

Fair Political Practices Commission

Memorandum

To: Chairman Schnur, Commissioners Garrett, Hodson, Montgomery, and Rotunda

From: William J. Lenkeit, Senior Commission Counsel
Scott Hallabrin, General Counsel

Subject: Emergency Adoption of Amendments to Regulations 18734 and 18751—
Financial Disclosure by Employees of Newly Created Agencies

Date: January 28, 2011

Proposed Commission Action and Staff Recommendation. Adopt emergency amendment of Regulations 18734 and 18751 concerning financial disclosure requirements by specified employees of new agencies while the agency is preparing its conflict-of-interest code.

Reasons for Proposed Amendment of Regulations. These changes are proposed to clarify an employee's reporting obligations when employed by a new agency pending his or her agency's completion of the adoption of the agency's conflict-of-interest code. This process can sometimes be lengthy. These regulations provide transparency during the code adoption process by requiring employees and consultants in decision-making positions to file statements of economic interests ("SEI").

In October 2009 the Commission adopted Regulation 18734, which provides interim disclosure procedures for "newly created positions." This amendment clarifies that newly created positions include both new positions at existing agencies and all applicable "new" positions at newly created agencies. The amendment is proposed on an emergency basis because, without the amendment, new agencies may be created and operate without any disclosure requirements for officials engaged in governmental decision making. This most often occurs with the formation by governmental agencies of temporary committee-type organizations but it also is relevant to agencies such as the newly created California Citizens Redistricting Commission. At the same time, proposed amendments to Regulation 18751 would eliminate the provision that an agency may operate for less than one year without being required to ever adopt a code.

Discussion: The Political Reform Act¹ requires public officials who make or participate in the making of governmental decisions to file SEIs in which they disclose

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices 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.

information regarding their economic interests. There are two categories of filers under the Act: statutory filers, those who are required to file under Section 87200, and “code filers,” those who are required to file under their agency’s conflict-of-interest code pursuant to Section 87300.

The first category of filers, governed by Sections 87200 et seq., includes most high-ranking elected officeholders and other high-ranking state and local government positions. The second category of filers, governed by Sections 87300 et seq., covers all other positions in an agency that “involve the making or participation in the making of decisions [that] may foreseeably have a material effect on any financial interest ...” (Section 87302(a).) Persons who hold these positions are generally referred to as “designated employees” and their positions are listed in an agency’s conflict-of-interest code, which most governmental agencies are required to adopt and promulgate. (Section 87300 and Section 82019 [defining “designated employee”].) These positions, and their respective disclosure requirements, are listed in each agency’s conflict-of-interest code. Generally, new agencies have six months to adopt a code (Section 87303), while agencies that experience changed circumstances must amend their codes within 90 days of the change. (Section 87306.) However, promulgation of code amendments often takes longer than the required 90-day amendment period.

Regulation 18734 was adopted to address the problem of interim decision making prior to the adoption of an agency conflict-of-interest code. The proposed amendment clarifies that the regulation applies to all newly created positions, whether the position is new because the agency is new or because the position is new to the existing agency.

Finally, proposed amendments to Regulation 18751 would eliminate the provision that an agency may apply for an exemption to the requirement that it adopt a conflict-of-interest code if it plans to operate for less than one year. Because of the broad definition of “agency” certain small groups such as temporary committees, task forces, or other similar organizations may qualify as an agency and be required to file a code. Nothing in the Act exempts agencies from filing if they operate for less than a year. Many times, these organizations are formed for brief periods to study certain issues and make recommendations that qualify as governmental decisions. The amendment would require all those working for such organizations to file SEI’s if subject to the provisions of Section 87300 et seq. and eliminate the potential for governmental decision making in the absence of public financial disclosure.

Emergency Regulation Procedure: Under the statutes applicable to the Commission’s adoption of regulations, the Commission may adopt an emergency regulation if, in any particular case the Commission makes a finding, including a statement of facts in writing describing the emergency, that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare. Included with the revised draft of Regulation 18413 and this memorandum is a memorandum detailing staff’s recommended findings in support of the emergency adoption

of the regulation. Once adopted, the regulation will remain in effect for 120 days, unless the regulation is permanently adopted in the interim. Staff proposes to bring this regulation to the Commission for permanent adoption within the 120-day period.

FINDING OF EMERGENCY

The Fair Political Practices Commission finds that an emergency exists and that the foregoing amendment to Regulations 18734 and 18751 are necessary for the immediate preservation of the public peace, health, safety or general welfare. A statement of the facts constituting such emergency is:

STATEMENT OF FACTS

Under Government Code Section 87200 and following, high ranking state and local public officials are required to periodically publicly disclose their economic interests by filing a Statement of Economic Interests (FPPC Form 700) or “SEI”). Government Code Section 87300 and following requires other state and local public officials who also occupy decision making positions in their agencies to file SEIs, as set forth in their agency’s conflict-of-interest code. The filing and public disclosure of financial interests alerts these public officials to areas in which they may have a conflict of interest when making governmental decisions while also allowing the public to monitor potential conflicts. Furthermore, officials who file SEIs are subject to the Political Reform Act’s (Government Code Sections 81000-91014, hereinafter “the Act”) limits on gifts and ban on honoraria.

On October 8, 2009, the Commission adopted Regulation 18734, which sets forth requirements for interim financial disclosure for newly created positions within agencies until the agency’s conflict-of-interest code can be amended to include the new position. The Regulation, however, overlooked positions that are “newly created” by virtue of the fact that the agency itself is newly created. This amendment would rectify that oversight and require who engage in governmental decision making to file SEIs, whether they work for new agencies or not.

Generally, new agencies have six months to adopt a code (Section 87303). However, promulgation of conflict-of-interest codes often takes longer than the required six-month period. While the Act’s conflict-of-interest rules apply to all public officials regardless of their SEI filing obligations, the Act’s gift limit and honorarium prohibitions do not apply to a public official until he or she is required to file an SEI. These changes would extend the Act’s gift limit and honorarium prohibitions to decision making employees during the code adoption process.

Without these amendments, decision making officials with agencies such as the California Citizens Redistricting Commission or at any number of other temporary or permanent “special committees” or “task forces” or other such organizations that qualify as an agency because they have decision making authority will be allowed to operate in the dark without public view of the financial influences that may play a part in their decision making. This is contrary to the most basic principal of the Act.

1 Amend 2 Cal. Code Regs. Section 18734 to read:

2 **§ 18734. ~~Designated Employees and Consultants~~ – New Positions Pending Code Adoption**
3 **or Amendment.**

4 (a) New Positions and Consultants – Interim Disclosure: Consultants and individuals in
5 newly created positions as set forth in Regulation 18219, including positions at newly created
6 agencies, that make or participate in the making of decisions that may foreseeably have a
7 material effect on any financial interest shall file interim disclosure under this category.

8 (b) Disclosure Requirements: ~~Persons~~ Individuals in positions specified in subdivision
9 (a) of this regulation shall file under the broadest disclosure category in the agency’s conflict-of-
10 interest code or, if the agency does not have a conflict-of-interest code, provide full disclosure
11 until the a new agency amends its code is adopted and approved to reflect the position.

12 However, if the position does not involve duties that require disclosure under the broadest
13 disclosure category or under full disclosure, the agency ~~may determine that the broadest~~
14 ~~disclosure is not necessary and~~ must set interim disclosure that is more tailored to the positions
15 ~~with a position’s~~ position’s limited range of duties. This determination shall include a description of the
16 position’s duties and, based upon that description, a statement of the extent of disclosure
17 requirements. Full disclosure means that the statement discloses all investments and interests in
18 real property held on the date of assuming office, and income received during the 12 months
19 immediately preceding assuming office. [The code reviewing body shall determine the filing](#)
20 [location for statements.](#)

21 (c) The Commission shall prescribe a form on which an agency must report disclosure
22 requirements pursuant to this regulation. The form must include, at a minimum, the following
23 information:

1 (1) A list of new positions not covered in an agency conflict-of-interest code, the
2 position's duty statement or description, and the disclosure requirements for each position.

3 (2) Newly created agencies must list consultants that file a statement of economic
4 interests pursuant to a contract. Information must include a description of the associated
5 governmental duties and an explanation of the disclosure requirements. This information is also
6 required when an existing agency tailors disclosure for a consultant.

7 (3) The form must be signed by the agency head.

8 (d) Public Records: Records pertaining to positions that file under this category are public
9 records and must be retained for the public's inspection in the same manner and location as the
10 agency's conflict-of-interest code as set forth in Section 81008(a). This includes any written
11 documents that support a limited disclosure category.

12 ~~(d)~~ (e) Time of Filing: Persons in positions specified in this regulation shall file an initial
13 statement within 30 days of assuming office and shall continue to file annually in the same
14 manner and location specified in the agency's conflict-of-interest code.

15 ~~(e)~~ (f) Annual Statement: Any statement filed under this provision is deemed to satisfy
16 the requirement of Section 87302(b), which requires that an initial or annual statement be filed.

17 ~~(f)~~ (g) Nothing in this regulation shall be construed to exempt any agency from
18 complying with provisions of Section 87306.

19 NOTE: Authority cited: Section 83112, Government Code. Reference: Section 87302,
20 Government Code.

1 Amend 2 Cal. Code Regs. Section 18851 to read:

2 **§ 18751. Procedure and Standards for Obtaining Exemption from Government Code**

3 **Section 87300, Requiring Adoption and Promulgation of a Conflict of Interest Code.**

4 (a) This section sets forth the procedure and standards by which the Fair Political Practices
5 Commission will determine whether to grant an exemption from Government Code section 87300 to
6 an agency for which the Commission is the code reviewing body. Other code reviewing bodies are
7 encouraged to adopt the same or similar procedure and standards. Nothing in this section shall be
8 construed to mean that a government agency is not required to adopt a conflict of interest code if it
9 has not been granted an exemption.

10 (b) A governmental body qualifying as an agency, and therefore required to adopt and
11 promulgate a Conflict of Interest Code pursuant to Government Code section 87300, or be included
12 within another agency's Conflict of Interest Code, may submit a request to the Fair Political Practices
13 Commission for exemption from that requirement if the Commission would be the agency's code
14 reviewing body. Obtaining an exemption as provided in this regulation is the exclusive means by
15 which an agency may obtain an exemption from the requirement to adopt and promulgate a Conflict
16 of Interest Code. The term "agency" as used in this section means any state agency or local
17 government agency with jurisdiction in more than one county.

18 (c) An exemption shall be granted to an agency by the Executive Director only if he or she
19 finds:

20 (1) That if the agency were to adopt a Conflict of Interest Code, there would be no
21 "designated employees," within the meaning of Government Code Sections 82019 and 87302(a),

1 ect to its provisions; or
2 (2) ~~That the agency is, or within one year will be, inoperative and nonfunctioning; or~~
3 ~~(3) That the agency is a committee, board, or commission that does not possess~~
4 decisionmaking authority as defined in 2 Cal. Code Regs. section 18701(a)(1), and both of the
5 following apply:

6 (A) The agency will not acquire real property in the foreseeable future; and
7 (B) The annual operating budget exclusive of salaries for the agency is less than \$ 150,000;

8 or

9 (4) That good cause exists for granting an exemption due to extraordinary circumstances that
10 indicate the burden on the agency of adopting a conflict of interest code is not warranted by the
11 degree of likelihood that a conflict of interest may occur.

12 (d) An exemption may be granted to an agency or extended by the Executive Director on his
13 or her own initiative or in response to a request by the agency. A request by an agency shall be
14 signed by the chief executive officer or a legal representative of the agency and shall be accompanied
15 by a statement of the alleged basis for a grant of exemption with supporting documentation, as
16 described in subdivisions (e) through (g) of this regulation.

17 (e) A request for exemption under subdivision (c)(1) shall be accompanied by:

18 (1) A list of every position in the agency, including each officer, employee, member and
19 consultant with the agency;

20 (2) A copy of the job description for each position listed in subsection (1) above;

21 (3) A copy of the statutory authority under which the agency was created with specific
22 citations to the provisions setting forth the duties and responsibilities of the agency;

23 (4) Identification of the person or body to whom the agency reports;

1 (5) A copy of the last annual or regular report submitted by the agency to the person or body
2 to whom the agency reports;

3 (6) A detailed justification of the request for exemption including an explanation of why none
4 of the positions listed in subsection (1) above, are designated employees. In preparing this
5 justification, particular note should be taken of Government Code section 82019.

6 (f) A request for exemption under subdivision (c)(2) shall be accompanied by:

7 (1) A copy of the statutory or legal authority under which the agency ceased, or soon will
8 cease, to operate or function;

9 (2) The date, time and place of the last meeting of the agency;

10 (3) Identification of the positions and names of any staff who continue to work for or
11 represent the agency, whether salaried or unsalaried; and

12 (4) A detailed explanation of the reasons the agency is, or soon will be, inoperative and
13 nonfunctioning.

14 (g) A request for exemption under subdivision (c)(3) shall be accompanied by:

15 (1) A copy of the statutory authority under which the agency was created with specific
16 citations to the provisions setting forth the duties and responsibilities of the agency;

17 (2) Identification of the person or body to whom the agency reports; and

18 (3) A copy of the last annual or regular report submitted by the agency to the person or body
19 to whom the agency reports;

20 (h) Within 90 days after receiving a request for exemption, the Executive Director shall:

21 (1) Approve the request;

22 (2) Deny the request; or

23 (3) Return the request for additional information and resubmission within 60 days. Upon

1 resubmission, the Commission shall, within 60 days, either approve the request for
2 exemption or deny the request.

3 (i) In the case of a newly created agency, the time limits prescribed by Government Code
4 sections 87302.6 and 87303 for the members of a board or commission to file statements of
5 economic interests, and for the agency to submit a proposed Conflict of Interest Code, shall be tolled
6 while a request for exemption is under initial consideration by the Executive Director or
7 reconsideration by the Commission, provided the request is submitted prior to the time limit expiring.

8 (j) When an exemption is granted, the Executive Director shall issue an exemption letter and
9 transmit it to the requesting agency. The exemption letter shall state a legal and factual basis for the
10 granting of an exemption. When an exemption is granted under subdivision (c)(4), the letter shall
11 also describe the particular extraordinary circumstances that warrant the granting of an exemption
12 under that subdivision. A copy of the exemption letter shall be transmitted to any person requesting
13 it, and shall be posted on the Commission's website. Within 30 days after the exemption is granted,
14 any interested party may submit a request that the grant of exemption be reconsidered by the
15 Commission. The Chairman shall consider the request and, if in his or her discretion good cause
16 exists for reconsideration, he or she shall schedule the matter for hearing before the Commission.

17 (k) When a request for exemption is denied, the Executive Director shall issue a letter
18 denying the request for exemption, transmit it to the requesting agency, and establish a new deadline
19 by which the agency requesting the exemption shall submit a proposed Conflict of Interest Code to
20 the Commission, or be included within the Conflict of Interest Code of another agency. If the request
21 is from a newly created agency having a board or commission whose

1 members are subject to the filing requirements imposed by Government Code section
2 87302.6, the letter denying the request for exemption shall also establish a new deadline, not
3 exceeding 30 days from the date the letter is issued, by which the board or commission members
4 shall file statements of economic interests pursuant to Government Code section 87200. A copy of
5 the letter denying the exemption shall be transmitted to any person requesting it, and shall be posted
6 on the Commission's website. Within 30 days after the request for exemption is denied, any
7 interested party may submit a request that the denial be reconsidered by the Commission. The
8 Chairman shall consider the request and, if in his or her discretion good cause exists for
9 reconsideration, he or she shall schedule the matter for hearing before the Commission.

10 (l) An exemption granted under subdivision (c)(3) of this regulation does not constitute
11 formal written advice or informal assistance pursuant to 2 Cal. Code Regs. sections 18329 and
12 18329.5 concerning the duty of an individual to file a statement of economic interests under the
13 provisions of an existing Conflict of Interest Code.

14 (m) Upon being issued, an exemption shall remain in effect until the basis for the grant of
15 exemption no longer exists or the expiration of 2 years, whichever occurs earlier. When an agency's
16 exemption expires without being renewed on the Executive Director's own initiative, the agency shall
17 either adopt and promulgate a Conflict of Interest Code pursuant to Government Code section 87300,
18 submit a request for the exemption to be extended, or submit a new request for exemption.

19 (n) A request to extend an exemption need only consist of a declaration signed by the chief
20 executive officer or a legal representative of the agency stating that the circumstances that served as
21 the basis for the original grant of exemption have not changed. The request shall then be granted or
22 denied according to the procedures set forth in subdivisions (h) through (k) of this

1 regulation, and if granted, subject to the provisions of subdivision (l) of this regulation, just
2 as an original exemption.

3 Note: Authority cited: Sections 83108 and 83112, Government Code. Reference: Section 87300 et
4 seq., Government Code. Note: Authority cited: Section 83112, Government Code. Reference:
5 Section 82019, Government Code.