California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Hyla P. Wagner, Senior Counsel
Luisa Menchaca, General Counsel

Date: March 27, 2002

Subject: **Pre-notice Discussion of Amendments to Regulation 18707.4**
Public Generally: Appointed Members of Boards and Commissions

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At its November 5, 2001 meeting, the Commission discussed regulation 18707.4, one of the final regulations being examined in the conflicts regulations improvement project. While not necessarily seeking to change the scope of this exception, the Commission directed staff to try to tailor the regulatory language so that it is more easily applied. We propose minor changes to the regulation to conform it to current advice and to make the "significant segment" standard clearer.

Regulation 18707.4 sets forth a narrow exception from the conflict-of-interest rules for members of boards and commissions who are appointed to represent a particular economic interest, such as industry representatives on regulatory boards. The exception applies if:

1. The law that creates the board specifies that the individual is appointed to represent a specific economic interest;
2. The board member is required to have the economic interest that he or she represents;
3. The board's decision does not have a material financial effect on any other economic interest held by the board member; and
4. The decision will affect the board member's economic interest in substantially the same manner as the decision will affect a significant segment of the persons the board member was appointed to represent.

A. Background: *Callanan* and *Consumer's Union*.[1] The exception for industry boards and commissions was adopted by the Commission early in its administration of the Political Reform Act and is one of the few FPPC regulations that has judicial sanction. After the Act passed in 1975, the Commission was faced with the problem of how to reconcile the new conflict-of-interest and disqualification rules with numerous existing state laws providing for industry representatives on regulatory boards.

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[1] The memorandum by William L. Williams, Jr., titled "Discussion of Policy Issues Concerning Regulation 18707.4," dated October 23, 2001, provides detailed background on this regulation and is available on the FPPC website under the past agendas section.

In 1976, the Commission responded by adopting regulation 18703, the predecessor to regulation 18707.4.[2]

The Commission first applied regulation 18703 in the *Callanan* Opinion, which dealt with the State Board of Funeral Directors and Embalmers, an eight-member board, of whom three members were required to be licensed funeral directors or embalmers and the remaining five were public members. The Commission discussed the rationale behind the exception:

> "The subsections were adopted in an effort to reconcile the conflict of interest provisions of the Political Reform Act with other statutes which require certain boards to include as members persons who represent the industry, trade or profession which the board oversees. The Commission was persuaded that when the legislative body which creates a regulatory board determines that industry views and expertise should be represented on the board, the Political Reform Act should not be interpreted to prevent industry members from participating in board decisions affecting the industry." (*In re Callanan*, 4 FPPC Ops. 33 (1978), p. 4.)

Soon after the Commission adopted regulation 18703, Consumers Union filed suit challenging the regulation. They argued that the Act was intended to prevent industry members of boards from making decisions that affected them financially. The California Court of Appeal upheld regulation 18703, stating:

> "We must determine whether the Fair Political Practices Commission (FPPC) validly interpreted the California Government Code section 87103 phrase 'public generally' so as to continue to allow members of an industry to serve on state decision-making boards affecting their industry. We conclude that the FPPC's interpretation of 'public generally' is consistent with the Political Reform Act (PRA)." (*Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd*. (1978) 82 Cal.App.3d 433, 445.)

The court stated that it did not believe the Act intended "to nullify the many state and local laws establishing regulatory boards and commissions whose members are drawn from the very industry, trade or profession regulated." *Id.* at 435.

B. Application of the Exception. The classic application of the regulation is to commodity commissions of the Department of Agriculture or boards regulating a particular profession under the Department of Consumer Affairs. In advice letters the regulation has been applied to boards such as the California Board of Chiropractic Commissioners, the Delta Protection Commission, the Sonoma County HIV Consortium, L.A. Care Health Plan, a city mobile home rent review board, and a city redevelopment project area committee. A summary of past advice issued under this regulation is

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[2] Current regulation 18707.4 was formerly numbered 18707.3(a), and its predecessor was regulation 18703(c)-(d).

attached as Appendix 2. The advice issued under this exception is consistent and seems in accord with the policies set forth in *Callanan* and *Consumer's Union*.

The regulation has been applied to entire boards, such as a commodity commission, or to specific seats on boards in instances where a law requires that particular seats on the board represent different interests. For example, the ordinance creating the Palm Springs Visitors and Promotion Board requires four seats to be occupied by hotel owners and two seats to be occupied by restaurant owners. Many boards are created by statute as such "representative" or "stakeholder" boards, as shown in Appendix 2.

On March 7, 2002, the staff held an interested persons meeting on the regulation. We solicited input on the operation of the exception generally; whether the "significant segment" portion of the regulation functions as desired; and whether the composition or structure of various boards and commissions has changed over time in a way that affects the operation of this regulation. Representatives from the Department of Agriculture, the Department of Technology Trade and Commerce, and LA Care Health Plan attended. We received comments from attorneys representing LA Care Health Plan about the regulation generally and its application to their specific situation. From the other participants at the meeting and several agency counsels we contacted by phone, there was not a large expression of concern about how the regulation was currently working. They were interested in keeping abreast of possible changes to the regulation, but for the most part thought that it was functioning as intended or that it did not apply to many of the boards with which they worked. For example, the Department of Technology, Trade and Commerce has numerous boards with business representatives on them, but the regulation does not apply to that situation because such board members do not represent a specific economic interest.

C. Proposed Amendments. Reviewing the application of regulation 18707.4, we identified two concerns. First, the advice letters issued under this regulation have advanced beyond the four corners of the requirement of subdivisions (a)(2) of the existing regulation. Second, the significant segment portion of the regulation in subdivision (a)(4) is awkward to apply. We propose two minor substantive changes to the regulation to address these concerns, as shown in Appendix 1.

1. Change 18707.4(b) so that the requirement in (a)(2) for the member to have the economic interest he or she represents can be implicit. For the exception to apply, regulation 18707.4 subdivision (a)(2) currently states that the board member must be required by law to have the economic interest he or she represents. However, regulation 18707.4 has been appropriately applied where the statute authorizing creation of the board or commission does not explicitly require the member to have the economic interest the member represents. Rather, given the statutory scheme, it is clear that the statute anticipates that the board member will likely have the economic interest the member represents.

For example, in the *Overstreet* Opinion, 6 FPPC Ops. 12 (1981), the Commission applied the exception to a landlord commissioner sitting on Berkeley's rent stabilization board. Here, all residents of Berkeley were eligible to serve as commissioners on the rent stabilization board. Measure D, creating the board, did not specifically require the appointment of tenants or landlords, but the Opinion found that the measure contemplated that both tenants and landlords would be appointed.[3]

Another example is the *Towner* Advice Letter, No. A-87-038, which dealt with a sexual assault advisory committee created by statute to have 11 members, five appointed by the Office of Criminal Justice Planning, and six appointed by the Commission on the Status of Women, including one representative of a rape crisis center. The statute creating the advisory committee did not expressly require that the individual representing a rape crisis center be employed by the center and thus have an economic interest. Nonetheless, the advice letter applied the exception and stated that the employee appointed as the representative required by statute could participate in committee decisions that would affect all rape crisis centers in substantially the same manner.

More recently, in the *Bennett* Advice Letter (No. A-98-239), the law creating the San Mateo County Commission on Publicly Assisted Medical Care required that one member represent the interests of the minority community in the county. The appointee was the executive director of a nonprofit community health organization that served the minority community. The letter found that regulation 18707.4 applied, and that the commissioner could participate in board decisions about contracts with other community nonprofits.

Advice in these instances seems to be sound and within scope of *Callanan* and *Consumer's Union*, but it does not fit precisely with the regulation's second requirement. Therefore, we propose adding language to subdivision (b) of the regulation permitting the exception to apply if the requirement for the member to have the economic interest he or she represents is implicit. The change to subdivision (b) would clarify the regulatory authority for the exception to be applied in cases such as these.

2. Quantify the "significant segment" standard within this regulation itself. The second change involves the "significant segment" language. Subdivision (a)(4) states that the exception only applies if the "decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a **significant segment of the persons the member was appointed to represent."**

For quantification of what "significant segment" means here, we have traditionally cross-referenced to the definitions of "significant segment" in regulations 18707.1 (public generally - general rule) or 18707.7 (public generally - predominant industry, trade or profession). The cross referencing is confusing and does not work well

[3] Rent control board situations would now be covered by regulation 18707.9: Public Generally – Residential Properties.

for the appointed boards regulation, which usually applies to a smaller universe of affected individuals or entities.

The usual definition of “significant segment” in 18707.1 does not fit regulation 18707.4 situations very well. Frequently in the industry board situation, the appointees are representing a group of individuals or entities (chiropractors in the state, avocado growers, or nonprofit clinics) rather than representing a particular district or jurisdiction. Regulation 18707.1's definition of “significant segment” is keyed to the population or number of businesses in a geographic district or jurisdiction.

For example, consider a board member who by statute, is on the board to represent nonprofit clinics serving low-income persons. Under regulation 18707.4(a)(4), the board member would be permitted to participate if the board's decision would financially affect the board member’s economic interest (a nonprofit clinic) in a way that is substantially the same as the decision will affect a significant segment of the persons the member was appointed to represent (nonprofit clinics).

Cross-referencing to regulation 18707.1(b)(1)(C), the definition of “significant segment” is "2,000 or twenty-five percent of all business entities[4] 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." The 25 percent threshold does not exactly apply because low-income clinics are not made up of more than a single industry, trade or profession.

So we turn to the significant segment standard in regulation 18707.7, “Public Generally - Industries, Trades or Professions,” but it does not exactly apply either. Regulation 18707.7 covers the “company town” situation where one industry, trade or profession predominates in a town and practically all officials would have an economic interest from this industry, trade or profession. It is a narrow exception that is rarely used. Regulation 18707.7(b) provides that an industry, trade or profession:

“. . . constitutes a significant segment of the public generally if that industry, trade or profession is a predominant industry, trade or profession in the official's jurisdiction or in the district represented by the official. An industry, trade or profession that constitutes fifty percent or more of business entities in the jurisdiction of the official’s agency or the district the official represents is a ‘predominate’ industry, trade or profession for purposes of this regulation.”

In the example, however, low-income clinics are not a predominant industry in the city, because they do not constitute 50 percent of all businesses in the district. Thus, for the appointed boards regulation, neither of the “significant segment” definitions in regulations 18707.1 or 18707.7 apply correctly.

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[4] A nonprofit entity is treated as a business entity for purposes of this regulation. (Regulation 18707.1(b)(1)(C).)

The application of regulation 18707.4 will be clearer if the significant segment is defined in the regulation itself. The percentage should stay high (50 or 75%) because often the "persons the member was appointed to represent" may be a relatively small group of individuals or entities. As shown in Appendix 2, board members were appointed to represent small groups in *Towner* (rape crisis centers), *Larocque* (AIDS nonprofits), *Bennett* (nonprofit community health clinics) and *Dorsey* (various board seats represent narrow constituencies). Keeping the significant segment quantified at a high percentage would ensure the majority of persons affected by the governmental decision would be affected in a substantially similar manner. Applying a fifty percent threshold to the fact patterns of past advice summarized in Appendix 2 does not appear to change any outcomes.

Finally, in subdivision (a)(3) of regulation 18707.4, we would add the concept of foreseeability (as described in the recently-amended regulation 18706) by substituting "reasonably foreseeable material financial effect" for "material financial effect." In addition, we propose to correct a typographical error in subdivision (b). The reference in the second line of subdivision (b) should be to section 18707.4(a)(1), not (b)(1).

Recommendation. The Legal Division and Enforcement Division staff believe the proposed changes will improve the application of regulation 18707.4 without expanding its scope. Staff recommends that the Commission approve the amendments to regulation 18707.4 for public notice.

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