

# **Abstentions and Disqualifications: Conflicts of Interests and When to Step Aside**

**September 22, 2016  
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# Speakers

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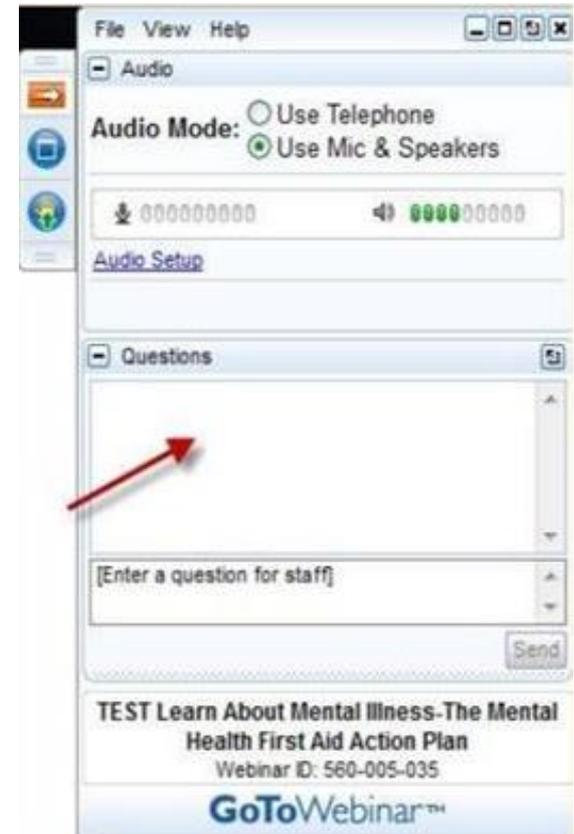
# Moderator

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**Thank you to ILG Partner Richards,  
Watson & Gershon for making this  
webinar possible!**

# How to ask a question during the webinar

- Please type your questions into the question box at any time during the webinar.
- We will read your questions during the question period at the end of the webinar.



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**ILG**

# ILG Mission

- Promoting good government at the local level
- Practical, impartial and easy-to-use materials



# Abstentions and Disqualifications: Conflicts of Interests and When to Step Aside



# Abstaining is not easy!

No public official or employee likes to be told they aren't allowed to do their job.

- ▶ “But I had no idea that it would affect me personally...”
- ▶ “But I’m the most fair-minded person I know...”
- ▶ “But I owe it to my constituents to vote...”

Especially, when it is implied that you might do something wrong if you did...

# Topics to be covered

- ▶ Ethical Principles
- ▶ Taking Precautions
- ▶ Potentially Disqualifying Interests
- ▶ Conflict of Interest Laws
- ▶ Process of Abstaining
- ▶ Getting Help

# Ethical Principles

- ▶ Holding public office or employment is a public trust
- ▶ Public officials and employees should act in the best interests of the public and not for private benefit
- ▶ Public perception of ethical behavior bolsters confidence in local government. Perception is as important as reality
- ▶ The law is the floor for our conduct, not the ceiling

# Headlines!

## **“Corruption on Steroids”**

City of Bell corruption scandal:- Los Angeles Times 3/20/13

The Bell corruption scandal burst onto the nation’s front pages in 2010 as a story about a small city whose leaders paid themselves outsized salaries.

## **“Former Sweetwater Superintendent sentenced to Jail for Pay-to-Play Corruption Scandal”**

Imperial Beach News (patch.com) 6/28/14

Among 15 people indicted in 2012 in a probe into pay-to-play culture between contractors and officials from three school districts. Officials accepted trips, dinners, tickets, in exchange for votes on multi-million dollar construction projects. Former superintendent pled guilty to a felony conspiracy charge and a misdemeanor count of failing to report gifts. Sentenced to 220 days in jail and placed on two years probation.

# Taking Precautions

- ▶ Learn about your ethical and legal obligations
- ▶ Identify your interests that may cause a conflict
- ▶ Consult the professionals (Agency counsel and the FPPC)

# Potentially Disqualifying Interests

»» Financial and otherwise...

# Form 700 Disclosures

- What? Statement of economic interests
- When? File when running for office, upon assuming office, and annually thereafter
- Who? Section 87200 Filers (*e.g.*, county board, city council, planning commissioners)
- Officials and employees designated in the local agency's conflict of interests code

# Economic Interests

- ▶ Business Entities – investments & positions
- ▶ Real Property
- ▶ Sources of income
- ▶ Gifts
- ▶ Personal Finances (not required on Form 700)

# Economic Interests

## Business Entities – Investments

- ▶ **Section 87103(a): Investments**

Business entity in which the official or a member of his/her immediate family has an investment of \$2,000 or more

*See also Regulation 18700(c)(6)(A)*

- ▶ **Section 87103(d): Positions**

Business entity in which the official is a director, officer, partner, trustee, employee, or holds any position of management. Note: No monetary threshold

*See also Regulation 18700(c)(6)(D)*

# Economic Interests

## Business Entities – Investments

- ▶ “Business Entity” defined broadly
  - For-profit entities
  - Joint Ventures
  - Person or group of persons acting in concert
  - Business Trusts

# Economic Interests

## Business Entities – Investments

“Investment” broadly defined as any financial interest in or security issued by a business entity, including:

- ▶ Common and preferred stock
- ▶ Stock options
- ▶ Debt instruments
- ▶ Any partnership or other ownership interest
- ▶ Pro rata share of investments in:
  - businesses or trusts
  - non-diversified mutual funds

# Economic Interests

## Business Entities – Investments

- ▶ “Investments” includes those directly, indirectly, or beneficially owned by the public official or immediate family; including immediate family’s pro rata share of investments in any business, mutual fund, or trust of 10% or more
- ▶ Corporate “families” – Investments in parent companies, subsidiaries (>50% control), or other related business entities (same majority control)

# Economic Interests

## Business Entities – Investments

“Investment” does not include:

- ▶ Time or demand deposits in a financial institution
- ▶ Credit union shares
- ▶ Insurance policies
- ▶ Interests in diversified mutual funds registered with the SEC
- ▶ Common trust funds
- ▶ Government–defined pensions
- ▶ Government –issued bonds and debt instruments

# Economic Interests

## Business Entities – Positions

- ▶ Business position, defined:
  - Director
  - Officer
  - Partner
  - Trustee
  - Employee
  - Any position of management
- ▶ No threshold investment or monetary interest

# Economic Interests

## Real Property

- ▶ Any real property in which a public official has a direct or indirect interest worth \$2000 or more
  - Leaseholds, beneficial or ownership stakes, and options, but not month-to-month leases
  - Includes personal residences, but need not be disclosed on Form 700
- ▶ Any real property interest of a business entity or trust in which the official or an immediate family member has an ownership or beneficial interest of 10% or more

# Economic Interests

## Sources of Income – Defined

- ▶ Any payment (salary, wage, rent, sales proceeds, loan, etc.)
- ▶ \$500 or more,
- ▶ Provided, received, *or promised*,
- ▶ 12 months before a government decision

# Economic Interests

## Sources of Income – Special Rules

- ▶ Family income – official's income includes
  - ▶ Community property interest in a spouse's income
  - ▶ Pro rata share on income to a business entity or trust in which the official or spouse has an ownership or beneficial interest of 10% or more
- ▶ Business income – official's sources of income include any person who either (1) controls 50% or more of a business entity or (2) has power to direct the management or policy of a business entity, where that business entity is a source of \$500 or more in income to the public official
- ▶ Commission income: insurance brokers, real estate agents, travel agents, salespersons, stockbrokers (*see Regulation 18700.1(c)*)
- ▶ Incentive income: employee income over and above salary as sales or purchases of goods or services accumulate. (*see Regulation 18700.1(d)*)

# Economic Interests

## Sources of Income – Exceptions

- ▶ Campaign contributions
- ▶ Government salaries
- ▶ Alimony or child support payments
- ▶ Commercial loans and credit cards
- ▶ Loans from family members and payments made on loans made to family members

# Economic Interests

## Gifts

- ▶ Donors, or their intermediaries, of a gift or gifts aggregating \$460 or more in value provided or promised within 12 months prior a decision
  - Any payment or other benefit you receive for which you do not provide payment or services of equal or greater value
- ▶ Other special gift rules:
  - Annual limit of \$460 from any single source
  - Any gift of \$50 or more must be reported
  - Numerous exceptions

# Economic Interests

## Personal Finances

- ▶ Decisions that affect expenses, income, assets, or liabilities of the public official or his or her immediate family
- ▶ Sort of “catch-all” category to address economic interests that do not qualify as investments, property, or business entities
- ▶ Some exceptions:
  - Reward cards
  - Government car or phone (including incidental personal use)

# Other Disqualifying Interests

Other conflict of interests rules may require disqualification based on other interests, including...

- ▶ Other property or financial interests
- ▶ Personal biases – positive or negative

# Conflict of Interest Laws

- »» The Political Reform Act  
Government Code Section  
1090
- Common Law Conflict of  
Interests
- Due Process

# The Political Reform Act

## ▶ The Basic Rule – Section 87100

- No public official at any level of state or local government,
- Shall make, participate in making or in any way attempt to use his or her official position to influence a governmental decision,
- In which he or she knows or has reason to know that he or she has a financial interest,

# The Political Reform Act

## New Regulations – Section 18700

- ▶ Restates the Basic Rule of Section 87100
  - “A public official at any level of state or local government has a prohibited conflict of interest and may not make, participate in making, or in any way use or attempt to use his or her official position to influence a governmental decision when he or she knows or has reason to know he or she has a disqualifying financial interest.”
- ▶ Restates Section 87103
  - “A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or his or her immediate family, or on any financial interest described in subdivision (c)(6)(A–F) herein.”

# The Political Reform Act

## New Regulations – Section 18700

- ▶ The Act's conflict of interest prohibitions apply only to public officials and only to governmental decisions that have a financial effect

# The Political Reform Act

## New Regulations – “Financial Interest”

Be aware that the term “financial interest” has a *different* meaning in Sections 87100 and 87103 than it does in Regulation 18700

- Sections 87100 and 87103 = “financial interest” is when a decision has a reasonably foreseeable material financial effect upon the enumerated interests in Section 87103 subdivisions (a) – (e)
- Regulation 18700 = “financial interest” is only the enumerated interests in Section 87103 subdivisions (a) – (e)

# The Political Reform Act

## New Regulations – Definitions

- 1) Public Official (restates Section 82048)
- 2) Member (previously included in Regulation 18701)
- 3) Governmental Agency – new
- 4) Governmental Decision – new
- 5) Financial Effect – new
- 6) **Financial Interest**

# The Political Reform Act

## New Regulations – Section 18700(d) Four Step Process

- Step 1:** Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?
- Step 2:** Will the reasonably foreseeable financial effect be material?
- Step 3:** *Affirmative Defense:* Can the public official demonstrate that the material financial effect on his financial interest is indistinguishable from its effect on the public generally?
- Step 4:** *Prohibition:* If Three-Step analysis establishes a conflict, the official may not make, participate in making or attempt to use his official position to influence a governmental decision.

# The Political Reform Act

## Step 1 – Reasonable Foreseeability

A financial effect on your interest is presumed to be reasonably foreseeable if directly involved in a decision

- ▶ Named party or the subject of the decision
- ▶ Subject of the approval, denial or revocation of a license, permit, or other entitlement
- ▶ Party to or subject of a contract
- ▶ Decisions affecting real property interests as described in Regulation 18702.2(a)(1)–(6)

# The Political Reform Act

## Step 1 – Reasonable Foreseeability

If the interest is not directly involved, consider these 6 factors

1. Whether the financial effect is contingent upon intervening events
2. Whether you should anticipate a financial effect as a potential outcome under normal circumstances when using appropriate due diligence and care

# The Political Reform Act

## Step 1 – Reasonable Foreseeability

The 6 factors continued

3. Whether the interest would typically be affected by the governmental decision
4. Whether the effects of the decision on interest might reasonably compromise an official's ability to act in in the public's best interests

# The Political Reform Act

## Step 1 – Reasonable Foreseeability

The 6 factors continued

5. Whether the decision would give or deny the interest an opportunity or advantage
6. Whether a similarly situated person with the same interest would feel the need to weigh the advantages and disadvantages of the governmental decision on that interest in formulating a position.

# The Political Reform Act

## Step 2– Material Financial Effect

- ▶ A financial impact is not material if it is merely “nominal, inconsequential, or insignificant”
- ▶ Different materiality thresholds apply depending on the type of interest

# The Political Reform Act

## Step 2– Material Financial Effect

### Specific materiality standards

- ▶ Business entity – Regulation 18702.1
- ▶ Real property – Regulation 18702.2
- ▶ Source of income – Regulation 18702.3
- ▶ Source of gifts – Regulation 18702.4
- ▶ Personal finances–18702.5

# The Political Reform Act

## Step 2– Material Financial Effect

Decisions that would have a material effect on Real Property owned by a public official

- ▶ Adoption or amendment of a general plan (with exceptions) or specific plan in which the property is located.
- ▶ Zoning, rezoning, or annexation or deannexation of the property.
- ▶ Imposition, repeal, or modification of taxes, fees, or assessments that apply to the property.
- ▶ Sale, lease, or purchase of the property.
- ▶ Approval, modification, or revocation of any entitlement for the property.
- ▶ Construction of improvements to streets, water, sewer, storm drainage, or other public facilities that will provide benefits to the official's property that are distinguishable from or disproportionate to those provided to other similarly situated properties.

# The Political Reform Act

## Step 2– Material Financial Effect

Decisions that would have a material effect on Real Property owned by a public official (continued):

- ▶ Decisions that alter
  - the development potential, highest and best use, or income-producing potential of the property.
  - the property's character by substantially altering traffic levels or intensity of use of surrounding property, including parking, views, privacy, noise levels, air quality, or other factors.
- ▶ Decisions that affect the value of any real property located within 500 feet of the official's property
  - Inapplicable to commercial property containing a business entity
  - FPPC may give written advice approving participation if there is evidence of no reasonably foreseeable measurable impact on the official's property
- ▶ Decisions that would cause a reasonably prudent person, using due care and consideration, would believe that the decision in question would have a reasonably foreseeable effect on the value of the official's property.

# The Political Reform Act

## Step 2– Material Financial Effect

Materiality standards for Real Property leased by a public official

- ▶ Change in the termination date of the lease;
- ▶ Increase or decrease the potential rental value of the property
- ▶ Increase or decrease in the rental value of the property, and the official has a right to sublease the property
- ▶ Change in the allowable use of the property
- ▶ Impact to the official's use and enjoyment of the property

# The Political Reform Act

## Step 3– The Public Generally

- ▶ If the material financial effect on the public official's interest indistinguishable from its effect on the public generally then there is no conflict
- ▶ Must show:
  - A significant segment of the public is affected; and
  - The effect on the official's financial interest is not unique compared to the effect on the significant segment
- ▶ Threshold percentages increased, numerical thresholds eliminated

# The Political Reform Act

## Step 4 – Prohibited Actions

- ▶ If the 3–step process concludes that a conflict of interests exists, the official may not make, participate in making, or in any way attempt to use his or her official position to influence the governmental decision
- ▶ Includes:
  - votes and direct actions, appointments, and approvals
  - Providing recommendations, information, or opinions with the purpose of affecting the decision

# The Political Reform Act Pop Quiz!

- ▶ The City Council agenda includes decision on a CUP for private school
- ▶ Condition of approval requires construction and dedication of a public pedestrian path (“Path”) along the eastern property line
- ▶ The Path would be consistent with the General Plan and Pedestrian and Bicycle Plan

# The Political Reform Act Pop Quiz!

- ▶ Pedestrian and Bicycle Plan includes a map of “Recommended Pedestrian Improvements,” which shows existing and proposed paths
- ▶ Plan also includes a “Detailed Pedestrian Project List,” and depicts a pedestrian path in the general vicinity of the proposed School.
- ▶ Mayor’s home, which he owns, is 472 feet from both the proposed school and the Path.
- ▶ Can the Mayor vote on the project?

# The Political Reform Act

## Pop Quiz! (next question)

- ▶ Water district is considering approval of its budget and a change in water rates
- ▶ Board member A co-owns landscape business that exclusively operates within the District
- ▶ Board member B's spouse owns landscape design business that also exclusively operates within the District

# The Political Reform Act

## Pop Quiz!

- ▶ Both businesses' projects include turf removal and drought-tolerant landscaping, which are eligible for District rebate programs, if sufficient funds are available
- ▶ Can A vote on the budget and changes to the water rates?
- ▶ Can B vote on the budget and changes to the water rates?

# Government Code Section 1090

- ▶ A public official may not “make” a contract in which he or she is “financially interested”
  1. Officer or employee of a local agency who has...
  2. A direct or indirect financial interest in...
  3. A contract made by the official or body of which they are a member
    - Broadly interpreted to include negotiations, discussions, design, planning, etc.
- ▶ If you have a financial interest in contract, you must recuse yourself from all acts leading up to contract approval

# Government Code Section 1090

## ▶ Examples:

- You are the landlord or tenant of the entity that is seeking a contract from your agency
- Non-profit entity member vs. board member
- Public agency employment

## ▶ Exceptions

- “Remote Interests” (Section 1091) – Abstention and disclosure required
- “Non-interests” (Section 1091.5) – No abstention required. Disclosure sometimes required

# Government Code Section 1090

## Severe Penalties

- ▶ Contracts are not just “voidable,” but void
- ▶ You might have to refund money
- ▶ Willful violation is a felony
- ▶ Fines (up to \$10,000) or imprisonment
- ▶ Barred from holding public office

# Government Code Section 1090

*Thomson v. Call*, 38 Cal.3d 633 (1985)

- ▶ City required parkland dedication for development
- ▶ Developer paid \$600K to various property owners for parkland acquisition, including \$256,000 for land that was owned by Council Member
- ▶ Developer dedicated the land to the City
- ▶ Councilmember abstained from related decisions on city attorney's advice
- ▶ Held: the councilmember violated Section 1090 and had to refund the \$256,000, plus interest, and lost the land to the City

# Government Code Section 1090

Defenses that won't work:

- ▶ Contract was fair, just, and equitable to all parties
- ▶ Legal staff said it was okay to participate
- ▶ Abstention might not be enough to avoid 1090 violation and invalidation of the contract

Advice can now be obtained from the FPPC

# Common Law Conflicts of Interests

- ▶ Law made by court decisions
- ▶ Predates the Political Reform Act, but still very much alive
- ▶ Applies when public official is tempted by personal interests to use their position for personal benefit

# Common Law Conflicts of Interests

*Clarke v. City of Hermosa Beach*, 48 Cal.App.4th 1152 (1996)



# Common Law Conflicts of Interests

*Clarke v. City of Hermosa Beach*, 48 Cal.App.4th 1152 (1996)

- ▶ Why no violation of the PRA?
  - Month-to-month lease is not an interest in real property under Political Reform Act
- ▶ Public officials should not participate in decisions that affect their personal interests
- ▶ Requirement for objective & unbiased decision makers

# Due Process

- ▶ No person shall be ... deprived of life, liberty, or property, without due process of law . . . .” Fifth Amendment, U.S. Constitution
- ▶ Requires reasonable notice & opportunity to be heard before an impartial decisionmaker
- ▶ Due Process is required whenever a local agency conducts a public hearing that will impact a person’s property or liberty interests
  - Conditional use permits
  - License revocations
  - Terminating or disciplining certain employees

# Due Process

- ▶ Biased decision makers are disqualified and must abstain
- ▶ Requirements:
  - Concrete proof of a specific prejudice against a person affected by the decision
  - Bias which is sufficient to impair the decision maker's ability to decide the matter on appropriate grounds

# Due Process

*Nasha LLC v. City of Los Angeles*, 125 Cal. App. 4th 470 (2004)

- ▶ Planning commissioner wrote an article in HOA newsletter, calling a proposed project a “threat to a wildlife corridor” and then voted on the project
- ▶ Court found “unacceptable probability of actual bias”
- ▶ Because three votes were required to sustain the appeal, the commissioner’s tainted vote was decisive

# Due Process

## Avoiding Due Process violations

- ▶ If you think you cannot be fair, don't participate
- ▶ Behave judiciously; avoid the appearance of bias
- ▶ Avoid statements before the close of a hearing that suggest your mind is made up
- ▶ If you make private site visits, don't make any commitments to applicants or neighbors
- ▶ Disclose at the hearing any "off-the-record" information you have obtained

# Abstentions



# Abstention

## Generally

- ▶ When you are disqualified by a conflict of interests, you must abstain
- ▶ You cannot vote or otherwise participate in making a decision.
- ▶ Participating includes using or attempting to use your position to influence the decision

# Abstention

## The Political Reform Act

The Act has specific procedures that must be followed when you are required to abstain

- ▶ Identify each conflict in detail at the meeting prior to consideration
- ▶ Announce your abstention
- ▶ Leave the chambers
- ▶ Closed session: disclosure must be made in open session but may be limited to a declaration that recusal is due to a conflict of interest under Section 87100.

# Abstention

## Political Reform Act Exceptions

- ▶ Consent calendar:

You must identify any conflicts with consent calendar items and abstain from voting, but do not need to leave the chambers and can remain on the dais for consent calendar items that are uncontested

- ▶ Personal interests:

You may return to address the decision makers in the chambers the same as any other member of the public if the decision concerns your personal interests (e.g., property and businesses wholly owned or controlled by you or your immediate family)

- Identify your financial interest in the decision for the record

# Abstention

## Political Reform Act Exceptions

- ▶ Legally required participation:
  - Applies when a quorum cannot be convened due to the disqualifying conflicts of its members.
  - The minimum number needed to create a quorum is selected at random to participate
  - Cannot be used merely because members are absent or refuse to participate
  - No comparative weighing of conflicts allowed

# Guidelines for Decisionmakers

- »» “I think I might have a conflict,  
what should I do?”

# Tips for Decisionmakers

- ▶ Anticipate potential conflicts
  - Carefully review and update your Form 700
  - Consult radius maps to determine if decisions will affect your property or those nearby
  
- ▶ Seek help from the professionals
  - Consult with your agency counsel
  - Go to the FPPC
    - Formal advice letters
    - 1-866-ASK-FPPC
  - The Institute for Local Government [www.ca-ilg.org/trust](http://www.ca-ilg.org/trust)

# Tips for Decisionmakers

- ▶ Don't wait until the last minute!
- ▶ “When in doubt, sit it out.”
- ▶ Seek to uphold the spirit of the law, not just the letter

# Questions?

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AB 1234 Training

Understanding Public Service Ethics Laws

The Brown Act and Open Meetings

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# Thank You!

**And thank you to ILG Partner Richards, Watson & Gershon**

**The webinar recording and PowerPoint slides will be available on ILG's website shortly.**

If you have additional questions please contact  
Melissa at [mkuehne@ca-ilg.org](mailto:mkuehne@ca-ilg.org)