FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

To: Vice Chair Eskovitz and Commissioners Casher, Wasserman and Wynne

From: Zackery P. Morazzini, General Counsel

Subject: Monthly Report on Legal Division Activities

Date: April 3, 2014

A. OUTREACH AND TRAINING

- On February 10, 2014, Senior Commission Counsel Heather Rowan was a guest lecturer for the University of California Berkeley Goldman School of Public Policy. The Public Policy class focused on lobbying in California, restrictions, and pitfalls that led to recent scandals. The students were interested in ways to address and prevent such scandals and in particular focused on cleaning up our government system as the next generation of policy makers starts rising. Ms. Rowan was impressed by the lively and engaging discussion and the thoughtfulness of the class.

- On February 14, 2014, Commission Counsel Scott Hallabrin participated in an online webinar dealing with completion of the Statement of Economic Interests (Form 700) for approximately 100 judges. The webinar was sponsored by the Education Committees of the Los Angeles County Superior Court and the California Judges Association. Mr. Hallabrin highlighted several common issues that arise in completion of the Form 700 and provided detail on related issues concerning gifts, investments and sources of income. Mr. Hallabrin also fielded numerous follow-up e-mail questions from the participant judges.

B. PROBABLE CAUSE DECISIONS

Please note, a finding of probable cause does not constitute a finding that a violation has actually occurred. The respondents are presumed to be innocent of any violation of the Act unless a violation is proved in a subsequent proceeding.

In the Matter of Frank J. Burgess, FPPC No. 12/516. On February 6, 2014, after hearing, probable cause was found to believe that the named Respondent committed one violation of the Political Reform Act, as follows:

Count 1: On or about April 6, 2010, Respondent Frank J. Burgess, as a member of the Board of Directors for San Gorgonio Memorial Healthcare District (SGMHD), and consequently as a member of the Board of Directors for San Gorgonio Memorial Hospital (SGMH), attempted to use his official position to influence a governmental decision in which he had a financial interest when he gave a packet of informative materials to SGMH Board Members before they voted on whether to approve an agreement with a competing company and discontinue storing documents with Burgess North American, a business entity in which Respondent Burgess was an officer, director and held a position of management, in violation of Government Code section 87100.

In the Matter of James Gattis, 12/398. On March 6, 2014, after hearing, probable cause was found to believe that Mr. Gattis committed one violation of the Act as follows:

Count 1: On or about May 27, 2010, Respondent James Gattis, as a member of the Board of Directors for Salinas Valley Memorial Healthcare System, made a governmental decision in which he had a financial interest by voting to approve the termination of a lease agreement between the Salinas Valley Memorial Healthcare System and Central Coast Audiology, Inc., which was a source of income to Respondent Gattis, in violation of Government Code Section 87100.

The following case was decided based solely on the papers. The respondent did not request a probable cause hearing.

In the Matter of Marcie Berman Of Counsel, FPPC No. 13/0128. On March 12, 2014, probable cause was found to believe that the named Respondent committed four violations of the Political Reform Act, as follows:

Count 1: Respondent failed to timely file a Report of Lobbyist Firm (Form 625) with attached Lobbyist Report (Form 615) for January 1, 2012 through March

31, 2012 (Due April 30, 2012), in violation of Government Code Sections 86113 and 86114.

Count 2: Respondent failed to timely file a Report of Lobbyist Firm (Form 625) with attached Lobbyist Report (Form 615) for April 1, 2012 through June 30, 2012 (Due July 31, 2012), in violation of Government Code Sections 86113 and 86114.

Count 3: Respondent failed to timely file a Report of Lobbyist Firm (Form 625) with attached Lobbyist Report (Form 615) for July 1, 2012 through September 30, 2012 (Due October 31, 2012), in violation of Government Code Sections 86113 and 86114.

Count 4: Respondent failed to timely file a Report of Lobbyist Firm (Form 625) with attached Lobbyist Report (Form 615) for October 1, 2012 through December 31, 2012 (Due January 31, 2013), in violation of Government Code Sections 86113 and 86114.

C. LEGAL ADVICE TOTALS

- ***Email Requests for Advice:*** In February and March, Legal Division attorneys responded to more than 239 email requests for legal advice.

- ***Advice Letters:*** From January 31, 2014 to March 31, 2014, the Legal Division received 42 advice letter requests and issued 38 advice letters.

    - **Section 1090 Letters:** From January 31, 2014 to March 31, 2014, the Legal Division received 12 advice letter requests concerning Section 1090 and issued 7 advice letters.

D. ADVICE LETTER SUMMARIES

Campaign

John St. Croix **A-13-159**

Under Section 84215, candidates for director of the Bay Area Rapid Transit District, which is a multi-county agency, must file the original and one copy of their campaign statements with the county with the largest number of registered voters, the Registrar of Voters of Alameda County, and must file a copy with the county in which the candidate or elected official is domiciled.

Bob Nelson **A-14-010**

A county supervisor and his staff are not prohibited from advocating or soliciting contributions for a ballot initiative. However, if the supervisor controls a ballot measure committee supporting the initiative, he may solicit contributions only if the ballot measure committee does not make contributions to support or oppose candidates, including himself.

Erik Nasarenko **A-14-015**

A local elected official may maintain a campaign committee and bank account from his or her most recent election to use for officeholder expenses. Any mass mailings sent by the committee must comply with the sender identification requirements of Section 84305 and Regulation 18435. **This letter rescinds** the *Brown* Advice Letter, No. A-83-296 to the extent that the *Brown* letter creates an exception to the sender identification requirements of the Act in Section 84305 without statutory or regulatory authority. In addition, **the letter supersedes** the *Nolan* Advice letter, No. I-88-188, in part, to the extent that *Nolan* discusses with approval the conclusion in the *Brown* Letter.

Kirk Uhler **A-14-026**

Cross complaint alleging that the official failed to perform under a private consulting contract because of his time commitment to the county arises out of the official's private employment and not out of his activities, duties, or status as a candidate or elected official. Accordingly, campaign funds may not be used to defend against the complaint.

Terri A. Griffin **I-14-027**

The local electronic campaign filing provisions of Santa Rosa's proposed ordinance meet the legal requirements of Section 84615 for a local jurisdiction to enact electronic filing. The proposed ordinance's additional disclaimers on campaign communications funded by independent expenditures and local robocall regulations are permissible as they do not conflict with the Act or prevent anyone from complying with the Act. The ordinance's additional filing requirements for independent expenditures will not apply to county or state committees that make independent expenditures in support of or opposition to city council candidates or ballot measures under Section 81009.5.

Attebery, Rod A. **I-14-041**

A LAFCO alternate boardmember must recuse himself from any LAFCO decision if he knows or has reason to know that a participant has contributed $250 or more to his campaign for the state legislature. Alternately, the boardmember may return the contribution within 30 days of the decision. A boardmember knows or has reason to know he has received a contribution if the contribution is included on an up-to-date list of contributors to his campaign.

Conflict of Interest

Andrea S. Visveshwara **I-13-067**
A member of a city commission that advises the city council concerning grants-in-aid to assist non-profit groups may not make, participate in making, or influence decisions when to do so will have a foreseeable, material financial effect on her employer or on her personal finances. When decisions concern clients of her employer, she should consider the size of the grant, the size of the non-profit organization seeking the grant, and the volume of business between the non-profit and her employer when determining whether a financial effect is foreseeable and material.

E. Christine Dietrick **A-13-160**
Two city councilmembers whose personal residences were within 500 feet of the boundaries of properties that are the subject of governmental decisions were disqualified from participating and considering certain portions of a General Plan Land Use and Circulation Element policy. The councilmembers may participate in other related decisions provided that the official's participation does not affect the decision in which he or she has a conflict of interest. The city council may use a means of random selection that is impartial and equitable (e.g., draw straws) in order to determine which official will have the matter in which he has a conflict considered first, thereby allowing him to participate in all remaining decisions.

Mary Casey **I-14-007**
General informal advice instructing a board member of a local water district, whose outside source of income may be involved in issues before the district, on how to analyze whether she has a potential conflict of interest under both the Act's conflict of interest provisions and Government Code Section 1090's prohibitions on conflicts of interests in government contracts.

Deepak Moorjani **A-14-014**
A registered civil engineer was co-owner of a firm that provided engineering services to the city under a consulting contract entered into in 1993. By September of 2013, he had finished providing consulting services to the city and had sold his engineering firm. Therefore, the conflict-interest-provisions under Section 1090 do not prohibit him from entering into an employment contract with the city because, in his current capacity, he is not subject to those provisions.

Diana Mahmud **A-14-017**
A councilmember who owns a residence within 500 feet of another property seeking a conditional use permit from the City Planning Commission may not request that the City Attorney seek a legal opinion concerning CEQA interpretations that were provided to the Planning Commission unless she can rebut the presumption of materiality imposed by Regulation 18705.2(a)(1) by showing that it is not reasonably foreseeable that the decision will have *any* financial effect on her real property.

Brand, Edward M. **A-14-021**
A board member of a school district is not prohibited from voting on the relocation of the district offices to a building located more than 500 feet from property he owns and leases to a tenant. It is not reasonably foreseeable that the relocation would have a material financial effect on his interests.

Cary Reisman **A-14-022**
Even though a councilmember has a disqualifying conflict of interest, there are levels of participation that are allowed under the Act. For example, because he wholly owns his residence which is within 500 feet of property subject to a governmental decision, he may appear as any other member of the general public in order to represent himself on matters related solely to his residence. He may also discuss the issue with friends, neighbors, and other members of the community, even if he does so in an attempt to rally their opposition or support to the project, so long as the friends, neighbors, and community members are not members, officers, employees or consultants of the city.

Arnold M. Alvarez-Glasman **A-14-030**
So long as a decision affecting real property within 500 feet of a councilmember's business and leased property will not affect the councilmember's business or lease, the councilmember will not have a conflict of interest in the decision.

Jessica Jahr **A-14-031**
Except for officials who hold an office specified in Section 87200, an official with a conflict of interest does not violate Section 87100 by merely attending an informational hearing presented to the entire board at a public meeting. Moreover, the official does not have a conflict of interest with respect to implementation of an agency agricultural order or changes to the order so long as these decisions do not affect application of the order to the official, or any of his other interests as described in Section 87103.

Robert H. Pittman **A-14-039**
If the city's Housing Element and General Plan decisions can be broken down into separate decisions that are not inextricably interrelated to a decision in which the mayor has a disqualifying conflict of interest, the mayor may participate in these other unrelated decisions so long as: (1) the inclusion of property belonging to Mayor's source of income in the housing inventory list of the Housing Element and associated amendments to the General Plan are determined first and a final decision is reached by the agency without the mayor's participation; (2) the subsequent decisions do not result in a reopening of, or otherwise financially affect, the decision from which the mayor was disqualified; and (3) the mayor does not have a conflict of interest in the subsequent decisions based on other interests as specified in Section 87103. Moreover, Regulation 18709(c) provides that once all the separate decisions related to a general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt, reject, or amend the General Plan. However, the mayor may not

participate in any of the General Plan or Housing Element decisions, including preliminary discussions, study sessions, and environmental scoping sessions, until the decision in which he has a conflict of interest is resolved with finality.

Edward Z. Kotkin **A-14-038**
A city council member may participate in the decision regarding indemnification under the Government Claims Act for acts he took that were within the scope of his employment. Whether the city council member acted beyond the scope of his employment is a question of fact that the city council must decide, but the member at issue cannot participate. Nor can he participate in the decision to indemnify if the council determines his acts were outside the scope of his employment because that decision will have a material effect on his personal finances.

Christine Davi **A-14-040**
A city official may participate in a governmental decision where there are no facts that establish a reasonably foreseeable material financial effect on his interests would result. All of his interests, which include a property management business and clients of the properties his business manages, are only indirectly involved in the decision.

Gregory W. Stepanicich **A-14-053**
Proposed flood control measures to achieve a reasonable and acceptable level of flood protection would be considered “repairs” and “maintenance” and a Board Member with property within 500 feet of the floodplain would therefore be considered indirectly involved in the decisions.

Gifts Limits

Lynn Schenk **A-14-004**
Generally, services received by a public official without cost are considered reportable gifts to the official and are subject to the $440 gift limit. The Act provides an exception if the “gift” is a rebate or discount available for no charge regardless of their official position. There were insufficient facts to determine whether the specific action in question would result in the receipt of a gift by the official or would fall into the exception.

Lacey E. Keys **I-14-013**
Nonprofit 501(c)(3) organizations, which are also lobbyist employers, sought informal assistance regarding newly adopted gift regulations primarily related to reporting travel payments made for agency business under Regulation 18950.1, and payments for admission, food, and nominal items provided to an official making a speech under Regulation 18942(a)(11).

Mass Mailing

Kimberly D. Willy **A-14-008**
The Act's mass mailing restrictions under Section 89001 and Regulation 18901 would apply if a public official mailed a total of more than 200 posters with his name, office, and photograph to recipients at their residence, place of employment, business or post office box, and/or other non-governmental business locations.

Revolving Door

Elizabeth Siggins **A-14-006**
The Act's revolving door provisions prevent a former Department of Corrections and Rehabilitation senior policy advisor from advising her former department on behalf of her current, private employer, regarding implementing the Affordable Care Act. The ban is in place for one year after her departure from government service.

Erin C. Lama **A-14-009**
One-year ban: The Act generally prohibits a former employee from appearing before his own agency, for compensation, for 12 months after leaving office. However, the Act does not prohibit a former employee of Covered California from applying to his former employer in his personal capacity to be an insurance agent. Nor does the one-year ban prohibit the former official from advising clients about matters before his former employer.

Permanent Ban: The former employee will be subject to a permanent ban on appearing before or communicating with his former agency, or advising private clients, regarding a quasi-judicial matter or contract in which he was involved as a public official. However, he may appear before, or communicate with his former agency, and advise private clients, regarding *new* quasi-judicial matters or contracts in which he was not involved as a public official, so long as this occurs after the one-year ban period has passed. The former employee may also assist clients with the renewal of their contracts with his former employer if these renewals are new proceedings with different consideration and different terms than the contract in which he participated in as a state employee.

Jane Ogle **I-14-023**
The revolving door provisions do not prohibit a former state official from accepting employment with a consulting company. However, the one-year ban prohibits the former official from making an appearance or communication for the purpose of influencing certain proceeding for 12 months after leaving state employment, including general administrative decisions involving the health care initiative the former official had authority over as a state employee. Additionally, because the official had previously participated in the performance of his employer's contract with his former agency, the official is prohibited from aiding, advising, counseling, consulting with or in any way assisting his new employer, or making an appearance or communication on his

new employer's behalf, for the purpose of influencing: (i) the amendment or revocation of the contract; (ii) the issuance or awarding of a substantially similar contract; or (iii) agency decisions that, although still within the contract's terms, are likely to result in more than a *de minimis* change in the level of services or goods provided from that originally contemplated by the agency.

Hector D. Davila, PE **A-14-046**
Former Deputy District Director of Construction for Caltrans is prohibited from making appearances or communications before his former state employer for one year, except to the extent that the appearances are made to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement between Caltrans and his private sector employer. During the one-year period, he may not appear in connection with seeking future contracts for his private sector employer.

Section 1090

Pamela J. Walls **C-14-001**
The California Constitution states that boards of supervisors shall prescribe their salaries by ordinance. Neither the Political Reform Act nor Government Code Section 1090 interferes with that constitutional mandate. Therefore, a county supervisor is not prohibited from voting on a matter concerning his or her salary.

Rod Hsiao **I-14-002**
Under Government Code Section 1090, a county school board member is prohibited from being financially interested in contracts made in his official capacity or made by boards or commissions of which he is a member. This prohibition extends to contracts by the districts within the county in light of the budgetary authority the official's agency has over the districts. Accordingly, a business in which the official has a financial interest may not contract to provide services to the districts within the county.

Brand, Edward M. **A-14-021a**
Section 1090 generally prohibits public officials, while acting in their official capacities, from making contracts in which they are financially interested. If a board member of a school district has a financial interest in a lease agreement pursuant to which the district leases property located 517.1 feet from the board member's property, the board member would have a conflict of interest and the lease agreement would be void.

Ken Rosenberg **I-14-024**
A candidate for city council is not prohibited under either the Act or Section 1090 from holding that office because he has a financial interest in a contract with the city that pre-dated his taking office. However, depending on the facts, if the candidate is elected,

any future attempt to renew or modify the contract may raise conflict of issues for the councilmember under either the Act or Section 1090, or both.

Anne Russell **A-14-033**
A city councilmember who is president of a company that has a contract with the City that was entered into prior to his election to the City Council seeks to modify the contract while on the City Council. Government Code section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under Section 1090, modifying a contract constitutes the making of a contract, which is prohibited. And even though his company is a "tenant" of the City, neither of the landlord/tenant exceptions under Section 1090 applies. Therefore, the City Council is prohibited from modifying the existing lease, even if he abstains from participating in the decision.

Roger C. Peters **C-14-036**
Under Section 1090, a public official has a remote interest in her 401(k) account that is 100% funded by PG&E stock, as well as a remote interest in the related dividends. She does not have a financial interest in her 401(a) defined-benefit plan and payments thereon for purposes of Section 1090 because the payments are guaranteed regardless of the performance of the underlying assets. Because the public official has a remote interest in a corporation that is the subject of a contract with the city council on which she serves, she may not participate in negotiating or making the contract, but the city council is not barred from entering the contract.

SEI

Lois Fisher **A-14-011**
A Planning Commissioner is not required to report income from clients of her husband's business on her Form 700 because her prenuptial agreement treats his income as separate income and the income from those clients is not comingled with community funds, used to pay community expenses, or used to produce or enhance her husband's separate income. Also, such income would not be the source of a conflict of interest when participating in governmental decisions involving clients to her husband's business.

William D. McMinn **A-14-018**
When a person pays for a public official's travel and accommodations, the payment may either be a gift or income depending on whether the recipient official provides consideration of equal or greater value to the source of the payment. In the case of a payment made by the Jewish Institute for National Security Affairs (JINSA) to the benefit of a former Navy Rear Admiral (who currently serves as a port commissioner) to attend the Retired Generals and Admirals Program, the official will be providing consideration of equal or greater value and therefore the payment would not be a gift, but would be

income to him. Moreover, pursuant to the definition of income in Section 82030(b)(2), reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code would not be reportable.

Khalid T Siddiqui **A-14-020**

The obligation to file a Form 700 is governed by the Department of General Services' (DGS) duly enacted conflict of interest code. DGS may not require individuals whose positions are not designated in the code to file Form 700s. Proposed amendments to a conflict of interest code (including adding to the list of designated positions) is not effective or enforceable until the procedure in Regulation 18750 is fully complied with, including approval by the Code Reviewing Body.