AGENDA
Interested Persons' Meetings
January 13, 2004
8th Floor Hearing Room
428 J Street, Suite 800
Sacramento, CA 95814

10:00 to 12:00:	**Conflict-of-Interest Regulations and General Plans.**
2:00 to 4:00:	**Proposal to Merge Government Code section 1090 and other Statutory and Common Law Conflict-of-Interest Provisions into the Political Reform Act.**

Staff of the Fair Political Practices Commission will be holding two interested persons' meetings to solicit public input relating to two current Commission projects. The Commission also invites written comments addressing these topics. Written comments may be addressed to the Commission at the address set forth above. To participate in this interested persons' meeting by telephone, please contact Joan Giannetta at (916) 322-5660.

A. Introduction

***Conflicts of Interest under the Act*:** The Act prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A conflict of interest exists where:

1. The individual is a "public official."

2. The public official will be making, participating in making, or influencing a governmental decision.

3. The public official has an "economic interest."

4. The economic interest is directly or indirectly involved in the decision.

5. The financial effect of the decision on the public official's economic interests will be material based on the applicable materiality standard.

6. The material financial effect of the decision on the public official's economic interests is reasonably foreseeable.

Two statutory exceptions to the conflict-of-interest provisions of the Act exist. These exceptions will allow the official to participate despite the conflict of interest.

7. The "public generally" exception.

8. Legally required participation.

Other Conflict-of-Interest Laws: In addition to the conflict-of-interest provisions of the Act, there are a variety of conflict-of-interest laws that exist in other bodies of law. For example, Government Code section 1090 ("1090") generally prohibits agencies from contracting in cases where a member of the governing body may have a financial interest in the contract, and mandates that contracts made in violation of 1090 are void. This section at times overlaps with the application of the conflict-of-interest rules in the Act. There are circumstances where only disqualification of the interested official is required by the Act, but the contract is completely void under section 1090. Other laws also exist in the Public Contracts Code (section 10410 and 10411), in the state Constitution (the constitutional prohibition on the acceptance of passes or discounts from transportation companies) and common law (doctrine of incompatible offices, common law conflict-of-interest prohibition).

B. Morning Program: General Plan Issues (10:00 a.m. to noon)

Commission staff seeks input on the treatment of general plan decisions under the conflict-of-interest rules. In particular, the Commission wishes to explore possible modification of various steps of the conflict-of-interest analysis as applied to these types of decisions.

Options A and B offer two approaches. Option A proposes to amend the direct/indirect involvement (Step 4) and materiality standard (Step 5) rules as they relate to certain general plan decisions. In the alternative, the Commission could create a new Step 6 regulation specifying when it is not reasonably foreseeable that a particular type of general plan decision will have a material financial effect.

Option B proposes to amend existing "public generally" (Step 7) regulations 18707.1 and 18707.9 to clarify how the rules of these regulations do or do not apply in the context of general plan decisions. Under this option, the Commission could also adopt a special "public generally" rule that applies to only general plan decisions.

Staff presents draft language for discussion purposes addressing the following specific topics:

A. Step Four: Direct/Indirect Involvement. To offer additional clarification as to whether an official's property is directly or indirectly involved, it may be useful to codify that certain types of general plan decisions *indirectly* involve an official's property. The Commission seeks clarification on the types of decisions that should qualify as "indirectly involved" under such an approach. (See attached, regulation 18704.2.)

B. Step Five: Materiality Standard. Discussion will examine whether the current materiality standard applicable to indirectly involved real property is problematic in certain general plan decisions. Staff wishes to explore whether a more specific standard for rebutting the presumption applicable to such real property is desirable. (See attached, regulation 18705.2.)

C. Step Six: Reasonably Foreseeable. The Commission's staff is exploring whether a special type of "foreseeability" analysis, either in place of or in conjunction with, a special form of the "public generally" exception would be appropriate for general plan decisions. Staff seeks input on the attached illustrative draft regulation (See attached, regulation 18706), as well as on the following questions:

1. Is it necessary to have a special "foreseeability" regulation applicable uniquely to decisions concerning general plans to help public officials determine whether they have a conflict of interest?

2. If a special "foreseeability" regulation is adopted, would that resolve public officials' conflict-of-interest concerns so that it would be unnecessary to amend the public generally regulations to separately address general plan decisions?

3. Is it appropriate to define decisions concerning a general plan as only decisions to adopt or amend a general plan? If so, are the pro forma definitions included in the staff's illustrative regulation appropriate definitions?

4. Is it appropriate to conclude that decisions concerning a general plan will not have a reasonably foreseeable material financial effect upon a public official's economic interests when those decisions are general policy-type decisions, as opposed to decisions made in light of current or anticipated specific developments or other projects?

5. Are there specific types of general plan decisions for which it can be categorically concluded that there will be no reasonably foreseeable material financial effects?

6. Are there any factors of special importance to general plan decisions which may, or should, be considered by public officials in order to determine whether a general plan

decision will have a reasonably foreseeable material financial effect upon one or more of their economic interests?

A final issue not covered by a draft regulation -- should there be time parameters to define the outer boundaries of when a material financial effect can be deemed reasonably foreseeable? If so, should these parameters vary according to the nature of the economic interest implicated in the governmental decision?

Conclusions regarding foreseeability may or may not be reasonable, depending on the analysis employed by a public official. Thus, when considering the question of reasonable foreseeability, the Commission's staff also considered whether the Commission should adopt standards of care which would shape the breadth or depth of a public official's analysis. Staff's consideration of this question is premised also on the statutory language found in Gov. Code 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 official position to influence a governmental decision in which he **knows or has reason to know** he has a financial interest." [*Emphasis added*.]

Commission staff will separately discuss the conceptual framework for this topic.

D. Step Seven: "Public Generally" Exception. Some view the "public generally" rule as difficult to general plan decisions because it requires comparison of the financial effect on the official's economic interest with the financial effects on the "significant segment" of the public generally. In examining whether it is possible and desirable to develop a special "public generally" rule for general plan decisions (see draft regulation 18707.10), staff seeks input on the following questions:

1. Should a special "public generally" rule applicable to certain general plan decisions be developed?

2. Which types of general plan decisions should be governed by such a rule? Which types of general plan decisions are those that will result in financial effects on an official's economic interest, which are indistinguishable from the financial effects on the public generally?

3. Should a "public generally" exception for general plan decisions apply to an official's economic interest in real property and in business entities?

4. Should the term "substantially the same manner" as used in the Commission's "public generally" regulations be defined and, if so, how? Should such a definition use dollar thresholds as an objective standard?

5. What is the scope of regulation 18707.9? Can it be applied to general plan decisions? Or is it limited to decisions affecting the "rights or liabilities of tenants and owners?"

Clarifying amendments to regulations 18707.1 and 18707.9 have also been included for discussion (also attached).

For further information on issues addressed in the Morning Program, contact Natalie Bocanegra (Items A, B and D) or Ken Glick (Item C) at (916) 322-5660.

C. Afternoon Program: Section 1090 (1:30 p.m. to 3:30 p.m.)

As noted above, a basic purpose of the Political Reform Act (adopted by the voters of California in 1974) was to prohibit conflicts of interest caused by an official's financial interest in the decision. However, the Act's conflict-of-interest law is but one of several conflict-of-interest prohibitions that currently exist in California. Several interested parties have requested that the Commission consider a legislative proposal that would move these other laws into the Act. The amendment would give the Commission regulatory, advice and enforcement authority in these areas in an effort to provide greater continuity in application of these laws and greater service to the public.

The Commission asked staff to investigate (and staff seeks input on) the following general issues:

1. General Issues

(a) Scope: What laws should the Commission consider moving into the Act? What are the benefits and disadvantages from your perspective?

- Government Code section 1090 et seq.
- Public Contracts Code sections 11410-10430.
- Incompatible Activities.
- Common Law Doctrine of Incompatible Offices.
- Common Law Doctrine Against Conflicts of Interest.
- Government Code section 8920(a) (legislators)

(b) Section 1090 Financial Interests

- Should "financial interest" for purposes of section 1090 be defined and should it be consistent with the Act's definition?

- Should board members be presumed to have participated in contract decisions in which they are interested? Or should a disqualification rule be sufficient?

(c) Terminology and Special Issues: Are there other special issues or terminology that will need to be clarified in legislation (or later by regulation) of the laws proposed for merger?

2. Workload Impacts: Expansion of the Act results in greater workload. Staff is requesting feedback as to the workload and other administrative commitment that may be created by merging these other provisions into the Act.

3. Enforcement: What would the impacts on enforcement of these laws be?

- How will inclusion of section 1090 and other laws in the Political Reform Act affect the penalties for violation of those laws?

- How will inclusion of 1090 and other laws affect the enforcement authority of the Fair Political Practices Commission?

- How will the jurisdiction of the various enforcement agencies and the public overlap regarding the enforcement of 1090 and other laws?

Further information on issues addressed in the afternoon program may be obtained on the web at http://www.fppc.ca.gov/index.html?id=432, or contact John Wallace at (916) 322-5660.

D. Other Issues/Public Comment

If you are a representative of a public agency or association, please redistribute this notice to your employees or members.

Enclosures

1. OPTION A - Amend regulations 18704.2 and 18705.2 (Steps 4 and 5) or add regulation 18706.1 (Step 6). (Regulations 18704.2, 18705.2 and 18706.1.)

2. OPTION B - Amend public generally regulations and/or add a new regulation pertaining to general plans. (Regulations 18707.1, 18707.10, and 18707.9.)