

# Recognizing Conflicts of Interest

## A Guide to the Conflict of Interest Rules of the Political Reform Act

Fair Political Practices Commission

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This guide is provided by the Fair Political Practices Commission (FPPC) as a general overview of a public official's obligations under the conflict of interest rules provided for in the Political Reform Act (the Act).<sup>1</sup> It is intended to help the user spot situations and issues that may give rise to a conflict. The guide will provide answers to some of the more common questions:

- What is a conflict of interest under the Act?
- Who must be vigilant about conflicts of interest?
- What precautions can be taken to prevent conflicts?
- A conflict of interest exists, what now?
- Where to go for help?

A word of caution - officials should not rely solely on this guide to ensure compliance with the Act, but should also consult the statutes of the Act, the FPPC's regulations, and if necessary, seek legal advice.

### What is a conflict of interest under the Act?

In 1974, the voters enacted the Political Reform Act.<sup>2</sup> In adopting the Act, the voters recognized that conflicts of interest in governmental decision-making by public officials posed a significant danger.

“The people find and declare ...

- a) State and local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth;
- b) Public officials, whether elected or appointed, should 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....”<sup>3</sup>

Under the Act, a public official will have a statutory conflict of interest with regard to a particular government decision if it is foreseeable that the outcome of the decision will have a financial impact on the official's personal finances or other financial interests.<sup>4</sup> In such cases, there is a risk of biased decision-making that could sacrifice the public's interest in favor of the official's private financial interests. In fact, preventing conflicts of interest was of such vital importance to the voters that the Act not only prohibits actual bias in decision-making but also “seeks to forestall ... the appearance of possible improprieties.”<sup>5</sup>

## Who must be vigilant about conflicts of interest?

*Public Officials:* The reach of the Act's conflict of interest rules is commonly misunderstood or understated. The Act applies to all "public officials," which is defined as "every member, officer, employee or consultant of a state or local government agency."<sup>6</sup>

It is universally recognized that certain elected public officials, such as city councilmembers, city managers and city attorneys, must refrain from decision-making where a conflict of interest exists. These persons hold high-level positions of trust in government. However, the Act's conflict of interest prohibition reaches much further than high-level state and local officials. The Act's conflict of interest disclosure and disqualification rules apply to thousands of local and state public employees and officials working throughout California.

*The Public:* The Act relies on individual citizens to monitor the decision-making of their elected and appointed representatives to identify whether they have a conflict of interest with respect to a specific decision. Much of the enforcement of the Act's conflict of interest provisions is based on citizen complaints.<sup>7</sup>

## What precautions can be taken to prevent conflicts of interest?

In order to prevent a conflict of interest, a public official should: 1) identify and fully disclose the financial interests that may cause a conflict; 2) understand the different types of financial interests that may be the basis for a conflict; and 3) consider whether the decision's effect on the official's financial interest is reasonably foreseeable and material. Each step is discussed in greater detail below.

### **1. Identify and fully disclose the financial interests that may cause a conflict.**

*Public Officials:* The most important thing an official can do to comply with this law is to recognize the types of interests from which a conflict of interest can arise. By learning to recognize these interests, an official will be able to spot potential problems and seek help from the agency's legal counsel or from the FPPC.

In fact, officials can take steps to protect themselves and the public from conflict of interest decisions well in advance of making a specific governmental decision. The Act requires that public officials annually disclose their financial interests on a Form 700 (Statement of Economic Interests). This is a requirement because the voters who enacted the law recognized that an important purpose of the Act was to ensure adequate disclosure:

“Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.”<sup>8</sup>

The financial interests disclosed include many of the interests that form the basis for a conflict and require disqualification under the Act. No one has a conflict of interest under the Act on general principles or because of personal bias regarding a person or subject – conflicts under the Act are based on financial interests. By thoroughly completing the Form 700, the official is on notice of the type of financial interests he or she holds that may cause a conflict of interest. If the official has no interests that governmental decisions can financially affect, the official will not have a conflict of interest.

*The Public:* Requiring officials to publicly disclose their financial interests allows the general public to monitor an official’s conduct. In other words, any individual citizen can obtain a copy of the Form 700 filed by their local or state official to determine whether the official has a conflict of interest with respect to a specific decision. This serves as an important enforcement mechanism for the Act’s disqualification requirements.

## 2. Understand the different types of financial interests that may be the basis for a conflict.

There are five types of interests<sup>9</sup> that may result in disqualification:

- ***Business Investment, Employment or Management.*** An official has a financial interest in a business entity in which the official, or the official’s spouse, registered domestic partner, or dependent children or an agent has invested \$2,000 or more.<sup>10</sup> An official also has a financial interest in a business entity for which the official is a director, officer, partner, trustee, employee, or holds any position of management.
- ***Real Property.*** An official has a financial interest in real property in which the official, or the official’s spouse, registered domestic partner, or dependent children, or an agent has invested \$2,000 or more, and also in certain leasehold interests of terms of more than a month (excluding a month-to-month lease and leases for terms of less than a month).<sup>11</sup>
- ***Sources of Income.*** An official has a financial interest in anyone, whether an individual or an organization, from whom the official has received (or from whom the official has been promised) \$500 or more in income within 12 months prior to the decision. A “source of income” includes a community property interest in the spouse’s or registered domestic partner’s income. Therefore, a person from

whom the official's spouse or registered domestic partner receives income of \$1,000 or more, such that the official's community property share is \$500 or more, may also be a source of a conflict of interest.<sup>12</sup>

In addition, if the spouse, registered domestic partner or dependent children own 10 percent or more of a business, the official is considered to be receiving "pass-through income" from the business's clients. In other words, under such circumstances, the business's clients may be considered sources of income to the official as well.

- **Gifts.** An official has a financial interest in anyone, whether an individual or an organization, who has given gifts to the official that total \$460 or more<sup>13</sup> within 12 months prior to the decision.
- **Personal Finances.** An official has a financial interest in decisions that affect the official's personal expenses, income, assets, or liabilities, as well as those of the official's immediate family. This is known as the "personal financial effects" rule.

### Quick Tip:

Not all of the financial interests that may cause a conflict of interest are disclosed on a Form 700. A good example is an official's home. It is common for financial effects on an official's home to trigger a conflict of interest. Officials are not, however, required to disclose their home on the Form 700.<sup>1</sup>

### **3. Consider whether the decision's effect on the official's financial interest is reasonably foreseeable and material.**

The next steps all focus on the specific governmental decision in question. At the heart of deciding whether an official has a conflict of interest in a specific decision is determining whether an effect on the financial interest is reasonably foreseeable (might realistically happen or is too remote a possibility) and is material (financially important enough). Determining whether a decision's effects are foreseeable and material will depend on the nature of the specific decision and the relationship of the official's interest to the effects of the governmental decisions.

**IS IT REASONABLY FORESEEABLE?<sup>14</sup>**

Is it a realistic possibility that the decision will actually affect the official’s financial interest or is it too remote or theoretical? Two alternative tests answer this question depending on whether an interest is explicitly involved in a decision.

<p><b><u>An Interest is Explicitly Involved in a Decision If:</u></b></p> <ol style="list-style-type: none"> <li>1) The interest is a named party in or the subject of a governmental decision, or</li> <li>2) The decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest, or</li> <li>3) The decision affects the real property of the official as described in Regulation 18702.2(a)(1)-(6).</li> </ol>	<p style="text-align: center;"><b><u>Then</u></b></p> <p>It is reasonably foreseeable that the decision will have a material financial effect on the interest.</p>
<p><b><u>If Not Explicitly Involved in the Decision</u></b></p> <p>All other decisions, other than those above, are considered not explicitly involved in the decision.</p>	<p style="text-align: center;"><b><u>Then</u></b></p> <p>If an interest is not explicitly involved in a decision, the financial effect on the interest is reasonably foreseeable only if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. However, if the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.</p>

**Quick Tip:**

For purposes of being vigilant to avoid conflict of interest decisions, keep the general rule in mind – if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable.

**IS IT MATERIAL?**

The FPPC has adopted various rules (general and specific) for deciding what kinds of financial effects are important enough to trigger a conflict of interest. Generally, for each of the five interests set forth above, a separate materiality standard exists. The following charts reflect the materiality standards that apply to each type of interest.

**Interests in Business Entities<sup>15</sup>**

(Including investments in, employment or positions with, or income from business entities)

<p><b>If Business Explicitly Involved = Financial Effect Assumed to be Material</b></p> <p>A material financial effect is assumed if the business:</p> <ol style="list-style-type: none"> <li>1) Initiates the proceeding by filing an application, claim, appeal, or request for other government action;</li> <li>2) Offers to make a sale of a service or a product to the official’s agency;</li> <li>3) Bids on or enters into a written contract with the official’s agency;</li> <li>4) Is the named manufacturer in a purchase order of any product purchased by the official’s agency or the sales provider of any products to the official’s agency that aggregates to \$1,000 or more in any 12-month period;</li> <li>5) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement that the official’s agency is authorized to issue;</li> <li>6) Is the subject of any inspection, action, or proceeding subject to the regulatory authority of the official’s agency; or</li> <li>7) Is otherwise subject to an action the official’s agency takes, the effect of which is directed solely at the business entity in which the official has an interest.</li> </ol> <p><b>NOTE:</b> In all other circumstances, the business is considered not explicitly involved in the decision and the financial effect is not assumed to be material.</p>	<p><b>⊘ Not Assumed Material if Business Not Explicitly Involved</b></p> <p>In all other cases, a financial effect is material <i>if</i> a prudent person with sufficient information would find it is reasonably foreseeable that the decision’s financial effect would contribute to a change in the price of the entity’s publicly traded stock, or the value of a privately-held business entity.</p>
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**Interests in Real Property<sup>16</sup>**

NOTE: There are different materiality standards depending on whether it is an ownership or leasehold interest.

**Ownership Interests in Real Property**

<p>A material financial effect is assumed if...</p>	<p>The decision:</p> <ol style="list-style-type: none"><li>1) Involves adopting or amending a general or specific plan, that includes the official’s property;</li><li>2) Determines the property’s zoning or rezoning, annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision, or other boundaries (other than a zoning decision applicable to all properties designated in that category);</li><li>3) Imposes, repeals, or modifies any taxes, fees, or assessments that apply to the property;</li><li>4) Authorizes the sale, purchase, or lease of the property;</li><li>5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the property or any variance that changes the permitted use of, or restrictions placed on it;</li></ol> <p>NOTE: For a financial effect resulting from a governmental decision regarding permits or licenses issued to the official’s business entity when operating on the official’s real property, the materiality standards under Regulation 18702.1 applicable to business entities would apply instead.</p> <ol style="list-style-type: none"><li>6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the property in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official’s jurisdiction or the official will otherwise receive a disproportionate benefit or detriment by the decision.</li></ol>
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<p><b>Unless it is nominal, inconsequential or insignificant, a material financial effect is also assumed if...</b></p>	<p>The decision:</p> <ol style="list-style-type: none"> <li>1) Changes the development potential of the real property;</li> <li>2) Changes the income-producing potential of the real property;</li> </ol> <p>NOTE: If the real property contains a business entity, including rental property, and the nature of the business entity remains unchanged, the materiality standards under Regulation 18702.1 applicable to business entities would apply instead.</p> <ol style="list-style-type: none"> <li>3) Changes the highest and best use of the parcel of real property in which the official has a financial interest;</li> <li>4) Changes the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;</li> <li>5) Affects real property value located within 500 feet of the official's property line. However, if the real property is commercial property and contains a business entity, the materiality standards under Regulation 18702.1 applicable to business entities would apply instead;<sup>17</sup></li> <li>6) Causes a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.</li> </ol>
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**Leasehold Interests in Real Property <sup>18</sup>**

<p>A material financial effect is assumed if...</p>	<p>The decision:</p> <ol style="list-style-type: none"> <li>1) Changes the termination date of the lease;</li> <li>2) Increases or decreases the potential rental value of the property;</li> <li>3) Increases or decreases the rental value of the property, and official has right to sublease it;</li> <li>4) Changes the official's actual or legally allowable use of the real property; or</li> <li>5) Impacts the official's use and enjoyment of the real property.</li> </ol>
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**Sources of Income**

NOTE: There are different standards depending if income is for goods and services or the sale of personal or real property.

**Income Received for Goods and Services Provided in the Ordinary Course of Business, including a Salary<sup>19</sup>**

A material financial effect is assumed if...	The source of income is: <ol style="list-style-type: none"><li>1) A claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding;</li><li>2) An individual and the individual will be financially affected under the standards applied to an official in Regulation 18702.5, or the official knows or has reason to know that the individual has an interest in a business entity or real property that will be financially affected under the standards applied to those financial interests in Regulation 18702.1 or 18702.2, respectively;</li><li>3) A nonprofit that will receive a measurable financial benefit or loss, or the official knows or has reason to know that the nonprofit has an interest in real property that will be financially affected under the standards applied to a real property interest in Regulation 18702.2; or</li><li>4) A business entity and the business will be financially affected under the standards applied to a business interest in Regulation 18702.1.</li></ol>
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**Income from the Sale of Personal or Real Property of the Official or the Official’s Spouse if Community Property<sup>20</sup>**

A material financial effect is assumed if...	The official knows or has reason to know that the source of income: <ol style="list-style-type: none"><li>1) Is a claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding;</li><li>2) Has an interest in a business entity that will be financially affected under the standards applied to a financial interest in Regulation 18702.1; or</li><li>3) Has an interest in real property that will be financially affected under the standards applied to a financial interest in Regulation 18702.2.</li></ol>
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**Sources of Gifts<sup>21</sup>**

(Including Gifts from Individuals, Nonprofits, and Business Entities)

<p>A material financial effect can be assumed if...</p>	<p>The source is:</p> <ol style="list-style-type: none"> <li>1) A claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding;</li> <li>2) An individual who will be financially affected under the standards applied to an official in Regulation 18702.5, or the official knows or has reason to know that the individual has an interest in a business entity or real property that will be financially affected under the standards applied to those interests in Regulation 18702.1 or 18702.2, respectively;</li> <li>3) An nonprofit that will receive a measurable financial benefit or loss, or the official knows or has reason to know that the nonprofit has an interest in real property that will be financially affected under the standards applied to a financial interest in Regulation 18702.5; or</li> <li>4) A business entity will be financially affected under the standards in Regulation 18702.1.</li> </ol>
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**Interests in Personal Finances<sup>22</sup>**

(Including the Personal Finances of Immediate Family Members)

<p>The financial effect is material if...</p>	<p>The official or the official’s immediate family member will receive a measurable financial benefit or loss from the decision unless it is nominal, inconsequential, or insignificant.</p>
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**Quick Tip:**

There are many rules and many exceptions (so numerous we can’t discuss them all here). At a big picture level, remember:

- In most cases, if the financial interest is directly or explicitly involved in the decision, the materiality standard is met. This is because an interest that is directly or explicitly involved in a governmental decision presents a more obvious conflict.
- On the other hand, if the financial interest is not directly or explicitly involved, the materiality standard is generally based on a reasonable person standard.

### 4. Consider whether an exception applies.

Once an official has determined that he or she has a conflict of interest in a particular decision, the official can examine if an exception permits the official's participation despite the conflict. Not all conflicts of interest prevent the official from lawfully taking part in the government decision.

- *The Public Generally Exception:*<sup>23</sup> Even if an official otherwise has a conflict of interest, the official is not disqualified from the participating in the decision if the “public generally” exception applies. This public generally exception applies when the financial effect on a public official or the official's interests is indistinguishable from its effect on the public generally.

**NOTE:** The “public generally” exception must be considered with care. An official may not just assume that it applies. There are rules for identifying the specific segments of the general population with which the official must compare the official's financial interest, and specific rules for deciding whether the financial impact will uniquely affect the public official as compared to the public generally. Again, officials should contact their agency counsel or the FPPC concerning these specific rules.

- *Legally Required to Participate:*<sup>24</sup> Even if an official has a disqualifying conflict of interest, is the participation legally required? In certain rare circumstances, an official may be called upon to take part in a decision despite the fact that the official has a disqualifying conflict of interest. This “legally required participation” rule applies only in certain very specific circumstances in which the government agency would be paralyzed or unable to act. The FPPC or the agency's counsel must generally make this determination and will instruct the official on how to proceed.

## A conflict of interest exists, what now?

Once an official determines that they have a conflict of interest and that an exception does not apply, the official must disqualify from all of the following:<sup>25</sup>

- *Making the governmental decision.* A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.

- *Participating in making the governmental decision.* A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.
- *Influencing the governmental decision.* A public official uses his or her official position to influence a governmental decision if he or she: contacts or appears before (1) any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or (2) any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.

Certain officials (including city council members, planning commissioners, and members of the boards of supervisors) have a mandated manner in which they must disqualify from a decision.<sup>26</sup> They must publicly identify in detail the interest that creates the conflict, step down from the dais, and must then leave the room. The official must identify the interest following the announcement of the agenda item to be discussed or voted upon, but before either the discussion or vote commences.

If the decision is to take place during a closed session, the identification of the financial interest must be made during the public meeting prior to the closed session but is limited to a declaration that the official has a conflict of interest. The financial interest that is the basis for the conflict need not be disclosed. The official may not be present during consideration of the closed session item and may not obtain or review any nonpublic information regarding the decision.

There are limited exceptions that allow a public official to participate even when a conflict is present, such as participating as a member of the general public, speaking to the press, or discussing one's own governmental employment. The exceptions are limited and fact-specific, and may require advice from the agency's counsel or the FPPC.

## Final thoughts

Generally speaking, here are the keys for public officials to meet their obligations under the Act's conflict of interest laws:

- Know the purpose of the law, which is to prevent biases, actual and apparent, that result from the financial interests of the decision-makers.
- Learn to spot potential trouble early. Understand which financial interests could give rise to a conflict of interest.

- Understand the “big picture” of the rules. For example, know why the rules distinguish between explicitly involved interests, and why the public generally exception exists.
- Realize the importance of the facts. Deciding whether an official has a disqualifying conflict of interest depends just as much - if not more - on the facts of the particular situation as it does on the law.
- Don’t try to memorize all of the specific conflict of interest rules. The rules are detailed, and the penalties for violating them are significant. Rather, look the rules up or ask about the particular rules applicable to a given case.
- Ask for advice. It is available from the agency’s legal counsel and from the FPPC.

### Where to go for help?

<b>Email Advice (informal)</b>	<a href="mailto:advice@fppc.ca.gov">advice@fppc.ca.gov</a>
<b>Written Advice (formal and informal)</b>	<b>Fair Political Practices Commission 428 J Street, Suite 620 Sacramento, CA 95814</b>

<sup>1</sup> The Political Reform Act is contained in Government Code §§ 81000 - 91014, and all statutory references are to this code. The FPPC regulations are contained in §§ 18110 - 18997 of Title 2 of the California Code of Regulations, and all regulatory references are to this source.

<sup>2</sup> Enacted through Proposition 9 at the June 4, 1974 Primary Election.

<sup>3</sup> § 81001.

<sup>4</sup> § 87100.

<sup>5</sup> *Witt v. Morrow* (1977) 70 Cal. App. 3d 817 at 822–823: “Morrow asserts it is unconstitutional to automatically disqualify a public official from participating in decisions which may affect the investments of an entity which pays him .... However, the whole purpose of the Political Reform Act of 1974 is to preclude a government official from participating in decisions where it appears he may not be totally objective because the outcome will likely benefit a corporation or individual by whom he is also employed.”

<sup>6</sup> § 82048.

<sup>7</sup> § 83115.

<sup>8</sup> § 81002(c).

<sup>9</sup> § 87103.

<sup>10</sup> Under § 87103, an official has an "indirect interest" in real property owned by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater.

<sup>11</sup> § 82033.

<sup>12</sup> § 82030.

<sup>13</sup> The Commission adjusts the gift threshold on January 1 of each odd-numbered year to reflect changes in the Consumer Price Index.

<sup>14</sup> Regulation 18701.

<sup>15</sup> Regulation 18702.1

<sup>16</sup> Regulation 18702.2(a).

<sup>17</sup> Particular facts can rebut this presumption depending on advice given by the FPPC.

<sup>18</sup> Regulation 18702.2(b).

<sup>19</sup> Regulation 18702.3(a).

<sup>20</sup> Regulation 18702.3(b).

<sup>21</sup> Regulation 18702.4.

<sup>22</sup> Regulation 18702.5.

<sup>23</sup> Regulation 18703.

<sup>24</sup> § 87101 and Regulation 18705.

<sup>25</sup> Regulation 18704.

<sup>26</sup> § 87105 and Regulation 18707 applicable to persons holding positions specified in § 87200.