Proposed Regulation Defining the Term “Consultant”

Note: Below are alternative proposals for a new regulation defining the term “consultant” as used in Government Code Section 82048, which generally provides that a “public official” means “every member, officer, employee, or consultant of a state or local government agency.” An individual meeting this definition would be subject to the Political Reform Act’s conflict of interest rules.

Staff is also considering whether the same definition should apply to define the term “consultant” as used in Government Code Section 82019, which generally provides that a “designated employee” means “any officer, member, employee, or consultant of any agency” who occupies certain positions with the agency or whose position is designated in the agency’s conflict of interest code. An individual who is a “designated employee” is required to file a Statement of Economic Interests (Form 700). In addition to comments on the proposed language below, staff welcomes comments on the issue of whether the term “consultant” should be defined the same way for both “public official” and “designated employee.”

The current definition of “consultant” is set forth in Regulation 18701(a)(2). Regulation 18701 also defines when members of a governmental advisory body are “public officials” (Regulation 18701(a)(1)) and which individuals fall under the category of “other public officials who manage public investments” in Government Code Section 87200 (Regulation 18701(b)). Staff is proposing to split existing Regulation 18701 into separate regulations (18701.1 - 18701.4) to separately address not only the terms already covered by the regulation, but also to add the criteria for whether a private entity is a government agency (the “Siegel” regulation”) proposed in new Regulation 18701.4, which will also be discussed
at the Interested Persons Meeting on January 22, 2013. No substantive changes are contemplated for the existing regulatory provisions covering when members of a governmental advisory body are “public officials” and which individuals fall under the category of “other public officials who manage public investments” in Government Code Section 87200.

Finally, provisions that appear in bold font in the proposed regulations below are existing language taken from current Regulation 18701(a)(2).
Adopt 2 Cal. Code Regs. Section 18701.2 to read:


(a) Definitions. As used in this regulation, the terms below have the following meaning:

(1) “Compensation” means any form of economic consideration but does not include reimbursement for travel or other expenses to conduct agency business; credits toward a course, degree, license, certification, continuing education requirement or similar matter; or workers’ compensation or liability insurance coverage.

(2) An individual receives compensation “pursuant to” a contract between an independent contractor and a state or local government agency when he or she receives compensation to perform services required by the contract from the independent contractor or from another person through one or more subcontracts.

(b) For purposes of Section 82048, defining “public official,” the term “consultant” means an individual who receives compensation as an independent contractor with a state or local government agency, or receives compensation pursuant to a contract between an independent contractor and a state or local government agency, and, in either case, also meets the criteria in (1), or (2) below:

(1) The individual “makes,” as defined in Regulation 18702.1, or “participates in making,” as defined in Regulation 18702.2, a governmental decision on whether to do any of the following and the decision will foreseeably have a material effect on any financial interest:

(A) Approve a rate, rule, or regulation.

(B) Adopt or enforce a law.
(C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement.

(D) Enter into, modify, or renew a contract provided it is the type of contract that requires agency approval.

(E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications to such a contract.

(F) Grant agency approval to a plan, design, report, study, or similar item.

(G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof.

(2) The individual serves the agency in any of the following positions:

(A) A position listed in Section 87200.

(B) A position of officer, employee or member listed under and not exempted by Section 82019.

Adopt 2 Cal. Code Regs. Section 18701.2 to read:


(a) Definitions. As used in this regulation, the terms below have the following meaning:

(1) “Compensation” means any form of economic consideration but does not include reimbursement for travel or other expenses to conduct agency business; credits toward a course, degree, license, certification, continuing education requirement or similar matter; or workers’ compensation or liability insurance coverage.

(2) An individual receives compensation “pursuant to” a contract between an independent contractor and a state or local government agency when he or she receives compensation to perform services required by the contract from the independent contractor or from another person through one or more subcontracts.

(b) For purposes of Section 82048, defining “public official,” the term “consultant” means an individual who receives compensation as an independent contractor with a state or local government agency, or receives compensation pursuant to a contract between an independent contractor and a state or local government agency, and, in either case, also meets the criteria in paragraph (1), (2) or (3):

(1) The individual “makes,” as defined in Regulation 18702.1, a governmental decision on whether to do any of the following and the decision will foreseeable have a material effect on any financial interest:

(A) Approve a rate, rule, or regulation.

(B) Adopt or enforce a law.
(C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement.

(D) Enter into, modify, or renew a contract provided it is the type of contract that requires agency approval.

(E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications to such a contract.

(F) Grant agency approval to a plan, design, report, study, or similar item.

(G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof.

(2) The individual serves the agency in any of the following positions:

(A) A position listed in Section 87200.

(B) A position of officer, employee or member listed under and not exempted by Section 82019.

(3) Except as set forth in subparagraphs (A) or (B), the individual “participates in making,” as defined in Regulation 18702.2, a governmental decision described in subdivision (b)(1) and the decision will foreseeably have a material effect on any financial interest.

(A) An individual is not a consultant under this paragraph (b)(3) when the individual performs work for the agency pursuant to one or more contracts during fewer than six calendar months in any consecutive two-year period.

(B) An individual is not a consultant under this paragraph (b)(3) unless the major purpose of the contract is to provide advice or recommendations to agency or other government officials.

(i) The following are examples of the types of contracts in which providing advice or recommendations is likely to be the major purpose of the contract:
Example #1 – To provide legal counsel or expert advice on a broad range of unrelated matters.

Example #2 – To provide legal counsel or expert advice on a specific matter or related matters and the counsel or advice does not relate to current or reasonably imminent litigation involving the agency.

Example #3 – To advise the agency on issues relating to implementation of one or more programs or projects, such as: a bond issuance; a public works project; a general plan; replacement or upgrade of all or a major portion of an agency’s information technology system; adoption, repeal or modification of a rent control law or ordinance; or annexation or de-annexation.

Example #4 – To advise the agency on the specifications for a proposed contract or desired qualifications of potential contractors.

Example #5 – To produce a report or study, or statistical, technical or scientific information, that provides a recommendation on the course of action a government agency should take.

Example #6 – To identify and recommend the purchase or sale of a specific investment, or the purchase, sale or lease of specific real property, goods or services.

(ii) The following are examples of the types of contracts in which providing advice or recommendations is not likely to be the major purpose of the contract:

Example #7 – To provide goods or supplies.

Example #8 – To provide manual, clerical or secretarial services.

Example #9 - To manufacture, construct, repair or maintain public roads, levees, structures, facilities or equipment.
Example #10 – To produce a report or study, or provide statistical, technical or scientific information, that does not contain a recommendation on the course of action a government agency should take.

Example #11 – To appraise the value of real property.

Example #12 – To assist the agency in the purchase or sale of a specific investment already identified by the agency, or in the purchase, sale or lease of specific real property, goods or services already identified by the agency.

Example #13 – To provide legal counsel, or assistance as an actual or potential expert witness, to assist the agency in litigating, avoiding litigation or settling a specific matter or related matters on current or reasonably imminent litigation involving the agency.