

Memorandum

To : Members of the Commission

Date October 27, 1978

From : FAIR POLITICAL PRACTICES COMMISSION
Ted Prim

Subject: Amendments to Regulation 18702

Enclosed please find a copy of Regulation 18702 regarding material financial effect. The amendments proposed by the staff are indicated by underlining and strike outs.

The recommended changes are designed to clarify the regulation and conform it to present Commission practices. The following is a summary of the changes.

The present paragraph (a) has tended to confuse the public in two ways. First, it contains language relating to foreseeability as well as materiality. The revised draft removes foreseeability concepts from this regulation.

Second, paragraph (a) states that a decision will have a material effect if the "official knows or has reason to know" that the existence of the financial interest may interfere with his performance of his duties in an impartial manner free from bias. This language sometimes causes people to think that an official may participate in a decision if, in his own mind, he believes that he will not be biased by the existence of the financial interest. This was not the intent of the regulation. In the Opinion requested by Iris Sankey, 2 FPPC Ops. 157 (No. 76-071 November 3, 1976), the Commission stated that disqualification is required if a reasonable person would conclude that the existence of a financial interest might interfere with an official's ability to render an impartial decision. This is an objective standard similar to the one applied in negligence cases and not one which looks to the state of mind of a particular official. However, I think it is fair to say that many officials and their legal representatives throughout the state are unaware of the Commission's interpretation and have looked only to the official's state of mind.

Generally, the question of whether a reasonable person could conclude that the existence of a financial interest might interfere with an official's ability to render an impartial decision turns upon the degree to which the financial interest will be affected by the decision. Therefore, the staff's proposed modification provides that a governmental decision will materially affect an official's financial interests when the decision will have a substantial rather than an insignificant effect upon the business entity, real property or source of income in question.

The standards set forth in both the present and revised paragraph (a) are general in nature. However, such a general standard is necessary to give guidance in those instances in which it is difficult to quantify the effects a decision may have. It is the staff's belief that the proposed revision of the general standard in subsection (a) will be easier to understand and apply than the present version. Although paragraph (a) sets forth a general standard, the thresholds set forth in paragraph (b) do set some parameters for what is to be considered substantial rather than insignificant.

The second amendment proposed by the staff would remove the language from paragraph (b) that suggests that the thresholds contained therein are merely a guideline and should be considered along with other factors in determining whether a decision will have a material financial effect. This language was included into the regulation at the time of adoption several years ago because the Commission was uncertain as to how effective and equitable the quantitative guidelines would be in resolving questions of materiality. After several years of application, however, I can report that the guidelines generally have been well received and have produced results which have furthered the purpose of the Act. We have reviewed opinions and advice letters issued during the tenure of the regulation and have found very few instances in which other "factors" pointed to a result different from that indicated by application of the quantitative standards.

There have, however, been numerous situations in which people have attempted to use factors unrelated to materiality to overcome a finding of materiality under the quantitative standard. For example, some officials have argued that a decision will not have a material financial effect because

the investment in question is owned by an official's spouse 1/ or because the amount of income to be received by the official will not be affected even though the source of that income will be materially affected. 2/

The current regulation does not specify when the general standard of (a) or the quantitative standards of (b) should be applied. The proposed amendment makes clear that where the effects of a decision are easily quantified, the standards in paragraph (b) must be used. The staff believes that these changes will simplify the regulation and, consequently, incidents involving the improper application of the standards set forth in paragraph (b) will be reduced.

The third amendment proposed by the staff clarifies the circumstances under which the thresholds contained in subsection (b)(1) will apply to sources of income. At present, subsection (b)(3)(A) provides that the standards set forth in subsection (b)(1) regarding material effects on business entities in which the official has an investment also shall apply to sources of income. The staff's proposed revision would make it clear that subsection (b)(1) applies only to sources of income which are business entities. We do not believe that the thresholds were designed to be applied to an individual.

The words "or decrease" have been added to section (b)(2)(A) and (B) to bring the regulation in conformance with its intent and application.

1/ The Act specifically states that an official's investments include those of a spouse and requires examination of the materiality question without respect to whether the investment is owned by the official or the spouse. See Section 87103, last paragraph.

2/ In determining materiality, Section 87103(c) specifically requires examination of the effects of a decision on the source of income.

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