected officials is as follows: city councils, boards of supervisors, planning commissions, certain retirement investment boards, Public Utilities Commission, Fair Political Practices Commission, Energy Commission and Coastal Commission.

Generally, when one of these officials is disqualified from participating in a decision because of a conflict of interest, the official must publically announce the specific financial interest that is the source of the disqualification. (Cal. Code Regs., tit. 2,

§ 18702.5(b)(1).)) After announcing the financial interest, the official usually must leave the room during any discussion or deliberations on the matter in question and the official may not participate in the decision or be counted for purposes of a quorum. (§ 87105; Cal. Code Regs., tit. 2, § 18702.5(b)(3).)

In the case of a closed session, the disqualified official still must publically declare his or her conflict in general terms but need not refer to a specific financial interest. (Cal. Code Regs., tit. 2, § 18702.5(c).) A disqualified official may not attend a closed session or obtain any confidential information from the closed session. (Cal. Code Regs., tit. 2, § 18702.5(c); *Hamilton v. Town of Los Gatos, supra*, 213 Cal.App.3d 1050.)

2. Public Officials Not Covered By Government Code Section 87105

A public official who is not covered by section 87105 (either because the official is not covered by section 87200 or because the official's position is not covered by the Brown Act or the Bagley-Keene Open Meeting Act) is not subject to these same rules. (Cal. Code Regs., tit. 2, §§ 18702.1(d) and 18702.5(a).) Neither the Act nor implementing regulation requires the officials to leave either the room or the dias. (See Cal. Code Regs., tit. 2, § 18702.1(a)(5), (b) and (c).) However, nothing in these regulations either authorizes or prohibits an agency by local rule or custom from requiring a disqualified member to step down from the dias and/or leave the meeting room. These disqualified officials still may not attend a closed session or obtain any confidential information from the closed session. (Cal. Code Regs., tit. 2, § 18702.1(c).)

All of the restrictions discussed above are separate and apart from the official's right to appear in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. (Cal. Code Regs., tit. 2, § 18702.4.)

L. LIMITATIONS ON AND REPORTABILITY OF GIFTS AND HONORARIA

1. Limits On Gifts

The Act limits the amount of gifts that can be received by specified officials and candidates from a single source during the calendar year to \$250, adjusted biennially by the FPPC to reflect changes in the Consumer Price Index. (§ 89503(f); Cal. Code Regs., tit. 2, § 18940.2.) These limits are separate from the prohibition against receiving gifts totaling \$10 or more a month, if provided by or arranged by a lobbyist. (§§ 86203-86204.) The covered officials and candidates, and corresponding gift limitations, effective as adjusted on January 1, 2003 (Cal. Code Regs., tit. 2, § 18940.2(b)), are set forth below:

- **Elected State or Local Officer or Candidate:** \$340. (§ 89503(a) and (b); Cal. Code Regs., tit. 2, § 18940.2(a).)

- **State Board Member or State or Local Designated Employee:** \$340 if the receipt of the gift would have to be reported as a gift or income from that source on the member's or designated employee's statement of economic interests (exception for part-time members of governing boards of public institutions of higher education unless that position is an elective office). (§ 89503(c) and (d); Cal. Code Regs., tit. 2, § 18940.2(a).) (For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests, since such persons are covered by the prohibition and should be included in the agency's conflict of interest code.)
- **Any Person Covered by Section 87200 Except Judges, but Including Judicial Candidates:** \$340. (§ 89503(a) - (d).)

2. Limits On Honoraria

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

3. Reportability Of Gifts

Gifts aggregating \$50 or more in a calendar year from a single source generally must be reported. (§ 87207.) A "gift" is anything of value that provides a personal benefit for which adequate consideration was not provided in return. Generally, the recipient of the benefit has the burden of demonstrating that any consideration paid was of equal or greater value than the benefit received. A gift is received when the recipient takes possession of the gift or exercises some direction or control over it. (Cal. Code Regs., tit. 2, § 18941(a).) However, for purposes of the disqualification requirement, when there is a promise to make a gift, the gift is received on the date on which it is offered so long as the recipient knows of the offer and ultimately receives the gift or exercises some direction or control over it. (Cal. Code Regs., tit. 2, § 18941(b).)

Both a source of a gift and any intermediary in the making of a gift must be disclosed. (§§ 87210, 87313; Cal. Code Regs., tit. 2, § 18945.3.) The gifts of an individual donor are aggregated with any gift by an entity in which the donor is more than a fifty percent (50%) owner. (Cal. Code Regs., tit. 2, § 18945.1.) When a gift is made by multiple donors, the group of donors must be generally identified, and any individual donors of \$50 or more must be named. (Cal. Code Regs., tit. 2, § 18945.4.)

Under specified circumstances, a gift may be made to a public agency rather than to an individual. (Cal. Code Regs., tit. 2, §§ 18944.1, 18944.2; see Section E, subsection 3(b) of this chapter.)

4. Reportability Of Travel Expenses

Reportable travel expenses of an official or candidate should be reported on the special schedule created by the FPPC for that purpose. (§ 87207(c); Cal. Code Regs., tit. 2, 18950.1(a)(2)(B).)

5. Special Rules On Travel

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

a. Totally Exempt

1. The following travel expenses, when provided to an official or candidate (“filer”) who gives a speech, participates in a panel or seminar, or performs a similar service, are not payments and are not subject to any prohibition, limitation or reporting obligation (see Cal. Code Regs., tit. 2, § 18950.3):
 - (i) Free admission, refreshments and non-cash nominal benefits provided to a filer during the entire event;
 - (ii) actual intrastate transportation to and from the event;
 - (iii) any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar or service, including meals and beverages on the day of the activity.

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

2. Travel expenses paid from campaign funds are not honoraria or gifts so long as they are expressly authorized by section 89513(a). (§ 89506(d)(1); Cal. Code Regs., tit. 2, §§ 18950.1(c) and 18950.4.)
3. Travel expenses paid for by an official’s public agency do not constitute honoraria or gifts. (§ 89506(d)(2); Cal. Code Regs., tit. 2, § 18950.1(d).)

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

b. Reportable but Not Limited

The travel expenses discussed below are not subject to the gift and honoraria limits contained in the Act. However, such travel expenses may trigger the basic disqualification requirement contained in section 87100 (see *ante* under Sections A through J of this chapter). In addition, if the reporting threshold (\$50) is reached, the expenses must be reported by the official or candidate on any applicable statement of economic interests.

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

1. The travel expenses are in connection with a speech given by an official or candidate; the lodging and subsistence is limited to the day before, the day of, and the day after the speech; and the travel is within the United States; or
2. the travel is provided by a government agency (foreign or domestic), an educational institution under Internal Revenue Code section 203, or a nonprofit organization which is tax exempt under Internal Revenue Code section 501(c)(3). (§ 89506(a); Cal. Code Regs., tit. 2, § 18950.1.)

Although not limited, these travel expenses are generally reportable pursuant to Gov. Code §§ 87207(c), 89506(c).

c. Both Reportable and Limited

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

6. Definition Of Gift

As previously noted, a gift is anything of value that provides a personal benefit, either tangible or intangible, to a public official or candidate for which the donor has not received equal or greater consideration. (§ 82028(a).) Gifts frequently include money, food, transportation, accommodations, tickets, plaques, flowers and articles

for household, office, or recreational use. A gift also includes a rebate or discount in the cost of a product or service, unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.

The Act and FPPC regulations contain a number of exemptions from the basic definition of a gift. Items that are exempt from the gift definition provisions are likewise exempt from any reporting or limitations placed on gifts. The rules providing for these exemptions are quite technical and complex. Below is a summary of the major exemptions from the definition of gift.

a. Informational Material

Material that serves primarily to convey information and is provided to assist the official or candidate in the performance of his or her official duties, or the elective office he or she seeks is exempt as “informational material.” These materials may include books, magazines, maps, models, etc. (Cal. Code Regs., tit. 2, § 18942.1.) If the item is a scale model, pictorial representation, or map, and the value is \$340 or more (this amount is adjusted biennially; see Section L, subsection 1, of this chapter), the recipient has the burden of demonstrating that the purpose of the material is to assist the recipient in performing his or her official duties in order for the item to be exempt. (Cal. Code Regs., tit. 2, § 18942.1(b).) Travel is not informational material, except that on-site tours or visits designed specifically for public officials or candidates are informational material. However, transportation to and from the site is not deemed informational material unless there are no commercial or other normal means of travel to the site (such as by private auto). (§ 82028(b)(1); Cal. Code Regs., tit. 2, § 18942.1(c).)

b. Returned Unused

Gifts are exempt if unused and returned within 30 days to the donor or donated to a government agency or nonprofit entity exempt from taxation under § 501(c)(3) of the Internal Revenue Code so long as a charitable tax deduction is not taken. (§ 82028(b)(2); Cal. Code Regs., tit. 2, § 18943(a).) Specific procedures for returning gifts in order to avoid disqualification are set forth in California Code of Regulations, title 2, section 18943(b). A recipient may negate a gift or may reduce a gift’s value by reimbursing the donor for some or all of the gift within 30 days of receipt or acceptance of the gift. (Cal. Code Regs., tit. 2, § 18943(a)(4).) As a general rule, a recipient may not negate the receipt of a gift by turning the item over to another person or discarding it. (Cal. Code Regs., tit. 2, § 18941(a)(3).) (However, see different rule for passes and tickets *post* under Section L, subsection (7)(a) of this chapter.)

c. Relatives

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

d. Campaign Contributions

Bona fide campaign contributions are exempt. (§ 82028(b)(4); Cal. Code Regs., tit. 2, § 18942(a)(4).)

e. Plaques or Awards

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

f. Home Hospitality

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

g. Exchange of Gifts

Gifts exchanged between an official or candidate and another individual, other than a lobbyist, in connection with birthdays, Christmas, other holidays or similar events are exempt, so long as the gifts exchanged are not substantially disproportionate in value. (Cal. Code Regs., tit. 2, § 18942(a)(8).)

h. Devise or Inheritance

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

7. Valuation Of Gifts

Gifts are valued as of the date they are received or promised to the recipient. (Cal. Code Regs., tit. 2, §§ 18941(a) and 18946(a).) The value is the fair market value of the gift on that date. If a gift is unique, the value of the gift is the cost to the donor if the cost is known or ascertainable to the recipient. In the absence of such knowledge, the recipient must exercise his or her best judgment in reaching a reasonable approximation of the gift's value. (Cal. Code Regs., tit. 2, § 18946(b).)

a. Passes and Tickets

A ticket providing a single admission to an event or facility, such as a game or theater performance, is valued at the price the ticket is offered to the public. However, the pass or ticket has no value unless it is either used or transferred to another. (Cal. Code Regs., tit. 2, § 18946.1(a).)

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

b. Testimonial Dinners

When an official or candidate is honored at a testimonial dinner or similar event, other than a campaign event, the recipient is deemed to have received a gift in the amount of the pro rata share of the cost of the event plus the value of any specific tangible gifts received by the individual. (Cal. Code Regs., tit. 2, § 18946.2.)

c. Wedding Gifts

Generally, wedding gifts are considered to be made to both spouses equally. Therefore, one-half of the gift is attributable to each spouse. If a wedding gift is particularly adaptable to one spouse or intended exclusively for the use of one spouse the gift shall be allocated in whole to that spouse. (Cal. Code Regs., tit. 2, § 18946.3.) Although wedding gifts are exempt from the gift limit, they are reportable and may trigger disqualification. (Cal. Code Regs., tit. 2, § 18942(b)(2)). Moreover, this exemption does not negate the lobbyist gift limit of Government Code section 86203. (Gov. Code § 89503(e)(2) and (g).)

d. Tickets to Political and Nonprofit Fundraisers

Tickets to political fundraisers or fundraisers conducted by nonprofit organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code have no value. The value of tickets to other nonprofit, tax exempt organization fundraisers is the face value minus the value of any donations stated on the ticket, or where no such donation is set forth, the value is the fair market value of food, beverage, or other tangible benefits provided to each attendee. (Cal. Code Regs., tit. 2, § 18946.4.)

e. Prizes and Awards

Generally, prizes and awards are valued at their fair market value. However, a prize or award won in a bona fide competition unrelated to the recipient's status as an official or candidate is not a gift but is income and may be reportable, depending upon the source and amount. (Cal. Code Regs., tit. 2, § 18946.5.)

8. Definition Of Honoraria

In general, an honorarium is a payment made in consideration for any speech given, article published, or attendance at a public or private conference, convention, meeting, social event, meal, or similar gathering. (§ 89501.) However, the definition excludes certain travel-related payments. For information concerning limitations on food, transportation, lodging, and subsistence, see Section K, subsection 5, of this chapter.

A speech includes virtually any type of oral presentation including participation as a panel member. Comedic, dramatic, musical, or artistic performances do not constitute the making of a speech for purposes of the honoraria limitation. (Cal. Code Regs., tit. 2, § 18931.1.)

For purposes of the honoraria limitation, an "article published" refers to a non-fiction written work which is published in a periodical, newsletter, or similar document. An article published in connection with a bona fide business, trade, or profession is exempt from the prohibition. (Cal. Code Regs., tit. 2, § 18931.2.) (A bona fide business is defined in Cal. Code Regs., tit. 2, § 18932.1.) An individual is deemed to have received payment in connection with a published article if he or she receives payment for drafting any portion of the article, or is identified as an author or contributor to the work. (Cal. Code Regs., tit. 2, § 18931.2.)

a. Earned Income

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

- The services are provided in connection with an individual's business (including nonprofit entities) or employment in a bona fide business, trade, or profession (other than speech making), (§ 89501(b); Cal. Code Regs., tit. 2, § 18932(a)(1) and (b)); and
- The services are customarily rendered as a part of the business. (Cal. Code Regs., tit. 2, § 18932(a)(2).)

b. Teaching Profession

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

- The individual is under contract or employed to teach at a school, college, or university which is accredited, approved, or authorized as an educational institution by the State of California, another state, the federal government or an independent accrediting organization. (Cal. Code Regs., tit. 2, § 18932.2(a).)
- The individual is paid to teach a course which is presented to maintain or improve professional skills and knowledge and where the course provides continuing education credits for members of the profession. (Cal. Code Regs., tit. 2 § 18932.2(b).)
- The individual is paid for teaching individuals who are enrolled in an examination preparation program such as a State Bar examination review course. (Cal. Code Regs., tit. 2, § 18932.2(c).)

c. Return or Donation of Honoraria

The limitations on honoraria do not apply if, within 30 days of the receipt of the honorarium, the honorarium is returned unused or it is donated to the general fund of the agency in question. If the payment is not money and cannot be contributed to the general fund, the recipient may reimburse the donor for the value or use of the honorarium. (§ 89501(b)(2); Cal. Code Regs., tit. 2, § 18933.)

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

- The donation is made directly to the charity;
- the speaker does not make the donation a condition for making the speech or appearance;
- the donation is not claimed as a tax exemption by the speaker;
- the donation will not have a foreseeable material financial effect on the speaker or the speaker's immediate family; and
- the speaker is not identified to the recipient charity in connection with the donation.

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

M. SPECIAL RULES FOR ELECTED STATE OFFICERS

Because section 87102 exempts elected state officers from the Act's remedies for violation of section 87100, special disqualification prohibitions have been created for these officials. (§§ 87102.5-87102.8.) With respect to legislators, these prohibitions generally are imposed where legislators have specified interests in non-general legislation, i.e., legislation which affects only a small number of persons and does not affect the general public. (§ 87102.6.) Members of the Legislature are also prohibited from participating in, or using their official position to influence state government decisions in which the member has a financial interest, and which do not involve legislation. (§ 87102.8.)

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

II.

ECONOMIC DISCLOSURE PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87200 Et Seq.*

A. OVERVIEW

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

Articles 2 and 3 of Chapter 7 of the Act deal with disclosure of economic interests by public officials. These provisions were challenged in the case of *Hays v. Wood* (1979) 25 Cal.3d 772, as unconstitutionally overbroad and as violative of privacy rights. The court rejected these claims holding that the disclosure scheme established in the Act was not overbroad and that any infringements on the official’s right to privacy or associational freedom was justified by the limited disclosure needed to prevent a conflict of interest. (See also, *Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662.)

B. PERSONS COVERED

The Act provides that all state and local officials, who foreseeably may materially affect private economic interests through the exercise of their public duties, must disclose such interests. Some persons are required to file disclosure statements because of the positions they hold and others are required to file because of their job duties. The disclosure requirements for constitutional officers, members of the Legislature, county supervisors, city council members, mayors, judges, and other high ranking officials are set forth in Government Code sections 87200-87210.² All other officials who make or participate in the making of decisions are covered by conflict of interest codes adopted pursuant to Government Code sections 87300-87313. The promulgation and administration of conflict of interest codes will be discussed in Section F of this chapter. Under Government Code section 87200 et seq., high ranking state and local officials must disclose all income,

*Selected statutory materials appear in appendix B (at p. 127).

²All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

gifts, interests in real property, and investments located in or doing business in their jurisdiction. The disclosure requirements for all other officials depend upon the power of the individual by virtue of his or her official position to affect financial interests.

C. STATEMENTS OF ECONOMIC INTERESTS

Public officials disclose their private economic interests in a document entitled “Statement of Economic Interests.” (Form 700.) (For information concerning public access to these statements, see Section E of this chapter.) There are three basic types of statements of economic interests: assuming office; annual; and leaving office. As the names of these statements suggest, public officials must report their economic interests when they begin public service, annually thereafter, and when they leave service. In addition, candidates for the elective offices specified in section 87200 et seq., (other than appellate or supreme court justices), must file candidate statements. (§ 87201.) The time for filing candidate statements is set forth in section 87201, for those subject to its provisions, and in conflict of interest codes for all other candidates.

D. CONTENT OF STATEMENTS

In general, an official’s statement of economic interests discloses the types of interests in real property, investments, business positions, and sources of income and gifts which he or she potentially could affect in his or her official capacity. (For a brief discussion of these economic interests, see Chapter I, Sections E and L. For specific instructions, see the disclosure forms and manual of the FPPC or contact the FPPC directly.)

Except for the disclosure of gifts, officials need not disclose the specific amount of their economic interests. They are merely required to mark the appropriate value range applicable to their economic interests, e.g., less than \$2,000; \$2,000 to \$10,000; \$10,000 to \$100,000; or \$100,000 or more. By merely indicating the applicable value range, the public is alerted at least partially to any potential conflict of interest, and the official’s privacy is safeguarded from those who are merely curious about the degree of the official’s wealth. (*City of Carmel-By-The Sea v. Young* (1970) 2 Cal.3d 259.)

If income is received or an interest in real property or investment is held at any time during the period covered by the statement, it must be disclosed. Officials are required to report all interests in real property and investments held by their spouses and dependent children and their community property interest in the income of their spouses. (§§ 82030, 82033, 82034.) Officials who own a 10 percent or greater interest in a business entity must disclose the sources of income to, and the interests in real property and investments held by, the business entity if the applicable prorated dollar thresholds are satisfied. (§§ 82030, 82033, 82034.) Similar disclosure provisions exist with respect to trusts. (See Cal. Code Regs., tit. 2, § 18234.) Assets held by a truly blind trust that meets the standards contained in FPPC regulations are not disclosable. (See Cal. Code Regs., tit. 2, § 18235.)

Except for gifts, the disclosure of income, interests in real property, business positions and investments need not be reported if there is not a sufficient connection between the official's economic interest and the jurisdiction of the official's office or agency. Thus, an interest in real property must be disclosed only if it is within the official's jurisdiction or within two miles of it. (§§ 82033, 82035.) Similarly, a source of income, or a business entity in which an official has an investment or holds a business position, must be reported only if the source or entity is located in the jurisdiction, is doing business in the jurisdiction, is planning to do business in the jurisdiction, or has done business within the jurisdiction during the past two years. Once again, the purpose for this limitation is to protect the official's privacy in financial affairs that are beyond the official's power to affect. (See, *City of Carmel-by-the-Sea v. Young*, *supra*, 2 Cal.3d 259.) In reporting income, the appropriate value range is determined by the gross amount received, rather than the net. (*In re Carey* (1977) 3 FPPC Ops. 99.) Therefore, an official may have reportable income even when he or she sells a car, land, or an investment at a loss.

For a discussion of gifts, including definitions, valuation and reporting, see Chapter I, Section E, subsection 4; Chapter I, Section L, specifically subsections 3 through 8.

E. PUBLIC ACCESS TO STATEMENTS OF ECONOMIC INTERESTS

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

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

F. CONTENTS AND PROMULGATION OF CONFLICT OF INTEREST CODES

Every agency taking actions that foreseeably may materially affect economic interests must adopt a conflict of interest code for its employees. A conflict of interest code lists those employees or officers who have disclosure obligations (designated employees) and prescribes the types of interests which must be disclosed by such officials (disclosure categories). For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests. Such persons are covered by the disqualification prohibition and should be included in the agency's conflict of interest code. Employees who perform merely ministerial or manual tasks, or members of advisory non-decisionmaking boards, as defined by FPPC regulations, are not subject to a conflict of interest code. The public is entitled to participate in the code adoption process as provided for in section 87311 and the applicable open meeting law (for local

government bodies, The Brown Act, contained in Gov. Code, § 54950 et seq.; for state bodies, The Bagley-Keene Open Meeting Act, contained in Gov. Code, § 11120 et seq.). You may contact the Office of the Attorney General for information on the applicable open meeting law. For more information about the promulgation and contents of conflict of interest codes, contact the FPPC. The FPPC can provide sample lists of designated employees, model disclosure categories, and other aids.

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

G. PENALTIES AND ENFORCEMENT

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