



## FAIR POLITICAL PRACTICES COMMISSION

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October 10, 2000

Warren H. Fox, Ph.D.  
Executive Director  
California Postsecondary  
Education Commission  
1303 J Street, Suite 500  
Sacramento, CA 95814-2938

**Re: Your Request for Informal Assistance  
Our File No. I-00-221**

Dear Dr. Fox:

This letter is in response to your request for informal assistance regarding the duties of the staff and members of the California Postsecondary Education Commission (CPEC) under the conflict-of-interest provisions<sup>1</sup> of the Political Reform Act (the "Act").<sup>2</sup> Your questions appear to be general and precautionary in nature, and involve future conduct not specifically described in your letter. Thus, we are treating these questions as requests for informal assistance. (Reg. 18329(b)(8)(C) and (D).) Informal assistance does not provide the requestor with the immunity provided by formal written advice. (Section 83114; Reg. 18329(c)(3).)

### QUESTIONS

1. Should a CPEC Commissioner abstain from voting on a general policy issue because he/she is involved in a business that is related to that particular area?
2. If a Commissioner is not employed by an institution of higher education, but does business with a particular institution or institutions, how should that relationship be treated when acting upon CPEC recommendations?

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<sup>1</sup> Please note that the Commission is currently considering various amendments to the conflict-of-interest regulations discussed herein. You may wish to monitor the progress of these amendments on the Commission's website ([www.fppc.ca.gov](http://www.fppc.ca.gov)).

<sup>2</sup> Government Code sections 81000 - 91015. Commission regulations appear at Title 2, sections 18109 - 18996, of the California Code of Regulations.

3. Is it the sole responsibility of the individual CPEC Commissioner to recognize a conflict of interest and to abstain from a particular vote?
4. What is the appropriate role and responsibility of staff in advising CPEC Commissioners on these matters?
5. What is the liability of CPEC staff if a CPEC Commissioner voted on an issue when he or she should have abstained?
6. What assistance from the Commission is available to CPEC to help identify and resolve potential conflict of interest questions and concerns?

### FACTS

The California Postsecondary Education Commission serves as the planning and coordinating agency for higher education in the state. It is comprised of 16 members, three of whom are appointed by the Governor, three by the Speaker of the Assembly, three by the President Pro Tem of the Senate and two are student representatives. In addition, each of the governing boards for the systems of education -- the University of California, the California State University, the California Community Colleges, and the independent colleges and universities, as well as the State Board of Education -- have representation on the Commission. Individuals employed by the colleges and universities full-time are prohibited from serving on the Commission by California law.

The work of the Commission is advisory in nature -- providing policy direction and recommendations on higher education matters to the Governor and the Legislature. Because the Commission has few regulatory powers, rarely, if ever, do the Commissioners vote on issues that would bring them individual financial gain. Instead, votes are taken on general policy direction that often involve all systems of higher education.

### DISCUSSION AND CONCLUSIONS

*Question 1. Should a CPEC Commissioner abstain from voting on a general policy issue because they are involved in a business that is related to that particular area?*

Conclusion 1. Pursuant to section 87100, public officials are only required to disqualify themselves from participating in a government decision when (a) it is reasonably foreseeable that the governmental decision will have a material financial effect on the public official, his or her immediate family, or on one or more of the official's economic interests, and (b) no exception applies to the decision (such as the "public generally" exception or the rule of legally required

participation). In order to determine whether the prohibition in section 87100 applies to a given decision, regulation 18700 provides the following eight-step analysis.

“(1) Determine whether the individual is a public official, within the meaning of the Act. (See Cal.Code Regs., tit. 2, §18701.) If the individual is not a public official, he or she does not have a conflict of interest within the meaning of the Political Reform Act.

“(2) Determine whether the public official will be making, participating in making, or using or attempting to use his/her official position to influence a government decision. (See Cal. Code Regs., tit. 2, §18702.) If the public official is not making, participating in making, or using or attempting to use his/her official position to influence a government decision, then he or she does not have a conflict of interest within the meaning of the Political Reform Act.

“(3) Identify the public official’s economic interests. (See Cal. Code Regs., tit. 2, §18703.)

“(4) For each of the public official’s economic interests, determine whether that interest is directly or indirectly involved in the governmental decision which the public official will be making, participating in making, or using or attempting to use his/her official position to influence. (See Cal. Code Regs., tit. 2, §18704.)

“(5) Determine the applicable materiality standard for each economic interest, based upon the degree of involvement determined pursuant to California Code of Regulations, title 2, section 18704. (See Cal. Code Regs., tit. 2, §18705.)

“(6) Determine whether it is reasonably foreseeable that the governmental decision will have a material financial effect (as defined in California Code of Regulations, title 2, section 18705) on each economic interest identified pursuant to California Code of Regulations, title 2, section 18703. (See Cal. Code Regs., tit. 2, §18706.) If it is not reasonably foreseeable that there will be a material financial effect on any of the public official’s economic interests, he or she does not have a conflict of interest within the meaning of the Political Reform Act.

“(7) Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally. If the reasonably foreseeable material financial effect on the public official’s economic interest is indistinguishable from the effect on the public generally, he or she does not have a conflict of interest within the meaning of the Political Reform Act. If the reasonably foreseeable material financial effect on the public official’s economic interest is distinguishable from the effect on the public generally, he or she has a conflict of interest within the meaning of the Political Reform Act. (See Cal. Code Regs., tit. 2, §18707.)

“(8) Determine if the public official’s participation is legally required despite the conflict of interest. (See Cal. Code Regs., tit. 2, §18708.)”

Without facts, we cannot provide any additional information. However, any decision that a public official makes that may affect an economic interest of the official, even a general policy decision, must be analyzed under the eight-step analysis set forth above. There is no blanket exemption for “policy decisions,” although under some circumstances such decisions may not *foreseeably* affect the official’s economic interest as set forth in step 6 of the analysis.

*Question 2. If a CPEC Commissioner is not employed by an institution of higher education, but does business with a particular institution or institutions, how should that relationship be treated when acting upon CPEC recommendations?*

Conclusion 2. Applying the analysis set forth above to your question, we would review the question as follows:

**Step One: Is the individual a “public official?”** The members of CPEC are public officials and are included in the CPEC’s conflict of interest code.

**Step Two: Is the public official making, participating in making, or influencing a governmental decision?** A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Reg. 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (Reg. 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of

influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Reg. 18702.3.)

We assume the question concerns the CPEC Commissioner's participation in and voting on a governmental decision before CPEC.

**Step Three: Does the public official have economic interests?** Under section 87103 of the Act, there are six different types of economic interests that may result in a conflict of interest for a public official:

1. A public official has an economic interest in a business entity where the public official has a direct or indirect investment of \$1,000 or more in the business entity. (Section 87103(a); Reg. 18703.1(a).)

2. A public official has an economic interest in a business entity where the public official is in any of several business relationships specified in regulations 18703.1(b) through (e). (Section 87103(a); Reg. 18703.1.)

3. A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth \$1,000 or more in fair market value. (Section 87103(b); Reg. 18703.2.)

4. A public official has an economic interest in any person from whom he/she has received income aggregating \$250 within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c); Reg. 18703.3.)

5. A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$300 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. (Section 87103(e); Reg. 18703.4.)

6. A public official has an economic interest under the "personal financial effect" rule provided by regulation 18703.5. In particular, a governmental decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Reg. 18703.5.)

Your question concerns three types of economic interests recognized under the conflict-of-interest provisions of the Act. First, the CPEC Commissioner may have an investment interest in a business entity valued at \$1,000 or more. (Section 87103(a); Reg. 18703.1(a).) Second, the CPEC Commissioner may be an employee or director of the business entity

providing services to the institution of higher education. (Section 87103(a); Reg. 18703.1(b).) Third, the institution of higher education (as well as the CPEC Commissioner's own business) may be sources of income to the CPEC Commissioner depending on the facts. (Section 87103(c); Reg. 18703.3(a).)

**Step Four: Are the Public Official's economic interests directly or indirectly involved in the decision?** A business entity or other person that is a source of income to an official is directly involved in a decision when it either initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. (Reg. 18704.1(a)(1).) A business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the business entity. (Reg. 18704.1(a)(2).) If the source of income is not directly involved in the decision, the source is considered indirectly involved in the decision. (Reg. 18704.1(b).) Obviously, determination of the specific standard depends on the facts.

**Step Five: Determine the applicable materiality standard for each economic interest.** It appears from your facts that in most cases, your members will be confronted with decisions that have an indirect financial effect on their economic interests. Generally, when a business entity or source of income is directly involved in a decision, the effect is considered material unless there will be no financial effect on the business or source of income. When the business or source of income is indirectly involved, the applicable standard varies depending on the nature of the economic interest. For example, if the CPEC Commissioner's business was a small business entity, regulation 18705.1(b)(7) provides that the effect is considered material when:

“(A) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

“(B) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

“(C) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.”

Where the source of income is a person other than a business entity, such as a public school, regulation 18705.3 would apply. Regulation 18705.3(b)(2)(F) provides, for example, for an entity whose gross annual receipts are \$100,000 or less, the effect of the decision is material if:

“(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$10,000 or more.

“(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more.

“(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$10,000 or more.”

**Step Six: Is it reasonably foreseeable that the financial effect of the decision on the Public Official's economic interest will be material?** Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on one of those economic interests. An effect is considered “reasonably foreseeable” if the effect is “substantially likely.” (Reg. 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made is highly situation-specific. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

The determination of foreseeability is simple if the source of income or other economic interest of the official is directly involved in a decision, such as where the source of income is an applicant for a contract or grant. A financial effect is certain under those circumstances. Foreseeability is more difficult to evaluate where the effect is indirect. A good example of how to determine foreseeability in the indirect setting is set forth in the *Thorner* Opinion. In *Thorner*, a water district was confronted with a decision regarding new water connections for projects in the jurisdiction, and requests for extensions of deadlines for those that had already been allocated connections. One of the directors had an economic interest in a business that supplied building materials to developers in the jurisdiction. In the opinion, the Commission held that where the business had no known connection to the project, but may or may not later bid on the project, a financial effect was not reasonably foreseeable. However, if the business had bid or was preparing to bid on a project with a serious hope of getting the contract, a financial effect was reasonably foreseeable. Similarly, if the CPEC Commissioner's business or source of income was likely to reap some financial benefit as a result of the decision, the financial effect is foreseeable.

If after these first six steps, a CPEC Commissioner determines that the general policy decision will have a foreseeable and material financial effect on his economic interests, the Commissioner must disqualify himself or herself from the decision unless an exception applies as discussed below.

**Steps Seven: The “Public Generally” Exception.** If the public generally exception applies, it will allow the public official to participate in the decision -- despite the foreseeable and material effect on his or her own interests. For the public generally exception to permit an official to participate, the decision must affect the public generally, or a significant segment of the public generally, in substantially the same manner as the decision will affect the official’s interests. The general rule includes several specialized rules that may apply under specific circumstances. For example, there are special “public generally” rules for small jurisdictions; industries, trades and professions; and, appointed members of boards and commissions. All these regulations (Reg. 18707, et seq.) are available on the Commission’s website.

**Steps Eight: Legally Required Participation.** Finally, the Act recognizes that situations may occur where multiple officials are disqualified and as a result, essential decisionmaking in the agency is stopped. Under such circumstances, the Act provides that if the official is legally required to Act and there is no alternate source of decision, the official may be legally required to participate and may do so despite a conflict of interest. Generally, this exception has been applied to multi-member boards and commissions where a quorum cannot be achieved by virtue of conflicts of interest. (section 87101; Reg. 18708.)

*Questions 3. Is it the sole responsibility of the individual Commissioner to recognize a conflict of interest and to abstain from a particular vote?*

*Question 4. What is the appropriate role and responsibility of staff in advising members of the CPEC on these matters?*

*Question 5. What is the liability of CPEC staff if a Commissioner voted on an issue when he or she should have abstained?*

Conclusions 3, 4, and 5. Ultimately, as the public official with the potential conflict of interest, the CPEC Commissioner bears the responsibility of deciding whether a conflict of interest exists. The member may consult third parties when making that determination. Whether staff is involved in identifying potential conflicts of interest for the members is purely a question of internal agency organization. (See Reg. 18316.5.) Please note that CPEC staff may also have a conflict of interest based on their own economic interests as described above. Potential conflicts of interest are not limited to appointed CPEC Commissioners.

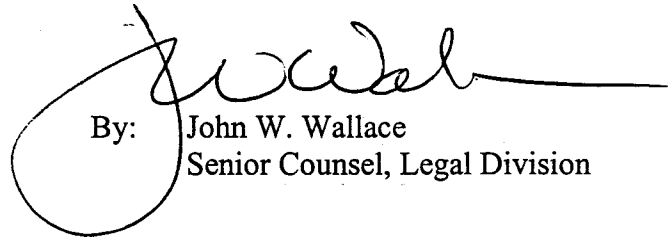
*Question 6. What assistance from your agency is available to the CPEC to help identify and resolve potential conflict of interest questions and concerns?*

Conclusion 6. The Commission can provide formal and informal written advice and informal verbal advice to public officials. You should consult the fact sheet in the library section of the Commission’s website entitled “*Getting Advice From the FPPC.*” The Commission also holds periodic seminars and workshops.

I have enclosed an informational fact sheet on conflict of interest entitled "*Can I Vote? Conflicts of Interest Overview.*" If you have any other questions regarding this matter, please feel free to contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
Assistant General Counsel

A handwritten signature in black ink, appearing to read "J. Wallace", written over a horizontal line. The signature is stylized and cursive.

By: John W. Wallace  
Senior Counsel, Legal Division

Enclosure