Fair Political Practices Commission

Memorandum

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

From: Zackery P. Morazzini, General Counsel
William J. Lenkeit, Senior Commission Counsel

Subject: Adoption of Proposed Amendments to the Conflict of Interest Regulations
Step 6 of the Conflict of Interest Analysis: Reasonably Foreseeable

Date: August 6, 2012

Proposed Commission Action and Staff Recommendation:

Approve for adoption the amendment of Regulation 18706 of the Act's conflict of interest regulations, as set forth in the attached proposed amendment.

Introduction:

Over the next several months, Commission staff will be proposing certain amendments to the Act's conflict of interest regulations with the goal of making the regulations more applicable, easier to understand, and generally more helpful in serving as a guide in determining if a conflict of interest exists under the Act. This project begins with what is the last, and perhaps most problematic, step[1] in the conflict of interest analysis – determining if a material financial effect on a public official's economic interest is "reasonably foreseeable."

Background:

Section 87100 provides the basic rule for the Act's conflict of interest prohibitions. It states:

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

Section 87103 provides that an official has a financial interest in a decision within the meaning of Section 87100 "if it is *reasonably foreseeable* that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any" of certain enumerated economic interests. (Emphasis added.) These economic interests consist of the following:

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[1] The Commission has developed an eight-step process (as explained below) for use in determining if a conflict of interest exists. The first six steps address whether or not a conflict exists. Steps seven and eight provide the two exceptions that allow a public official to participate in a decision notwithstanding a determination that the reasonably foreseeable financial effect of a governmental decision on the public official's economic interest is material. (See Regulations 18707-18707.10 and Regulation 18708.)

(1) A business entity if the official has a direct or indirect investment[2] of $2,000 or more;

(2) Real property in which the public official has a direct or indirect interest worth $2,000 or more;

(3) Any source of income, other than gifts or loans from a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating $500 or more, received by the official within 12 months before the decision was made;

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

(5) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating to more than $420 provided to, received by, or promised to the official within 12 months before the decision is made.

The Commission has developed an eight-step analysis for determining whether or not an official has a conflict of interest under the Act. (See Regulation 18700.) The eight steps are:

(1) Are you a public official?

(2) Are you participating in a governmental decision?

(3) Do you have any economic interests?

(4) Are your economic interests directly involved or indirectly involved in the decision?

(5) Are the financial effects of the decision material?

(6) Are the material financial effects of the decision reasonably foreseeable?

(7) May you nevertheless participate in a decision in which you have a disqualifying interest under the "public generally" exception?

(8) May you nevertheless participate in a decision in which you have a disqualifying interest under the "legally required participation" exception?

As stated above, this item solely concerns Step 6 of the analysis – how to determine if the material financial effects of the decision are reasonably foreseeable.

History:

The Commission first addressed the concept of what is reasonably foreseeable, less than one year after the Act became effective, in its *Thorner Opinion*, (1975) 1 FPPC Ops. 198. The questions raised in *Thorner* primarily involved a public official who was a director of a municipal water district.[3] At the time of the request, the district had a moratorium on new water connections, and was

[2] "For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependant child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official's agents, spouse, or dependant children own directly, indirectly, or beneficially a 10-percent interest or greater." (Section 87103(e).)

[3] There were two directors involved in the opinion, but the primary analysis involved only one of the directors, and our discussion is limited to his interests.

considering options for lifting the ban as well as facing general decisions for variances for new water connections. The director owned a business that sold building materials, major appliances, fuels, and heating and air conditioning systems. The lifting of the moratorium would increase building activity in the district.

The Commission was presented with a number of specific questions involving scenarios with potential connections between the director's business and the project that would be the subject of the governmental decision.[4] The five scenarios were:

(1) the director's business had no connection with the project, but may later bid on or supply building materials, appliances, or fuel;

(2) the director's business was preparing or had made a bid to supply products;

(3) a contractor who is a regular customer of the director's business and who normally buys principally or only from the business is preparing to or has bid on the project, and if awarded the bid "probably will purchase some of" the director's products;

(4) a contractor who is a regular customer of the director's business has already been awarded the contract, but has not purchased any materials from the director's business; and

(5) the director's business is supplying some of its products to the project, but the dollar value is small when compared to overall sales of the business.[5]

The Commission then turned its attention to the *sole question of foreseeability*, beginning with consideration of "pertinent case law." The "pertinent case law" analysis consisted primarily of one case – *United States v. Mississippi Valley Generating Company*, (1961) 364 U.S. 520 (see attachment 1). In that case, the Supreme Court voided a governmental contract because of a conflict of interest involving an unpaid, intermittent, federal financial consultant who participated in negotiations concerning a contract's provisions. The statute under which the contract was voided *did not* contain a requirement of foreseeability.

The consultant in question, an officer of a bank, helped to negotiate an agreement between various corporations to sponsor an electric power project to provide electricity to the Atomic Energy Commission. Soon after he ended his consultant position, the bank in which he was an officer contracted to finance the project. The court found that as an officer of the bank, the former consultant shared in the profits of the bank and received a bonus for any business he brought in.

The Commission's review of the case included a passage in the court decision that stated "there was a *substantial probability* that, because of [the bank's] prior experience in the area of private power financing, [it] would be hired to secure the financing for the proposed [power project],"

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[4] In reaching this opinion, the Commission conducted hearings on the issue on October 2, 1975, and a transcript was made. While researching this topic, staff attempted to locate the Commission file on the opinion, which was stored in a jammed file cabinet in a back room. After the Executive Director brought in a pair of pliers and unjammed the cabinet, we eagerly pulled the file only to have a Geraldo Rivera moment – the official file contained nothing, other than two copies of the Thorner opinion. The transcript has apparently been lost to time.

[5] The Commission declined to address this last scenario because it was directed at the element of materiality rather than foreseeability and they had not been provided enough information to "base a judgment regarding the element of materiality." (*Thorner*, *supra*, p. 6.)

which could lead to profits and greater prestige in competing for other such projects in the future. As a result, the former consultant "could expect to benefit from any agreement that might be made between the government and its sponsors." (*Thorner*, supra, p. 7; *U.S. v. Mississippi Valley* s*upra*, p.555, emphasis added.)

The Commission then emphasized the court's response to the consultant's claim that he could not be expected to benefit from the governmental contract, as there was no formal agreement or understanding between the bank and the sponsor with respect to financing the project at the time he participated in the negotiations.

> "…we do not think that the absence of such a formal agreement or understanding is determinative. The question is not whether Wenzell was certain to benefit from the contract, *but whether the likelihood that he <u>might</u> benefit was so great that he would be subject to those temptations which the statute seeks to avoid."* (*Thorner, supra,* pp. 7-8; quoting *U.S. v. Mississippi Valley* s*upra*, pp.555, 560 emphasis added.)

However, the language from the Commission opinion left off the next sentence of that statement provided by the court, which read: "That there was more than a mere likelihood in this case has already been shown." (*Thorner, supra*.)

Citing similar reasoning in other cases, the Commission then went on to state that "[t]hese cases also make it clear that the question of whether financial consequences upon a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of the particular case." (*Thorner, supra,* p. 8.) It then turned to addressing the factors involved in the case before it, where each decision was whether to grant a variance to permit a *particular building* to be constructed.

In the first scenario, where the director's business had "no known connection" with the proposed project, but may later bid or supply materials to the project, the Commission stated that "[o]n these facts alone, we cannot find a reasonably foreseeable financial effect on McPhail's (the director's business). McPhail's has numerous competitors in each product it sells, except ready made concrete (for which there are three competitors)." (*Thorner, supra,* p. 9.) The Commission emphasized that this was unlike the situation in *U.S. v. Mississippi Valley* "where there was a substantial probability" that the official's bank would be hired because of its prior experience in the area of private financing.

In the second scenario, where the director's business was "preparing or has made a bid to supply one or more of its products, but no award had been made," the Commission reasoned that, as a general rule, "when a bid is made with a serious hope that the contract will be awarded" a financial effect is reasonably foreseeable "*even if there is substantial competition*." (*Thorner, supra,* emphasis added.) "The ultimate test is whether the element of foreseeability, together with the other elements discussed earlier, is present to the point that the official's 'unqualified devotion to his public duty might be impaired."' (*Thorner, supra,* citing *People v. Darby,* (1952) 114 Cal. App. 2d 412, 433.)[6]

The third scenario involved a contractor who was a regular customer of the director's business, buying principally from his business and who was preparing a bid or had made a bid on the

[6] The Commission noted here that there may be situations where it is clear from circumstances that the contract would be awarded elsewhere, in which case the financial effect would no longer be reasonably foreseeable.

project and would probably buy products from the director's business if awarded the contract. The forth scenario involved the same contractor, but the contractor has already been awarded the contract but has not yet purchased or agreed to purchase any of the director's products for the project.

The Commission stated that it believed there were significant differences between these two scenarios regarding the determination of reasonable foreseeability.

Under the third scenario, "an extra degree of remoteness is added to the foreseeability of the financial effect." (*Thorne*r, *supra*, p. 10.) Here the contractor has not yet been awarded the contract, but "merely has entered a bid or is preparing to do so." (*Thorne*r, *supra*.) For McPhail's to receive a benefit, two things must happen – the bid must be successful, and the contractor "would have to follow his *normal practice* of purchasing from McPhail's." (*Thorne*r, *supra,* emphasis added.)

Under this scenario, the Commission found that because, in the past, the contractor purchased materials from other vendors as well as McPhail's "we cannot conclude that the financial effect on McPhail's is reasonably foreseeable." It then added:

> "Nevertheless, if in this last example there are facts indicating that the contractor is *likely* to be successful, the financial effect would be reasonably foreseeable (*Thorne*r, *supra*, emphasis added.)

In the fourth scenario, the Commission found that because the customer had already been awarded the contract and is a regular customer of the director's business "there is without question, a *sufficient likelihood* that McPhail's will receive business to make the financial effect on Director McPhail reasonably foreseeable."[7] (*Thorne*r, *supra*, pp.9-10.)

Finally, turning to the question of the decision involving the lifting of the building moratorium in the district, the Commission found that it was without question that "building activity within the MMWD would increase as a result of the decision" and that this increase "would provide significant opportunities for McPhail's to increase its sales within the MMWD." (*Thorne*r, *supra*.) Therefore, the "likely financial effect on McPhail's Inc. would be both material and reasonably foreseeable." (*Thorne*r, *supra*.)

Discussion:

Looking at the *Thorner* Opinion, several facts suggest that it is not a useful basis for the determination of foreseeability.

- First nothing in the opinion indicates that the Commission envisioned, at the time, that this opinion would serve as the authority for determining what is reasonably foreseeable under the Act for any future questions, let alone for the next 40 years. To put some perspective on Commission activities at the time, the Act was still in its infancy, there were no regulations clarifying the statute, and the Commission was essentially in a triage mode trying to handle a barrage of questions concerning what the Act meant.[8]

[7] In this analysis, the Commission also stated "although there is *no certainty* that McPhail's will receive business, there is a *high probability* that it will." (Emphasis added.)

[8] This was the 50th opinion issued by the Commission over the 11 months it had been in operation, slightly more than one opinion per week, and about the same number of opinions that it has issued in the last 35 years.

- Further, although citing relevant language in the court decision upon which it based its analysis, it does not appear that the Commission placed enough emphasis on the central theme enunciated in the court's decision – conflict of interest laws attempt "to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation" (*U.S. v. Mississippi Valley* s*upra*, p.550, citing *Rankin v. United States*, 98 Ct.Cl. 421, 439.); or on the specific holding that the statute "forbids a government agent from engaging in business transactions on behalf of the Government if, by virtue of his private interests, he *may* benefit financially from the outcome of those transactions" (*supra*, p. 562, emphasis added); or "the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transaction which they are conducting on behalf of the government. (*Supra*, p. 563.)

  For example, in analyzing the first scenario, the Commission's finding that it was not reasonably foreseeable was based upon the fact that because the director had no connection with the project "but may later bid on supplying materials" it was distinguishable from *U.S. v. Mississippi Valley* "where there was a substantial probability" the bank would provide the financing. Yet there was nothing in the supreme court decision to indicate that this was intended to be the standard. In fact, the court emphasized that the statute created an objective, and not a subjective, standard (*U.S. v. Mississippi Valley*, *supra*, p.560.), and while the term "substantial probability" was used in the court's decision, the court also used other terms such as "substantial possibility" (this was the Court of Claims language, which made the findings), "sufficient likelihood," "would probably," "good chance of receiving," "might be offered," and "more than a mere likelihood," or the specific holding, "may benefit." (*Supra*, pp. 555-562.) But, as the Commission pointed out in its opinion, the statute examined by the court "did not specifically require a finding of foreseeability," and none of these terms were intended to set any kind of level that must be reached for something to be foreseeable.

- Also difficult to understand from the Commission's opinion is why a one-in-four chance of receiving a benefit (potential sales of ready mix concrete) is not foreseeable when the business "may later bid or supply materials," but is foreseeable "even if there is substantial competition" once a bid is made. The question should not be determined by the subjective standard of whether the business "*may* bid or supply" the project verses "is preparing or has made a bid to supply" the project. The question is not whether something did happen or even was likely to happen "but whether the likelihood was so great that one would be subject to those temptations which the statute seeks to avoid." Or as the Commission put it: "The ultimate test is whether the element of foreseeability … is present to the point that the official's 'unqualified devotion to his public duty' might be impaired." (*Thorner*, *supra*, p. 9 citing *People v. Darby* (1952) 114 Cal.App. 2d412, 433.)

However, *Thorner* has become the test of foreseeability. And what has survived from the *Thorner* opinion with respect to determining foreseeability is the term "substantial probability."

In 1980, Commission staff issued an advice letter that created a new "ultimate test." It stated that "the ultimate test is whether or not there is a substantial probability or likelihood that there will be a material effect." (*Roberts Advice Letter*, A-80-067.) Within a few years, this language became the standard advice and was being repeated in virtually every conflicts advice letter.

In 1998, with the adoption of the current regulatory language, we codified the following language regarding step six and what is reasonably foreseeable:

> "(a) 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 … applicable to that economic interest will be met as a result of the governmental decision." (Regulation 18706(a).)

This appears to be the first time the term "substantially likely" was used instead of "substantial probability," and this is where the problems began. While the statement itself is absolutely correct, it does not provide any real guidance. It is about equivalent to saying that something is reasonably foreseeable if that is what you expect to happen. One would think that should be self-evident without any help from us.

The problem, however, is where this leads. Beginning almost immediately after the adoption of the regulation we started issuing advice letters that said **"reasonably foreseeable *means* substantially likely."** In so doing, we elevated the level of recognizing something as foreseeable from a possible effect to an almost certain effect. Here is what we typically began saying in addressing foreseeability:

> "As used here, **'**reasonably foreseeable' means 'substantially likely.' (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid*.)" (*DeBerry* Advice Letter, I-09-067, and 106 others just like it.)"[9]

This language has even made its way into the ethics training that many of us are required to take every two years. At the last required training, Commission staff provided the training, and we were told that "reasonably foreseeable means substantially likely." Other agencies provide the same training. In the current online training that most of the Commissioners have taken and staff is now taking, the program also says that "reasonably foreseeable means substantially likely," right before Jose tells Jessica, "now, in step 6, you need to ask whether it is substantially likely that the material financial effect in step five will actually occur." Again, the question should not be whether something is likely to occur, but whether it "might happen" to the degree that a public official would be subject to the temptations that the statute seeks to avoid. (*U.S. v. Mississippi Valley*, *supra*.)

Finally, the 2010 booklet published by the Attorney General's Office states, "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."[10]

More recently, we have eliminated the "reasonably foreseeable means substantially likely" language from our advice letters and have even said in two letters that something does not have to be substantially likely to be reasonably foreseeable. Generally, we just say that if something is

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[9] This language appears in 109 Commission advice letters.

[10] Here, at least, the words "substantial likelihood" are use instead of "substantially likely," which are two entirely different concepts, although, as we have seen, many do not recognize this.

substantially likely it is reasonably foreseeable, which is about as helpful as telling someone that if it is higher than a mountain, it is higher than a molehill.

At that point, after reaching the sixth level to determine if a conflict exists, we generally refer the fact question of foreseeability back to the requestor stating that we are not the finder of fact and that it is up to the official to make that determination.

If this project accomplishes nothing other than to enact a new standard of foreseeability that does not require that the material financial effect be "substantially likely" in defining what is "reasonably foreseeable," staff believes we have improved the regulation. We also hope to provide some useful guidance in the regulation and, as a result, greater assistance in advice letters in determining if a conflict of interest exists.

Reasonably Foreseeable – So, this brings us to the main question, how do we define what is "reasonably foreseeable"? First of all, the phrase is a lawyer's concoction. Only a lawyer would think that there is a need to add the modifier "reasonably" in front of "foreseeable."[11] Perhaps the thought is to distinguish it from the types of events that can only be "unreasonably" foreseen?[12] Most people call those events "unforeseen." There is no such thing as an event that can be foreseen without reason. Those are called guesses. But a basic principle of statutory construction requires us to give meaning to every word used in a statute. The only purpose we can see in using the word "reasonably" is to be redundant, in the typical lawyer fashion, e.g. cease and desist, aid and abet, due and owing, "a dated memorandum, *or other dated written record*" (see Regulation 18401(a)(5)), and a whole bunch more.[13]

In casual conversation, if you were to ask someone if something were reasonably foreseeable, they would look at you funny. In plain English, a lawyer's "reasonably foreseeable" is the equivalent of the layman's "did you think it could happen"? It is a judgment that we make every day of our lives.

Parents childproof their homes based on what is foreseeable when it comes to determining the dangers that a child may face.[14] As we grow up, we are instructed to take certain safety precautions – "look both ways before you cross the street, don't play with matches, watch where you are going, put on a jacket before you go out (you'll catch pneumonia), look before you leap, stay away from the hot stove, don't eat yellow snow."

As adults we know to carry umbrellas when there is a chance of rain, close the sink drain when cleaning our contact lenses, avoid travel in dangerous areas, lock the house and car, and take

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[11] The definition of foreseeable is: "1) Being such as may be *reasonably* anticipated; 2) lying within the range for which forecasts are possible." (Emphasis added) www.Merriam-Webster.com/dictionary.

[12] Lawyers are not the only ones susceptible to this practice. Writers in general seem to have a propensity to fall into this trap, as evidenced by the frequent use of the term "close proximity." Proximate means "immediately proceeding or following, very near, close." "Proximity" means the quality or state of being proximate, closeness." http://www.merriam-webster.com/dictionary/proximate; http://www.merriam-webster.com/dictionary/proximity. So "close proximity" means close closeness, as opposed to the far away kind of closeness.

[13] An article on plain writing published in the Michigan Bar Journal provides a list of the "Horrible Hundred" redundant phrases of legalese. The article also points out that "the list actually contains 127 phrases, but lawyers are so bad at arithmetic that they'll never notice the difference." ("Plain Language: Once Each Time is Not Enough," *Michigan Bar Journal*, July 1986.) http://www.michbar.org/generalinfo/plainenglish/PDFs/86_july.pdf

[14] http://www.totsafe.com/TotSafeBabyproofingChecklist.pdf

many other actions based on the foreseeable consequences if we do not take such precautions. When ordinary human perception is not enough, the law comes to our rescue, and requires us to wear seatbelts while riding in a car, or helmets when riding a motorcycle.

Our survival as a human race depends on our ability to determine what is foreseeable. Our judgment in this regard may be the determining factor as to whether today will be the day we eat the bear, or the day the bear eats us.[15] Foreseeability is all around us. Even famous movie lines cover foreseeability.[16] It is not a difficult concept.

So how do we define it?

Two attorneys, Larry and Bill, were discussing language to define "reasonably foreseeable" under the Act's conflict of interest provisions when Bill asked:

"How about we start by saying it has to be more than a possibility?"

"More than a possibility?" said Larry, "That's not definitive enough. Enforcement is going to want some guidelines, perhaps a presumption or two. And the regulated community is going to want a safe harbor, maybe a checklist. We need to come up with some kind of a bright-line rule."

"OK then," said Bill, "how 'bout we say that it has to be *five* more than a possibility?"

"I like it." Said Larry.

Some things just cannot be counted,(even if lawyers could count). If we have learned nothing else from this exercise, it is that you cannot quantify everything and should not even try. Several years ago, certain staff members raised the question as to how we could take the statutory requirement of "reasonably foreseeable" and instead replace it with what seemed to be a much higher standard of "substantially likely." In past meetings to discuss this issue, one proposed goal was to get rid of the "substantially likely" language we have been using and replace it with something closer to what the statute envisioned.

The conversation provided some interesting insights. One person indicated that there was no difference in the meanings, that neither one meant anything. Another person stated that "substantially likely means 51 percent."[17] When asked, "Then what is likely"? He responded, "something less." He was then informed that anything less would be "not likely."

Clearly, this person was not reading the word "substantially" as a measurement of *ho*w likely something was, but more to indicate that it had to be clearly likely, meaning more likely than not. In other words, another lawyer redundancy that means "likely likely" as opposed to "unlikely likely."

Substantially means "considerable in quantity or significantly great." Applying this definition, one could easily argue that the threshold for "reasonably foreseeable," as interpreted by Commission staff, is somewhere in the neighborhood of eighty to ninety percent or more. Yet no one

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[15] Some people, however, are apparently challenged in this respect. Hence, the need for product warnings such as the one that comes with the purchase of a new iron, which says: "Do not iron clothes while wearing."

[16] "You'll shoot your eye out!"

[17] As used here, and throughout this memorandum, 51 percent is shorthand for the more accurate, and more cumbersome, 50 percent plus one.

here is knowingly arguing that. But if we cannot even distinguish between the meaning of "substantially likely" and "barely likely," perhaps we should not be using such terms in an attempt to provide guidance to others.

This brings us to the next issue in the where-do-we-draw-the line debate. In our most recent discussion several years ago, as well as in previous discussions where staff has considered this topic throughout the years, staff has basically divided into two camps, with one vehemently arguing that something should have a least a 51 percent chance of happening to make it reasonably foreseeable, and the other camp arguing just as vehemently that those in the first group are nuts.

Those who argue for the application of the 51 percent test would not consider it reasonably foreseeable for a flipped coin to come up heads – or tails. One person was asked "So, if I gave you a revolver with one bullet in it, and spun the chamber, would you put it to you head and pull the trigger"? After answering "no" she was asked "why, if it's not reasonably foreseeable that you would shoot yourself? To which she replied "because the consequences are too high." So is this about foreseeability, or consequences? What if the bullet was a cotton ball, would this change the foreseeability because the consequences had changed?

Shortly after this meeting, on a February day in Sacramento, the weather service was predicting a 30 percent chance of rain. The morning started out with a drizzle, but by mid morning the sun was starting to come out. After lunch, one of the other people arguing for the 51 percent rule was seen walking back to the office, the only person in the mall still carrying an umbrella. If rain is foreseeable on a 30 percent chance, why should conflicts have to meet a 51 percent threshold to be prohibited? Are preventing conflicts of interest not at least as important as keeping your head from getting wet? Is foreseeability really the issue here or are there other influences at work?

Every day all over the world people walk into casinos and gamble with their own money. While these people may not have the best grasp on the practical application of the rules of probability,[18] they *do* understand what is reasonably foreseeable. If, against the odds, they happen to go home winners, they do not say to themselves, "Wow I never saw that coming." If winning against the odds was not reasonably foreseeable, no casino would ever survive.

The 51 percent threshold is like telling public officials they can play the game so long as the odds of them winning is one half or less, except they are not gambling with their own money. It is the equivalent of providing someone unlimited free chips. Even if the odds are never in their favor on any one decision, with nothing to lose and everything to gain they will always end up gaining something.

The next question that always comes up in our discussions is something along the lines of "So do you think something is reasonably foreseeable if it will happen one in a million times"? The answer, of course, is yes – not only is it reasonably foreseeable, it *will* happen, one in a million times. Certainly, if you are able to recognize the occurrence of an event with some degree of predictability, you have already determined that it is foreseeable. To say otherwise would put us in the position of determining at what point we find it permissible to gamble with the public trust. Einstein told us that God does not play dice with the universe. And we should not be playing dice with conflict of interest laws either. This is not a betting game.

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[18] The best casino odds are at the pass line in craps, where the odds of winning stand at 49.2929 percent, or playing red or black at the roulette wheel, where the odds of winning are 47.37 percent.

Even if we were inclined to draw a fixed line it would, in many cases, be meaningless because we do not have any way of statistically determining probability with any degree of certainty. This is not DNA science or even weather forecasting. We do not have scientific devices or other methods to test these things, so any questions that begin with "what if the chances are one in [pick a number]" are pointless. And if this is not a counting game, we should not be using counting words such as "substantially likely" or anything else that bases the decision on the probability of the final outcome. The whole examination needs to be based on common sense, not numbers. We need to get back to determining what is foreseeable, not what is likely. The question should be "will it have a possible effect?" not "what are the chances?"

Several years ago, the legal division received a telephone request for advice regarding a potential conflict of interest. The facts went something like this:

A local official in a central valley town was faced with a decision to approve an application for a Wal-Mart Superstore in his jurisdiction. In his day job, he owned several Subway Sandwich franchises and had the first right of refusal to any new Subway locations that the company planned to open in his district. If he turned down the new location, he would thereafter lose his first choice on any additional new openings. Wal-Mart planned to lease part of its space for a fast food restaurant. In the past, McDonalds was the most likely candidate, but Subway was also a leading candidate for the spot. Wal-Mart has not made a decision other than a general indication that it was considering both. McDonalds had not communicated whether or not it had any desire to obtain the location.

Under these facts, this should have been a very simply answer. Clearly there were factors at play here that could influence a decision other than the interests of the people he was elected to represent. This seemed to present a classic conflict, the very type of situation that conflict of interest laws are intended to address. Yet we struggled with our answer. Some argued that any financial effect was too speculative, that we did not know that the financial effect would, in fact, happen, and that it was not reasonably foreseeable because McDonalds was the more likely, or at least an equally likely, candidate. Others argued that the decision was too far down the road, and there would be too many intervening events before any decision was made for us to find that a conflict existed at this point. If we cannot state that this situation clearly presents a conflict, something is terribly wrong.

It seems that in trying to count the trees we have lost sight of the forest. In developing all these gismos, schemes, and formulas to analyze conflicts, we have put the system on automatic pilot and have forgotten how to fly the plane. Our conflict analysis has turned into a game of chutes and ladders. We have lost our common sense.

Here we are not trying to make an accurate prediction of what will happen, as in a political poll, but trying to determine a measure of when something provides an influence so as to potentially interfere with a public official's duties to act in the public's interest. That is the whole purpose of conflict of interest laws! If a public official's job is to lead us to a better world, and the route can go either of two ways to get there with the public official receiving a chance of benefiting from one route over the other, the official has an interest that competes with the public interest, and conflict of interest laws should prevent the official from participating it that decision. "No one can serve two masters."[19]

[19] Matthew 6:24

Proposed Regulatory Amendments: With the above goals and direction in mind staff proposes the attached amendments to Regulation 18706. We have removed the root of the evil by altogether eliminating any reference to substantially likely, as at best it provided no assistance and at worst has corrupted the entire analysis. We have tried to eliminate any counting words and tried to apply common sense concepts.

The proposed regulation is now divided into two parts. Subdivision (a) applies if an economic interest is directly involved as a named party or the subject of a proceeding and presumes that a financial effect is reasonably foreseeable.

Subdivision (b) attempts to set out some simple common sense factors to consider when attempting to determine if a financial effect is reasonably foreseeable. These factors are not conclusive, but rather are provided for guidance in making the determination and, hopefully, will assist the Commission in providing advice on the question and public officials in determining for themselves whether they have a conflict.

Attachment 1:

United States v. Mississippi Valley Generating Company, (1961) 364 U.S. 520