



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: October 8, 2019

Requested Action and Summary of Proposed Action

Staff proposes for prenotice discussion the repeal and adoption of Regulation 18702.5. Existing Regulation 18702.5 sets forth the materiality standard applicable to a governmental decision's reasonably foreseeable financial effect on a public official's personal finances or those of immediate family. The proposed repeal and adoption of Regulation 18702.5 would update that 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.

Background

The Political Reform Act's (the "Act")¹ 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).) 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.)

The Commission has recently undertaken an update of the Act's conflict of interest regulations to improve their clarity and guidance through the incorporation of bright-line materiality standards, and has already updated the regulations providing the materiality standards applicable to a decision's effect on a real property interest (Regulation 18702.2), business interest (Regulation 18702.1), and source of income interest (Regulation 18702.3). 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 updating Regulation 18702.5's materiality standard to make it an objective, bright-line materiality standard.

¹ The Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code unless otherwise indicated. 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.

Update of Regulation 18702.5

Existing Regulation 18702.5(a) provides that a decision's reasonably foreseeable financial effect on an official's personal finances 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(a) instead provides that such an effect is material if the official or the official's immediate family member "will receive a financial benefit or loss of \$500 or more due to the decision in any 12-month period." Under previous iterations of this materiality standard that were in effect until 2015, a decision's reasonably foreseeable 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-month period." In attempting to determine the proper bright-line standard for new Regulation 18702.5(a), 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 in line with the Act's current gift limit, 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 governmental 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 reframe those exceptions as exceptions to when a personal financial effect is material under new Regulation 18702.5(a)'s updated 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 the exception 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 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 (3) "when the member of the public official's immediate family is the only person in the job classification or position."

Clarifying, the previous amendment removing this language was not intended to change the analysis for these types of decisions, new Regulation 18702.5(a)(2) would expressly provide that a personal financial effect is material if the decision:

(2) Is to appoint, hire, fire, promote, demote, suspend without pay, or otherwise take disciplinary action with financial sanction against the official or his or her immediate family member, or set a salary for the official or the immediate family member, which is different from the salaries paid to other employees of the agency in the same job classification or position, or when the official or the immediate family member is the only individual 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 meetings 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 move these provisions to subdivision (b)(5) and update them to be consistent with the regulation’s revised, bright-line materiality standard.

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 that the decision’s reasonably foreseeable 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 members.

Attachments:

Proposed Repeal of Existing Regulation 18702.5

Proposed Adoption of New Regulation 18702.5