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To: Chair Miadich, Commissioners Hatch, Hayward, and Cardenas

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Subject: Conflict of Interest Regulations, Public Generally, Regulation 18703

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Purpose

The Commission instructed Legal Division staff to prepare a memorandum summarizing the current regulation governing the public generally exception in conflict of interest cases. This memorandum is intended to facilitate a discussion by the Commission regarding possibly amending the regulation. The following provides a summary of the current regulation as well as a discussion of the Commission's reasoning for adopting the current regulation.

Summary

A public official is prohibited from making, participating in making, or attempting to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on the official's financial interest, *distinguishable from its effect on the public generally*. (Gov. Code, §§ 87100 and 87103.)¹ Regulation 18703 establishes the Commission's interpretation of what is commonly referred to as the Public Generally Exception. In other words, this exception determines when an official can take part in a decision despite an otherwise disqualifying financial interest if the effect of the decision on the official's interest is indistinguishable from the effects on the public generally.

Current Regulation 18703

Current Regulation 18703 was adopted by the Commission in 2015. In subdivision (a), it establishes the general rule that the effect of a decision on an official's financial interest "is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment." A "significant segment" is defined as at least 25 percent of:

¹ The Political Reform Act (Act) is set forth in Government Code Sections 81000 through 91014, and all further statutory references are to this code. The Commission's regulations are contained in Division 6, Title 2 of the California Code of Regulations, and all regulatory references are to this source.

“(1) All businesses or non-profit entities within the official’s jurisdiction;

“(2) All real property, commercial real property, or residential property within the official’s jurisdiction;

“(3) All individuals within the jurisdiction.” (Regulation 18703(b).)

Defining “unique effect,” Regulation 18703(c) provides:

“(c) A unique effect on a public official’s financial interest includes a disproportionate effect on:

“(1) The development potential or use of the official’s real property or on the income producing potential of the official’s real property or business entity.

“(2) An official’s business entity or real property resulting from the proximity of a project that is the subject of a decision.

“(3) An official’s interests in business entities or real properties resulting from the cumulative effect of the official’s multiple interests in similar entities or properties that is substantially greater than the effect on a single interest.

“(4) An official’s interest in a business entity or real property resulting from the official’s substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage.

“(5) A person’s income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.

“(6) An official’s personal finances or those of his or her immediate family.”

In addition to the general test provided in subdivision (a), Regulation 18703 also identifies several special circumstances in which the Public Generally Exception may apply. These circumstances include decisions that:

- Establish or adjust an assessment, tax, fee, or rate for water, utility, or other broadly provided public service or facility that applies equally, proportionally, or by the same percentage.
- Affect the official’s personal finances as a result of an increase or decrease to a general fee or charge that applies to the entire jurisdiction.
- Establish, amend, or eliminate ordinances that restrict on-street parking, impose traffic controls, deter vagrancy, reduce nuisance or improve public

safety, for a specific location if the body making the decision gathers sufficient evidence to support the need for the action at the location.

- Affect all renters of residential property within the official's jurisdiction and only interests resulting from the official's leasehold interest in his or her residence are affected.
- Are made by a board or commission if the law that establishes the board or commission requires certain appointees have a representative interest in a particular industry, trade, or profession or other identified interest, and the public official is an appointed member representing that interest, provided that the effect is on the industry, trade, or profession or other identified interest represented and there is no unique effect on the official's interest.
- Are made pursuant to an official proclamation of a state of emergency when required to mitigate against the effects directly arising out of the emergency and there is no unique effect on the official's interest.
- Affect a federal, state, or local governmental entity in which the official has an interest and there is no unique effect on the official's interest.

Historical Narrow Application of Public Generally Exception

Prior to the 2015 adoption, the former regulatory language addressing the Public Generally Exception was located in previous Regulations 18707 through 18707.10. The basic rule provided in former Regulation 18707.1 established that the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if the decision will affect a "significant segment" of the public generally in "substantially the same manner."

While the difference between the former and current regulatory standards may not be apparent when examining only the expressly stated basic rules, the regulatory revisions in current Regulation 18703 were intended to address the historically narrow application of the Public Generally Exception. More specifically, the narrow application of former Regulation 18707.1 based upon the previous regulatory definition of "significant segment," as well as the narrow definition and interpretation of the "substantially the same manner" standard.

In regard to the former significant segment standard, Regulation 18707.1 limited the significant segment considered to similar interests and required that each different interest be individually analyzed. As defined by regulation:

- The significant segment for a decision affecting the personal expenses, income, assets, or liabilities of a public official or a member of his or her immediate family, or an individual who is a source of income or a source of gifts to a public official, was "(i) Ten percent or more of the population in the jurisdiction of the official's agency

or the district the official represents; or (ii) 5,000 individuals who are residents of the jurisdiction.” (Regulation 18707.1(b)(1)(A).)

- The significant segment for a decision affecting a public official’s interest in real property was, “(i) Ten percent or more of all property owners or all residential property owners in the jurisdiction of the official’s agency or the district the official represents; or (ii) 5,000 property owners or residential property owners in the jurisdiction of the official’s agency.” (Regulation 18707.1(b)(1)(B).)
- The significant segment for a decision affecting a business entity in which a public official has an economic interest was “either 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession.” Regulation 18707.1(b)(1)(C).

The result of limiting the significant segment to similar interests, was that officials with multiple economic interest could not apply the Public Generally Exception unless the official could separately determine that each of the official’s interests would be affected in substantially the same manner as those with a similar interest. Accordingly, an official who owned a business, including the property from which the business was operated, would have to separately establish that the business was affected in substantially the same manner as more than 2,000 or 25 percent of all businesses in the jurisdiction, the property was affected in substantially the same manner as more than 5,000 or 10 percent of all property owners or all residential property owners in the jurisdiction, and that each individual source of income to the business was affected in substantially the same manner as more than 5,000 individuals or 10 percent of the population in the jurisdiction. Naturally, the result of this approach meant that it was highly unlikely that the Public Generally Exception applied if the official had multiple economic interests to consider.

Additionally, this issue was only compounded by the regulatory definition, and Commission Staff’s narrow interpretation, of the “substantially the same manner” standard. While Regulation 18707.1(b)(2) expressly stated, “[t]he financial effect need not be identical for the official’s economic interest to be considered “financially affected” in “substantially the same manner,” this language was rendered nearly meaningless by the remaining regulatory language and subsequent interpretations.

Consider, for example, the very next provision in former Regulation 18707.1(b)(2)(A), which established criteria for determining whether an interest in real property was affected in substantially the same manner as other properties. Under this provision, there were 13 separately identified considerations for determining whether the Public Generally Exception applied to an official’s interest in real property ranging from broad considerations, such as the magnitude of the financial effect compared to other properties, to very specific considerations, such as lot size and the square footage of a home. Giving such specific and narrow regulatory requirements, it is difficult to foresee when the Public Generally Exception would have ever applied to an interest in real property unless the official happened to own a track home located in a jurisdiction with a large number of similar sized track homes.

Moreover, in interpreting the former “substantial the same manner” standard, Commission Staff were left with little alternatives than to adopt all but the narrowest interpretation of the standard for other interests in business entities or individual sources of income. Ultimately, even when a “significant segment” could be identified, it was nearly impossible to show that the significant segment would be affected in “substantially the same manner.” As interpreted by Commission Staff, even the smallest differences between the official’s interests and other interests within the “significant segment” would usually preclude an official from successfully asserting that the effect on his or her interest is indistinguishable from the public generally.

Current Regulation 18703 and Case-by-Case Determinations.

Generally, the results of the revision to the basic Public Generally Exception have been as intended. Moving to the revised language has allowed for more case-by-case determinations examining the general effect of the decision on the entire jurisdiction and attempting to ascertain whether the official has any financial gain or lose from the decision distinguishable from other members of the public.

The *Minner* Advice Letter, No. A-19-032, which prompted the Commission’s inquiry into the Public Generally Exception, is a prime example of this approach. As the Commission is aware, Commission Staff advised the Vice Mayor of Cupertino that she could take part in decisions regarding a large-scale development located 939 feet from her residence. This conclusion was reached primary on the sheer the magnitude of the project, which would likely have some effect on the entire jurisdiction, and the fact that there appeared to be no unique interest in the decision other than the general support or opposition to the project as a resident of the City. While individual considerations such as view and proximity were evaluated, ultimately neither were significant concerns when considered the facts particular to the circumstances.

In summary, the Public Generally Exception represents a small exception to the Act’s conflict of interest rules that applies only in unusual and limited circumstances. Accordingly, the Public Generally Exception more broadly requires a comprehensive and fact specific analysis dependent on the specific circumstances of the governmental decision in question. As opposed to almost complete disregard to the Public Generally Exception prior to the 2015 adoption of Regulation 18703, the current regulation allows for these kinds of determinations.

Bright-Line Standards Under the Public Generally Exception

We note that clearer bright-line standards are not ruled out under current Regulation 18703. While the basic public generally rule provided in current Regulation 18703(a) through (d) requires fact dependent and case-by-case determinations, those instances in which a clear bright-line rule has been identified are provided for separately in Regulation 18703(e), which provides bright-line rules for special circumstances. In regard to these special circumstances, Commission Staff has identified several unintended results from the 2015 adoption of Regulation 18703. Staff anticipates proposing several revisions to these specific rules to be included on the

Commission's 2020 regulatory calendar, including further consideration of the Public Generally Exception as applied to rent control decisions under Regulation 18703(e)(4), as well as circumstances under which an official may otherwise be disqualified from a decision with limited neighborhood effects under Regulation 18703(e)(3).