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Submitted electronically to [CommAsst@fppc.ca.gov](mailto:CommAsst@fppc.ca.gov)

Alice T. Germond, Chair  
California Fair Political Practices Commission  
1102 Q Street, Suite 3000  
Sacramento, CA 95811

**Re: Comments on Proposed Amendment to the Materiality Standard for  
Financial Interests in Real Property**

Dear Chair Germond,

The Campaign Legal Center (“CLC”) respectfully submits these written comments to the Fair Political Practices Commission (“FPPC”) in response to the Notice of Proposed Amendment to Regulation § 18702.2 (“Proposed Amendment”).

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening the democratic process across all levels of government. Since the organization’s founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court as well as numerous other federal and state court cases. Our work promotes every citizen’s right to participate in the democratic process and to know the true sources of money spent to influence elections and government decisions.

CLC commends the FPPC’s decision to amend the materiality standard for financial interests in real property; with the right amendments, the standard can provide additional clarity for government officials as they assess their potential conflicts of interest. It is vital that the Proposed Amendment does not sacrifice meaningful assessment of potential conflicts of interest for simplicity. We make the following comments and recommendations to assist the FPPC’s effort in amending this important rule.

Under current law, assessing conflicts in real property entails three inquiries. The threshold question is whether a conflict-producing interest exists. For real property, the official or someone whose interests are imputed to the official must have invested \$2,000 or more in the property for it to be the basis of a conflict. Cal. Gov’t Code § 87103. Then the inquiry turns to whether the specific governmental decision has an effect on the property that is (1) reasonably foreseeable and (2) material.

The regulations list 12 criteria for assessing materiality of the interest. Cal. Code. Regs. § 18702.2(a)(1)-(12). Criteria (1)-(6) involve government decisions that involve the parcel directly—i.e., a decision that determines the parcel’s zoning or authorizes the sale of the specific parcel. Criteria (7)-(12) address circumstances where the decision is not directly related to the parcel at issue—i.e., a decision that would change the development potential of the official’s property.

Criterion (11) creates a presumption of materiality if an official owns a parcel of property within 500 feet of a government’s decision. For properties farther away that may be indirectly affected by a government decision, the current regulation requires an assessment of all the criteria. Therefore, determining materiality when an official’s property interest is farther than 500 feet away “requires a comprehensive review of all factors that potentially affect the value of the property.” Notice of Proposed Amendment to Reg. 18702.2.

The purpose of the Proposed Amendment is to make a materiality determination easier for conflicts relating to property that is “a sufficient distance from the property subject to the determination.” The Proposed Amendment does this by assessing the materiality considerations in 18705.2(a)(7)-(12) only when a government decision involves real property located between 500 feet and 1,000 feet of the property line of an official’s real property. If an official has an interest in property more than 1,000 feet away, the Proposed Amendment would create a rebuttable presumption that the financial effect is immaterial.

The Proposed Amendment therefore creates three categories of real property that are assessed by three different standards: (1) property within 500 feet of the subject of a government decision, on which the financial effect is assumed to be material; (2) property located between 500 feet and 1,000 feet of the subject of a government decision, on which the financial effect is only presumed to be material if the decision meets certain enumerated criteria; and (3) property located beyond 1,000 feet of the subject of a government decision, on which the financial effect is presumed to be immaterial. On its face the Proposed Amendment simplifies the real property materiality inquiry; however, this simplification may have unintended consequences.

First, the Proposed Amendment has a presumption of materiality for property within 500 feet of property that is the subject of a government decision.<sup>1</sup> But the January 3, 2019, version of the Proposed Amendment removes the requirement for the Commission to review and provide written consent if an official wants to participate in a decision affecting their property within 500 feet. This version replaces that appropriate oversight procedure with a vague rebuttable presumption: the presumption of materiality can be overcome by clear and convincing evidence that the decision will not have any measurable impact on the official’s parcel. This new standard obfuscates who must offer and review rebutting evidence, who makes the determination of a measurable impact, and whether the Commission will be involved in this process at all.

Second, the amendment would have the effect of making certain property interests per se immaterial, which means officials with potential conflicts of interest will not be required to seek advice from their agency’s legal counsel or the FPPC.<sup>2</sup> Because enforcement of the

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<sup>1</sup> Proposed Amendment, Jan. 3, 2019, § 18702.2(a)(7).

<sup>2</sup> *Id.* at § 18702.2(b).

Political Reform Act's conflict of interest provisions depends on vigilant citizens monitoring the behavior of their public officials,<sup>3</sup> an amendment that limits oversight should be carefully circumscribed to prevent conflicting property interests from falling through the cracks. For example, in FPPC Request for Advice No. A-15-185, the FPPC determined that the San Diego County Supervisor was prohibited from participating in decisions surrounding a development project because the decisions would have a reasonably foreseeable material financial effect on his real property interest 1.3 miles away. The FPPC assessed materiality using the criteria under 18705.2(a)(7)-(10), (12). Under the Proposed Amendment, these criteria would only be used to assess property between 500 and 1,000 feet away from the parcel subject to the government's decision. Even though the Commission found the financial effects on more distant property interests to be material when assessing them with the full set of existing criteria, under the proposed rule an official owning a similarly situated property would have no reason to seek advice from the Commission since any effect would be presumptively immaterial.

Third, for the purposes of conflict-producing property that sits more than 1,000 feet away from the decision, the Proposed Amendment provides for an opportunity to rebut the presumption of immateriality with clear and convincing evidence that the government's decision would have a substantial effect on the official's property.<sup>4</sup> Not only is this a high bar to overcome the presumption of immateriality, it is also unclear who may rebut the presumption and how the process of rebutting the presumption would work in order to provide a meaningful safeguard against conflicts of interests. The FPPC has used rebuttable presumptions in other contexts within its regulations where it is clear who bears the burden of rebutting a presumption.<sup>5</sup> The lack of similar clarity in the Proposed Amendment on who has the burden of rebutting the presumption of immateriality raises questions about how conflicts for property farther than 1,000 feet from a government decision will ever be detected, and who is responsible for detecting them.

Fourth, in the event that evidence is offered to rebut the presumption, the "substantial" standard potentially creates an additional line of inquiry for the FPPC. It effectively replaces the traditional materiality assessment without clear guidelines for what might constitute clear and convincing evidence of a substantial effect.

For the reasons above, CLC advises against instituting this rebuttable presumption of immateriality for property farther than 1,000 feet away from real property affected by a government decision. If the FPPC's goal is to simplify the analysis for potentially conflict-producing property that sits more than 1,000 feet away from the subject of a government decision, this can be done without eliminating thoughtful consideration of conflicts relating to property that sits farther away.

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<sup>3</sup> See "Recognizing Conflicts of Interest: A Guide to the Conflict of Interest Rules of the Political Reform Act," Cal. Fair Political Practices Comm. (Aug. 2015), <https://bit.ly/2VNa29X>.

<sup>4</sup> Proposed Amendment, Jan. 3, 2019, § 18702.2(b).

<sup>5</sup> For example, under the Commission's regulation addressing independent versus coordinated expenditures, candidates and committees have the opportunity to rebut a presumption that an expenditure made under certain circumstances is coordinated and not independent of the candidate or committee. Cal. Code Regs. tit. 2, § 18225.7(d).

CLC suggests determining what criteria the FPPC believes would constitute clear and convincing evidence of a “substantial” effect on a property farther than 1,000 feet away. The criteria that already exist at 18705.2(a)(7)-(10), (12) appear to meet the standard of “substantial.” But if the Commission decides on different standards, those should be enumerated in the amended language of the regulation. This enumeration would provide public officials and the public with the clarity they need to assess conflicts of interest for parcels sitting slightly farther away from properties subject to government decisions. This course of action would still simplify the inquiry; an official’s property that is more than 1,000 feet away from property that is the subject of a government decision will be presumptively immaterial, unless certain enumerated criteria are met.

Finally, if the Commission proceeds with a rebuttable presumption of immateriality for certain properties, we suggest providing more guidance as to how this process would work in order to provide a meaningful safeguard against conflicts of interests. The timely determination of conflicts and some clarity as to who may rebut the presumption are of the utmost importance in determining whether a presumption of immateriality is appropriate.

We thank the FPPC for considering our recommendations for its amendment. In conclusion, we would be happy to answer questions or provide additional information to assist the FPPC’s amendment of conflict of interest materiality standards.

Respectfully submitted,

/s/

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