

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

January 5, 1977

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Rear Admiral James V. Grealish, USNR  
Chairman, Pilotage Rate Committee  
World Trade Center - Ferry Building  
San Francisco, California 94111

Dear Admiral Grealish:

I have been asked to respond to your memorandum of November 19, 1976, which raises two questions:

1. Is the participation of the pilot members of the Pilotage Rate Committee legally required for a Pilotage Rate decision to be made?
2. If not, does the fact that the Committee, by statute, only makes recommendations to the Legislature preclude the application of Sections 4(a) and 4(b) of the proposed regulation to pilot and industry members?

With regard to your first question, the mere fact that two members of the Committee must be pilots does not mean that their participation is legally required. 2 Cal. Adm. Code §18701(a) provides that:

A public official is not legally required to make or participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

Government Code §87101 provides further that: "The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section".

Your second question raises a substantial issue as to whether the Pilotage Rate Committee is required to adopt a Conflict of Interest Code at all, and not just whether Sections 4(a) and 4(b) of your proposed Code are applicable.

2 Cal. Adm. Code §18751 establishes a procedure for requesting exemption from having to adopt a Code and provides that:

(b) A request for exemption shall be approved by the Commission only if it finds:

(1) That if the agency requesting the exemption were to adopt a Conflict of Interest Code, there would be no "designated employees" within the meaning of Government Code Sections 82019 and 87302(a), subject to its provisions.

While the members of the Pilotage Rate Committee would seem to be "public officials", subject to the disqualification requirements of Government Code §87100, they perhaps need not be "designated employees" subject to disclosure or disqualification under a Conflict of Interest Code.

2 Cal. Adm. Code §18700(a) defines "public official" to include a "member" of a state agency that possesses decision-making authority. Because of the Committee's powers to hold public hearings, subpoena witnesses, documents, etc., pursuant to Government Code §11500, the Committee would seem to make governmental decisions within the meaning of 2 Cal. Adm. Code §18700(a). Accordingly, the members of Pilotage Rate Committee would be "public officials" and subject to the prohibitions of Government Code §87100. It is possible, however, that the Committee members do not, with regard to their rate-making recommendations, "make or participate in making governmental decisions" within the meaning of 2 Cal. Adm. Code §§18700(b) and (c), because their recommendations are subject to significant intervening substantive review by various legislative staff and committees before any rate decision is made by the Legislature. If they don't make or participate in making governmental decisions", then their positions within the agency need not be "designated" pursuant to Government Code §§87302(a) and 82019(c); and, accordingly, the Pilotage Rate Committee may be entitled to an exemption from having to file a Code pursuant to the provisions of 2 Cal. Adm. Code §18751.

I hope these informal remarks are of some assistance in answering your questions. Under the circumstances, you might wish to consider requesting an exemption pursuant to 2 Cal. Adm. Code §18751, rather than submitting a Conflict of Interest Code by February 10, 1977. In considering this question, give particular attention to Government Code Section 82019 and Section 87302(a) which define "designated employee", and to 2 Cal. Adm. Code Section 18751(c)(6) which requires a detailed explanation of why none of the positions in your agency should be designated.

Rear Admiral James V. Grealish, USNR

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If an exemption is granted, there will be no disclosure requirement to which the members of the Pilotage Rate Committee will be subject as the Pilotage Rate Committee will not be required to adopt a Conflict of Interest Code.

Sincerely,



Edgar A. Kerry  
Staff Attorney  
Conflicts of Interest Division

EAK:mra

# Memorandum

To : Mr. Daniel Lowenstein  
Chairman  
Fair Political Practices Commission  
1100 K Street Building  
Sacramento, California 95814

Date : November 19, 1976

From : **Pilotage Rate Committee**

Subject: Pilotage Rate Committee

This Committee met on November 18, 1976 to consider the proposed Conflict of Interest Code of the Pilotage Rate Committee for San Francisco, San Pablo and Suisun Bays (copy enclosed.) All members were present.

For many years the Committee has been composed of one public member, two industry members and two Pilot members (Harbors and Navigation Code, Section 1202.) One of its functions is to "make recommendations to the Legislature" on, among other things, the rates for bar pilotage (H. & N. Code §1207.) It is not reasonably foreseeable that a Committee recommendation regarding rates for bar pilotage would materially affect the financial interests of industry members who are ordinarily employees of shipping concerns which use pilotage services. However, it is almost certain that any change in pilotage rates will materially affect the financial interests of the Pilot members.

Thus, it appears that unless the conflicts regulations otherwise provide, the Pilots must necessarily disqualify themselves on rate decisions, thereby destroying the legislatively established balance of the Rate Committee. Section 4(b) of the proposed regulations, however, would provide that a Pilot member (or industry member whose interests would in fact be materially affected) could participate in the rate decision "to the extent his participation is legally required for the action or decision to be made." (Emphasis added.)

In order to clarify this most important portion of the proposed regulations, and to properly guide the procedures of the Rate Committee, we respectfully request the opinion of the Fair Political Practices Commission on the following questions:

1. Is the participation of the Pilot members of the Pilotage Rate Committee legally required for a pilotage rate decision to be made? (We assume that your opinion on this question will apply as well to industry members.)

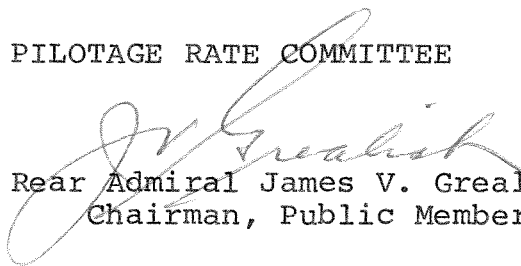
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2. If not, does the fact that the Committee, by statute, only makes recommendations to the Legislature preclude the application of Sections 4(a) and 4(b) of the proposed regulations to Pilot and industry members? (I.e., the action is not a "decision".)

We would appreciate a response at your earliest opportunity so that we may proceed with the adoption of the regulations and schedule further Committee meetings in the ordinary course of business.

PILOTAGE RATE COMMITTEE



Rear Admiral James V. Grealish, USNR  
Chairman, Public Member

JVG/d

Encl.

THE PROPOSED CONFLICT OF INTEREST  
CODE OF THE  
PILOTAGE RATE COMMITTEE FOR THE BAYS  
OF SAN FRANCISCO, SAN PABLO AND SUISUN

Notice is hereby given that the Pilotage Rate Committee for the Bays of San Francisco, San Pablo and Suisun, pursuant to the authority vested by Section 87311 of the Government Code, and to implement, interpret or make specific Section 87300 et seq. of Article 3 of Chapter 7 of Title 9 of that same Code proposes to adopt a Conflict of Interest Code as follows:

*THE CONFLICT OF INTEREST CODE  
OF THE  
PILOTAGE RATE COMMITTEE  
FOR THE BAYS OF  
SAN FRANCISCO, SAN PABLO AND SUISUN*

*ARTICLE I. GENERAL PROVISIONS*

*Section 1. Introduction.*

*On June 4, 1974, the Political Reform Act of 1974 was enacted into law. A part of that Act has a direct application to the Pilotage Rate Committee for the Bays of San Francisco, San Pablo and Suisun (hereinafter Committee). Among the goals the Act seeks to achieve are:*

*(a) Public employees should perform their duties in an impartial manner free from bias caused by their own financial interests.*

(b) Assets and income of public employees which may be materially affected by their official actions should be disclosed and, in appropriate circumstances, the employee should be disqualified from acting in order that conflicts of interest may be avoided.

(c) To accomplish the above goals, to satisfy the requirements of law, and to maintain the integrity of and trust in the members of this Committee while administering the laws with which they are charged, the Committee adopts the following Conflict of Interest Code.

(d) This Code has the force of law and any violation of the Code by a designated employee may subject the employee to the sanctions provided by law.

(e) The provisions of this code are in addition to Government Code Sections 1090, 19251, and 87100 and other laws pertaining to conflicts of interest.

*Section 2. General Prohibition.*

No designated employee shall make, participate in making, or in any way attempt to use his or her official position to influence a decision in which the person knows, or has reason to know, he or she has a financial interest.

(Reference: Government Code Section 87100)

*Section 3. Definition of Terms*

(a) "Committee" as used herein refers to the Pilotage Rate Committee for the Bays of San Francisco, San Pablo and Suisun.

(b) Definitions contained in Proposition 9, the Political Reform Act of 1974, and the Regulations of the Fair Political Practices Commission are herein incorporated by reference. Terms and phrases defined therein shall be given identical definition when used herein.

*Section 4. Disqualification.*

(a) A designated employee must disqualify himself or herself from making or participating in the making of a decision when the employee has a financial interest which it is reasonably foreseeable may be affected materially by the decision.

(b) This section does not prevent any employee from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an employee's vote is needed to break a tie does not make his participation legally required.

(Reference: Government Code Section 87100)

*Section 5. When a Financial Interest Exists.*

(a) An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial affect, distinguishable from its affect on the public generally, on:

(1) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);

(2) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000);

(3) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or

(4) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(b) For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by any business entity controlled by the public official or by a trust in which he has a substantial interest. A business entity is controlled by a public official if the public official, his agents, spouse and dependent children hold more than fifty percent of the ownership interest in the entity. A public official has a substantial interest in a trust when the official, his spouse and dependent children have a present or future interest worth more than one thousand dollars (\$1,000).

(Reference: Interpretation of "material financial affect",  
Division VI, Title 2, California Administrative  
Code, Chapter 7, Article 1, Section 18702)

*Section 6. Manner of Disqualification.*

A person required to disqualify himself or herself shall give notice during the meeting at which consideration of the decision takes place which notice shall be made a part of the official record of the meeting. The person shall then refrain from participating and shall in no way attempt to use his or her official position to influence any other person with respect to the matter.

*Section 7. Financial Disclosure Statements.*

*A designated employee shall file an annual disclosure statement disclosing that person's interest in investments, real property, and income designated as reportable in Section 9. The annual statement is required to be filed even though the designated employee has no investments or income to report.*

*Section 8. Place and Time of Filing.*

*(a) All designated employees shall submit an original and one copy of the annual financial disclosure statement to the office of the Committee.*

*(b) The Secretary to the Committee, upon receipt of the disclosure statement, shall retain the copy and forward the original to the Fair Political Practices Commission, Conflicts of Interest Division, in Sacramento, California.*

*(c) Each designated employee shall submit the initial financial disclosure statement within 30 days after receipt of notice of approval of this Code. The initial statement filed shall disclose only reportable investments and interests in real property and not income.*

*(d) Persons appointed to designated positions shall file initial statements not less than 10 days before assuming office, unless an earlier assumption of office is required by emergency circumstances, in which case the statement shall be filed within 30 days thereafter.*

(e) Annual statements shall be filed by all designated employees. Such statements shall cover the period of the preceding calendar year and shall be filed during the month of March and no later than March 31.

(f) Any designated employee whose position is terminated, voluntarily or involuntarily, shall within 30 days after termination, file a statement disclosing investments in business entities, interests in real property, and income, covering the period between the closing date of the previous statement of economic interests and the termination date.

*Section 9. Reportable Financial Interests.*

(a) As used in this section "person" includes, but is not limited to, individuals, partnerships, firms, corporations, and associations.

(b) The following are found to be the types of financial interests which might foreseeably be affected by the named designated employees. Any investment in, interest in real property, or income from:

- (1) Any person in the business regulated by the Committee;
- (2) Any person contracting with, or selling to the Committee.

(c) If a designated employee has a financial interest as specified in subsections (b)(1) or (b)(2) of this section, such interest must be disclosed.

*Section 10. Contents of Disclosure Statements.*

The statement filed shall disclose the following information relating to financial interests specified in Section 9.

(a) Investments (investments of less than \$1,000 need not be disclosed): (Reference: Government Code Section 82034)

(1) The name of the business entity in which each investment is held.

(2) A statement of the nature of the investment.

(3) A general description of the business activity in which the business entity is engaged.

(4) Whether the investment exceeds \$10,000 in value and whether it exceeds \$100,000 in value.

(b) Interests in real property (the designated employee's residence need not be disclosed): (Reference: Government Code Section 82033)

(1) The address or other precise location of the real property.

(2) A statement of the nature of the interest.

(3) Whether the fair market value of the interest exceeds \$10,000 and whether it exceeds \$100,000.

(c) Investments that constitute 50 percent or more of the ownership interest in a business entity:

If a designated employee's investment in a business entity constitutes 50 percent or more of the ownership in a business entity, then the employee shall disclose in the statement filed the investments and the interest in real property, described above, of the business entity.

(d) Income (state salaries, reimbursement for expenses while on state business and per diem need not be disclosed):

(Reference: Government Code Section 82030)

(1) The name and address of each source of income aggregating \$250 or more in value or \$25 or more in value if the income was a gift and a general description of the business activity, if any, of each source. (Reference: Government Code Sections 82028, 82030)

(2) A statement whether the aggregate value of income from each source, was greater than \$10,000.

(3) A description of the consideration, if any, for which the income was received.

(4) In the case of a gift, the amount and the date on which the gift was received.

(e) In the case of income from a business entity, in which the designated employee has an interest, which interest constitutes 50 percent or more of the ownership interest in the business entity, the statement shall disclose:

(1) The name, address and general description of the business activity of the business entity.

(2) In the case of a business entity which provides legal or brokerage services, the name of every person who paid fees to the business entity if the designated employee's pro rata share of fees from such person was equal to or greater than \$1,000.

(3) In the case of a business entity engaged in any other economic endeavor, other than legal and brokerage services, the name of every person from whom the business entity received payment if the designated employee's pro rata share of gross receipts from such person was equal to or greater than \$10,000 during the calendar year.

(f) Whenever disclosure of investments or interests in real property is required by this Code, investments and interests in real property owned by the designated employee's spouse and dependent children shall also be disclosed. Disclosure shall apply though the designated employee's spouse owns his or her financial interests as separate property.

*Section 11. Disclosure Statement a Public Record.*

Financial disclosure statements filed pursuant to this code are public records open for public inspection and reproduction during regular business hours, commencing as soon as practicable, but in any event not later than the second business day following the day on which received. No conditions whatsoever shall be imposed upon persons desiring to inspect or reproduce such statements filed under this code, nor shall any information or identification be required from such persons. Copies shall be provided at a charge not to exceed ten cents (\$.10) per page.

*Section 12. Sanctions for Code Violation.*

Any employee who knowingly or wilfully violates any provision of this Code is guilty of a misdemeanor. Further, the law permits a fine of up to the greater of \$10,000 or three times the amount a designated employee knowingly or wilfully fails to report.

If a designated employee is called upon to take official action and, pursuant to this Code, the employee is disqualified from taking the action but nevertheless does so, then, in a suit brought by anyone to enforce this Code, a court may award the prevailing party costs of suit including reasonable attorney's fees.

A designated employee who intentionally or negligently violates any of the disclosure requirements of this Code may be liable in a civil action brought by the Fair Political Practices Commission, or by a California resident, for an amount not more than the amount or value not properly reported.

If a designated employee realizes an economic benefit as a result of a case where the employee should have disqualified himself but failed to do so then the employee may be liable in a civil action brought by the Fair Political Practices Commission or a California resident, for an amount up to three times the value of the benefit.

*Section 13. Procedure for Amendment.*

The preparation of the proposed Code and the review of the Code by the Fair Political Practices Commission are subject to considerations of due process of the law, pursuant to which all members and employees of the Committee and residents of the State of California are guaranteed adequate notice and a fair opportunity to present their views.

The Committee may at any time amend the Code, subject to approval by the Fair Political Practices Commission, either upon its own initiative or in response to a petition submitted by any member or employee of the Committee, or a resident of the State.

Judicial review of any action of the Fair Political Practices Commission may be sought by any member or employee of the Board, or a resident of the State.

*Section 14. Conflict of Interest Code a Public Record.*

*The Conflict of Interest Code of the Committee is a public record and a copy shall be available for public inspection at the Committee office during regular working hours. Copies are available upon request.*

*Section 15. Designated Employees.*

*The following persons are determined to be designated employees:*

*(a) Members of the Committee.*

Notice is also given that any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at \_\_\_\_\_, Rm. \_\_\_\_\_, San Francisco, California at 10 a.m. on the \_\_\_\_\_ day of January, 1977.

The Pilotage Rate Committee for the Bays of San Francisco, San Pablo and Suisun, upon its own motion, or at the instance of any interested person, may thereafter adopt the proposals substantially as set forth above without further notice.

Further notice is given that the Committee has determined that the above proposed provisions do not mandate cost to local government within the meaning of Section 2231 of the Revenue and Taxation Code, and that any interested person may present statements or arguments orally or in writing relevant to such determination at the above-mentioned hearing.

DATED:

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Rear Admiral JAMES V. GREALISH, USNR  
Chairman