



**FAIR POLITICAL PRACTICES COMMISSION**

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**To:** Chair Ravel and Commissioners Eskovitz, Garrett, Montgomery and Rotunda

**From:** Zackery P. Morazzini, General Counsel

**Subject:** Monthly Report on Legal Division Activities

**Date:** November 28, 2011

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***A. REGULATIONS FOR 2012***

As you may recall from the July Commission Hearing discussion of the 2011 regulation calendar, Commission staff has implemented a new process for the development of regulations.

1. **Identifying Necessary Projects:** In order to establish a list of regulation ideas, Legal Division staff meets with the public to solicit feedback. For 2011, we held three Interested Persons meetings (April 14, April 21, and June 9). Once the proposals are collected, we meet with Executive staff for their review and guidance as to what projects should be placed on the calendar.

2. **Researching the Issue:** At that point, individual attorneys are assigned to each regulation project.

3. **Public Input:** After researching the issues, the attorney schedules an Interested Persons meeting. Depending on the complexity of the regulation or packet of regulations, multiple Interested Persons meetings may be held.

4. **Internal Vetting:** Staff will then prepare draft language that will be presented to other Commission staff for comment and changes.

5. **Setting Agendas:** Based on public and staff feedback, Executive staff can then determine on which agenda the regulation will appear. Staff believes it is very important to have

the regulation fully developed before placing on the Commission agenda. Obviously, public input can greatly delay or expedite the agendaing of regulation items.

6. **APA Compliance:** Once draft language has been settled upon, the regulation will be noticed through the Office of Administrative Law (OAL) as required under the Administrative Procedures Act (APA).<sup>1</sup> Staff's notice to the public is intended to ensure the public will be aware of the issues and options the Commission will consider.<sup>2</sup> This allows the public to provide informed comment during the notice period and to make an informed choice whether to appear and comment on the items at the actual Commission meeting. The statutory notice procedure also requires that the notice be sent to interested persons. We satisfy this requirement via our listserv email system. We also publish the materials on our website.

7. **Draft Agenda (30 days out):** While we are not required to do so by the law, we are now preparing and publishing a preview draft agenda that is posted to the website approximately 30 days in advance of Commission meetings so that the public has an earlier opportunity to see what items will be considered. This preview agenda will be updated as the agenda changes.

8. **Presentation to the Commission:** The final step is to prepare the regulation and a memorandum for Commission consideration. In order for the Commission to legally consider the item at a Commission meeting under the Bagley-Keene open meeting law, the Commission must publically agendaize the item 10 days in advance of the meeting date. Once the Commission adopts the regulation, it is then sent back to OAL for finalization. It is the Commission's practice, however, that the regulation becomes the official policy of the agency upon adoption.

Since June 2011, we have been able to complete several major projects identified by the public for revision, including improvement of the enforcement regulations, the simplification of the gift regulations, and dealing with specific campaign issues (appearing on this agenda). For 2012, we have two general categories of projects left from the total list prepared after the Interested Persons meetings. They are (1) improvement of the conflict of interest regulations and (2) improvement of the lobbying regulations.

At this time, staff is suggesting we focus on the conflict-of-interest rules which apply to all public officials at every level of government. Below is a list of projects that were suggested by interested persons. While we suggest waiting to examine the lobbyist regulations until next year, we in no way suggest those proposals are of any lesser importance. However, due to the

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<sup>1</sup> Unlike other agencies, the Commission is not subject to the current APA which governs the regulatory action of state agencies, but rather is subject to the 1974 version of the APA. Therefore Commission regulations are subject to only a 30-day notice period. However, since publication of notice still occurs in OAL's Notice Bulletin (along with all other state regulations), we must still provide the notice and regulation to OAL well in advance of the publication date (45 to 60 days in advance of the Commission Meeting).

<sup>2</sup> The actual notice is published in the notice bulletin, not the regulation. The regulatory language is made available from the Commission on its website.

complexity of the regulations and based on staff availability, we believe that project is best saved for the end of 2012 or early 2013.

1. **Possible codification of *In re Siegel* (1977) 3 FPPC Ops. 62.** In *Siegel*, the Commission considered whether members of a water development corporation, a non-profit corporation formed for the purpose of providing a financing mechanism for acquiring portions of the water system serving a city, are public officials because the water development corporation is a local government agency. The following criteria were applied for determining whether a non-profit corporation is a local government agency: (1) whether the impetus for formation of the corporation originated with a government agency; (2) whether it is substantially funded by, or its primary source of funds is, a government agency; (3) whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and (4) whether the corporation is treated as a public entity by other statutory provisions. These same criteria have been applied by staff since 1977, and staff believes they should be codified into a regulation.

2. **Reasonable Foreseeability:** This is presently Step 6 in the conflict-of-interest analysis. The current regulation provides that “A material financial effect on an economic interest is reasonably foreseeable, within the meaning of Government Code section 87103, if it is substantially likely that one or more of the materiality standards (see Cal. Code Regs., tit. 2, §§ 18704, 18705) applicable to that economic interest will be met as a result of the governmental decision.” (See also *In re Thorner* (1975) 1 FPPC Ops. 198.) However, the concept continues to be factually based and difficult to analyze in providing advice. Staff believes the definition can be clarified and simplified.

3. **Simplification of Identification of Financial Interests:** Move towards an “any financial interest” standard. Suggestions have been made that the Section 87103 paradigm of economic and financial interests is outdated. Consideration of a simpler rule could be in the form of a clarifying regulation or possible legislation.

4. **“Public Generally” Exception:** Review and amend as necessary the series of regulations dealing with “public generally” exception to conflicts, as they often prove difficult to apply to real-world situations. For example, Regulation 18707.2 could be revised to clarify the term “proportional basis” in connection with the public generally defense for certain types of votes.

5. **Material Financial Effect (indirect effect on real property):** Consider amending Regulation 18705.2 to establish a quantifiable definition of “material financial effect” when an official’s real property is indirectly affected. Currently, if an official’s real property is more than 500 feet from the subject property under consideration, there is a presumption that the effect will not be material. However, the presumption may be rebutted by “proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real

property in which the public official has an economic interest, which make it reasonably foreseeable that the decision *will have a material financial effect on the real property* in which the public official has an interest.” Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects: (A) The development potential or income producing potential of the real property in which the official has an economic interest; (B) The use of the real property in which the official has an economic interest; (C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. However, with respect to rebutting the presumption, what is considered “material” is not defined.

**6. Real Property Disclosure and Disqualification:** Consider amending Regulation 18703.3 to add that while an official’s personal residence is not reportable it can be a major source for conflicts of interest.

**7. Consultants:** Look at the consultant definition and disclosure requirements to determine if these can be clarified. Under the Act, “contractors” may be considered “filing consultants” depending on the facts surrounding the contract. However, not all contractors are consultants. So a clear dividing line is important for disclosure and disqualification under the Act.

**8. Economic Interest, Defined: Business Entities. (18703.1(d)(2)(C).)** Define “controlling owner” as limited to someone with an interest of “more than 50 percent,” rather than the simple “50 percent” we have now.

**9. LAFCO Contribution disclosure: § 84250 et seq.** In 2008, AB 1998 (Stats. 2008, ch. 192, § 1) added Section 84251 to the Act. Section 84251 provides: “A payment made for ‘political purposes,’ as that term is used in Sections 82015 and 82025, includes a payment made for the purpose of influencing or attempting to influence the actions of voters or a local agency formation commission for or against the qualification, adoption, or passage of a LAFCO proposal.” The stated purpose for the bill was to “impose on a committee formed to support or oppose a LAFCO proposal, as defined, requirements regarding the filing of campaign statements.” Since LAFCO proceedings are different in nature to traditional campaigns, it may be useful to adopt clarifying regulations concerning LAFCO proceedings.

## **B. UPDATE ON PUBLIC RECORD ACT REQUESTS AND ADVICE LETTERS**

Between October 24, 2011 and November 10, 2011 the division received 9 CPRAs and responded to 4. During the same period we received 17 advice letter requests and issued 12 advice letters.

**Advice Letter Summaries from October 24, to November 10, 2011****Campaign****Jack Scott, Ph.D.****A-11-170**

A former elected official recently became aware of a single misdirected \$1,000 political contribution incorrectly sent to the wrong address. Because the official's campaign bank accounts are closed and campaign committees are all terminated, he may sign the check over to a charitable organization or other entity permissible under the Act's surplus funds rules and file a campaign report showing the receipt and disposition of the funds.

**George E. Park, Jr.****A-11-071**

A political party committee may provide free office space to a candidate. The fair market value must be reported as a contribution. A political party committee may also receive reimbursement from a candidate for use of office space.

**Assemblymember Tony Mendoza****A-11-180**

The Act does not prohibit an elected official from soliciting a payment for a billboard asking people to register to vote, and the payment for the billboard does not constitute a contribution so long as the billboard does not contain express advocacy as defined in Regulation 18225(b)(2). Nonetheless, the payment must be reported as a behested payment if payments made by the source at the official's behest aggregate to \$5,000 or more in the calendar year.

**Richard Rios****A-11-181**

An Internet website is subject to disclosure requirements of the Act contained in Section 84506(a)(1) and (2) if the website is an independent expenditure paid for by a primarily formed or general purpose committee supporting or opposing a candidate for public office. Rescinded Letters: The *Thompson* Advice Letter No. A-06-061.

**Mark A. Kudler****A-11-196**

A party that has paid to erect a billboard that identifies or features a public official but does not expressly advocate for the official's election is not required under the Act to file a report disclosing payments for the billboard if it is removed 45 days before an election in which the official is a candidate.

**Miscellaneous****Richard R. Rios****A-11-198**

A sponsored non-candidate controlled committee unable to meet the criteria for termination provided in Regulation 18404(b) may send a written request for termination to the Commission disclosing the amount of funds believed to be misappropriated and attesting that (1) the sponsor does not know of any deposits into the committee's account, and has not authorized expenditures from the account, subsequent to the closing date of the period covered by the committee's last

filed campaign statement; (2) the amount of funds misappropriated is less than the likely costs of recovering the funds; and (3) any funds recovered will be immediately deposited into the bank account of a committee subsequently established by the same sponsor for the same purpose, paid to the Secretary of State for deposit in the General Fund of the State, or paid to the general fund of the local jurisdiction in which the committee is based.

### **Revolving Door**

#### **Mike Inamine**

**I-11-185**

A former state employee's activities on behalf of his new employer, a local flood control agency, are restricted under the Act's permanent and one-year bans. However, the one-year ban does not prohibit the official from making (1) an appearance or communication before his former agency if made as part of "services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings" or (2) a presentation, attended by representatives of his former agency, before a body other than his former agency (or an agency where its "budget, personnel, and other operations" are subject to the control of his former agency) so long as the presentation is not used to make a prohibited communication to the representatives.

#### **Sara J. Wan**

**A-11-193**

Under the Act's permanent ban, a former state employee may not advise or assist a permit applicant, for compensation, regarding the appeal of the applicant's permit before the official's prior state agency employer when the official had previously participated in a decision by the agency to grant the appeal.

### **SEI**

#### **Cathy Sparks**

**A-11-118**

Attorneys contracted as consultants by the Vallejo Sanitation & Flood Control District are participating in making governmental decisions, and therefore, must file Form 700s.