



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel, Legal Division
Brian Lau, Assistant General Counsel, Legal Division
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Subject: Repeal and Adoption of Regulation 18702.5

Date: December 9, 2019

Requested Action and Summary of Proposed Action

The Fair Political Practices Commission (the “Commission”) has recently undertaken an update of the conflict of interest regulations of the Political Reform Act (the “Act”)¹ to improve those regulations’ clarity and guidance through the incorporation of bright-line materiality standards. In furtherance of this ongoing effort, staff requests that the Commission repeal existing Regulation 18702.5 and adopt proposed, new Regulation 18702.5. The proposed repeal and adoption of Regulation 18702.5 would further advance the Commission’s ongoing update of the Act’s conflict of interest regulations by adopting a \$500 materiality threshold for a decision that effects the personal finances of a public official, or his/her immediate family members,² amongst other minor changes discussed below.

Background

The Act’s conflict of interest provisions ensure that public officials 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. (Section 81001(b).) Toward that end, the Act prohibits an official from making, participating in making, or attempting to use his or her official position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official’s financial interests distinguishable from the decision’s effect on the public generally. (Sections 87100 and 87103.) An official always has an interest in his or her personal finances or those of immediate family members. (See Section 87103.)

Staff presented the proposed repeal and adoption of Regulation 18702.5 to the Commission for prenotice consideration at the Commission meeting on October 18, 2019. There were no public comments.

¹ The Political Reform Act is contained in Government Code Sections 81000 and 91014. All statutory references are to the Government Code unless otherwise indicated. The regulations of the Fair Political Practices Commission (the “Commission”) are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Section 82029 defines “immediate family” as the spouse and dependent children.

Update of Regulation 18702.5

Under existing Regulation 18702.5's materiality standard, a decision's reasonably foreseeable financial effect on an official's interest in his or her personal finances or those of immediate family "is material if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision." New Regulation 18702.5 would instead provide that such an effect is material "if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision."

Under previous iterations of this materiality standard that were in effect until 2015, a decision's reasonably foreseeable financial effect on an official's interest in his or her personal finances or those of immediate family was material if it was "at least \$250 in any 12-monthly period." In attempting to determine the proper threshold for new Regulation 18702.5(a)'s updated bright-line materiality standard, we considered the former \$250 threshold, but determined that a threshold of "\$500 or more in any 12-month period" would be preferable because it is consistent with the threshold for establishing a financial interest in a source income under Section 87103, subdivision (c), and in line with the Act's gift limit, currently set at \$500 until December 31, 2020 under Regulation 18940.2. Thus, the proposed repeal and adoption of Regulation 18702.5 would update that regulation's materiality standard to make it an objective, bright-line materiality standard, met when a decision's reasonably foreseeable financial effect would result in "a financial benefit or loss" to the official at issue "of \$500 or more in any 12-month period."

Existing Regulation 18702.5(a) provides that a "personal financial effect" means a decision's financial effect on an official's personal finances and those of immediate family members, and existing Regulation 18702.5(b) sets forth exceptions to the definition of a "personal financial effect." New Regulation 18702.5(b) would recast those exceptions as exceptions to when a personal financial effect is material under new Regulation 18702.5(a)'s updated bright-line materiality standard.

Existing Regulation 18702.5(b)(1) provides that a "personal financial effect" does not include "[a]ny establishment of or changes to benefits provided under an employment or retirement policy for employees or retirees if the financial effect of the decision applies equally to all employees in the same bargaining unit or other representative group." Prior to 2015, previous iterations of this exception expressly provided that it would not apply to the financial effect of certain types of decisions, including any decision: (1) "to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family," (2) "to set a salary for the official or a member of this or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position," or (3) "when the member of the public official's immediate family is the only person in the job classification or position."

The previous amendment of Regulation 18702.5 removing this language was not intended to change the analysis of an effect of these types of decisions. Accordingly, new Regulation 18702.5(b)(1) would expressly reinsert this exception, and would provide as follows:

(b) Notwithstanding subdivision (a), a personal financial effect is not material if the decision would:

(1) Affect only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a

federal, state, or local government agency unless the decision is to appoint (other than an appointing decision permitted under subdivision (b)(2) and (3)), hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family member is the only person in the job classification or position.

Existing Regulation 18702.5(b)(3) provides an exception to the definition of a "personal financial effect" for "[s]tipends received for attendance at meeting of any group or body created by law or formed by the official's agency for a special purpose" only if the "selecting body" posts on its website a list of each appointed position eligible for a stipend, the amount of the stipend for each position, the name of the official appointed to the position, the name of the official who has been appointed an alternate, if any, and the term of the position. New Regulation 18702.5 would update this exception to be consistent with the regulation's revised, bright-line materiality standard, and would move the exception to subdivision (b)(2). Existing Regulation 18702.5(b)(6) provides an exception to the definition of a "personal financial effect" for the effect of a decision to fill a position on the body of which the official is a member, such as a decision to appoint a city councilmember to be the city's mayor. New Regulation 18702.5 would recast this exception and move it to subdivision (b)(3).

Existing Regulation 18702.5(c) provides that materiality is determined pursuant to Regulation 18702.1 if the decision at issue affects the official's business interest, or pursuant to Regulation 18702.2 if the decision affects the official's real property interest. New Regulation 18702.5(c) would update this provision to clarify that if the decision at issue would have a reasonably foreseeable financial effect on the official's business interest or real property interest, any related personal financial effect is not considered separately, and the decision's reasonably foreseeable financial effect on the official's business interest or real property interest is only analyzed under the respective materiality standards set forth in Regulation 18702.1 or Regulation 18702.2.

Summary

The proposed repeal and adoption of Regulation 18702.5 would update the regulation's materiality standard to make it an objective, bright-line materiality standard, and would also make other changes to the regulation, to improve the regulation's clarity and guidance. New Regulation 18702.5(a)'s bright-line materiality standard reflects the notion that the application of an objective, bright-line materiality standard will result in a more accurate assessment of the existence or absence of a disqualifying conflict of interest with respect to a decision's effect on an official's interest in his or her personal finances or those of immediate family.

Attachments:

Proposed Repeal of Existing Regulation 18702.5

Proposed Adoption of New Regulation 18702.5