



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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April 29, 2015

Molly S. Stump  
City Attorney

Albert S. Yang  
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City of Palo Alto  
250 Hamilton Avenue, 8<sup>th</sup> Floor  
Palo Alto, CA 94301

Re: Your Request for Advice  
Our File Nos. A-15-053, A-15-060, and A-15-066

Dear Ms. Stump and Mr. Yang:

This letter responds to your requests for advice on behalf of Councilmembers Marc Berman, Tom DuBois, Eric Filseth, Liz Kniss and Greg Scharff, and City Manager James Keene, regarding their duties under the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> More specifically, this is in response to three separate advice requests: Advice Request 15-053 regarding Annual Growth Limit or "Cap" on New Office and Research and Development Space; Advice Request 15-060 regarding a Retail Preservation Plan; and Advice Request 15-066 regarding an Appeal of 429 University Avenue Mixed Use Project.

As we discussed on April 15, 2015, because the Retail Preservation Plan, the subject matter of request 15-060, was considered at an April 6, 2015 meeting (before our response to the request could be issued) and some of the officials in question may have already participated in the decision, we could not provide advice. On April 17, 2015, you modified this request to pertain only to Councilmember Liz Kniss who did not participate in the April 6, 2015 Council consideration of the matter.

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. This letter is based only on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

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<sup>1</sup> 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.

**A-15-053. ANNUAL GROWTH LIMIT ON NEW OFFICE  
AND RESEARCH AND DEVELOPMENT SPACE**

**QUESTIONS**

1. May Councilmember DuBois participate in discussions and/or vote on an interim city-wide or area specific annual growth limit on office development? Also, may Councilmember DuBois participate in discussions and/or vote on an interim annual growth limit on new office and research and development space (the "Cap") if the Cap exempts property located in the Stanford Research Park?

2. May Councilmembers Scharff, Berman, Filseth, Kniss, and City Manager Keene participate in discussions and/or vote on the Cap?

**CONCLUSIONS**

1. No. Councilmember DuBois may not participate in discussions and/or vote on the Cap, whether Stanford is exempted or not.

2. Yes. Councilmembers Scharff, Berman, Filseth, Kniss, and City Manager Keene may participate in discussions and/or vote on the Cap.

**FACTS**

The City Council has engaged in a number of preliminary discussions regarding the potential establishment of a City-wide annual growth limit or "Cap" on new office and research and development space. The Council may wish to consider both a long-term Cap to be included in the City's general plan update and an interim limit, enacted through amendments to the Zoning Code, pending the completion of the general plan update process.

This request focuses on the potential conflicts of interest that may arise in the context of the interim Cap.<sup>2</sup> While an interim Cap could take several different forms, including a Cap on new development for a period of time until firm limits are developed in the general plan, the City Council has expressed an interest in focusing the interim Cap on three areas of the City which are experiencing rapid change: Downtown, the California Avenue Area, and the El Camino Corridor (the CD zone). Depending on the demand for development and the size of any limit that is eventually adopted, it is possible that the Cap could slow development in these three areas, reducing

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<sup>2</sup> In 2014, the Commission advised then-members of the Palo Alto Council and the City Manager that the exception in then Regulation 18705.2(c)(2) (now Regulation 18702.2(c)(3)) applied to permit the officials to participate in decisions regarding which broad policy alternatives to study in an Environmental Impact Report on the City's general plan update. The Commission recognized that while potential revisions to the general plan include focus areas, the proposed decisions are not tied to specific parcels or projects and are very general in nature. Thus, the Commission's 2014 advice applies to the participation of Councilmembers Berman, DuBois, Filseth, Scharff, Kniss and Keene in preliminary discussions regarding various types of growth limits that may be studied in the general plan update process.

increases in development impacts that might otherwise occur (traffic, parking, noise, etc.) and maintaining status quo conditions. On April 24, 2015, you clarified that all parcels within the three areas of the city theoretically are potentially affected by the Cap. For example, even if a particular parcel is a residential use (currently permitted only as part of a mixed use project) the Cap would affect future development opportunity.

In addition, if this kind of Cap is adopted, it would effectively exempt the Stanford Research Park and commercial areas in the East Meadow/Bayshore area and the South San Antonio Road area. Because opportunities for office development in Palo Alto are limited, any restriction or exemption in one or more of these non-residential areas could impact the attractiveness of property in other areas.

The primary landowner in the Stanford Research Park is Stanford University, a non-profit institution with gross revenues approximately equivalent to that of a Fortune 500 company. An annual office limit that applied to the Research Park could temporarily affect the ability of Stanford (or its tenants) to redevelop properties in the Research Park. In general, the City is unaware of the status of Stanford's leases with its current tenants in the Stanford Research Park.

- Councilmember Marc Berman has an interest in residential real property approximately 600 feet from the University Avenue downtown area.
- Councilmember Tom DuBois's spouse is employed by Stanford University. Accordingly, DuBois has an interest in Stanford University as a source of income. Stanford is a major commercial land owner in the City, with interests in both the Stanford Research Park and Stanford Shopping Center areas.
- Councilmember Eric Filseth has an interest in residential real property within 500 feet of the University Avenue downtown area.
- Councilmember Liz Kniss has an interest in residential property within 500 feet of the California Avenue area. This property produces rental income.
- Councilmember Greg Scharff has an interest in commercial real property within 500 feet of the University Avenue downtown area. This property is zoned for multi-family residential, with commercial uses permissible via conditional use permit or grandfathering. The University Avenue property is leased to a medical office for 5 years, running to June 2018. The lessee has an option to extend for one additional five year period, running to June 2023.
- City Manager James Keene has an interest in residential real property within 500 feet of the University Avenue downtown area.

On April 27, 2015 you noted that there are no pending discretionary applications within 500 feet of any of the officials' properties that would be affected by the Cap decision.

## ANALYSIS

*Councilmember DuBois:* Councilmember DuBois has an interest in Stanford University as a source of income since his spouse is employed by the University. Moreover, your facts do not suggest that the business entities that lease from Stanford are an interest of the councilmember under any other provision of Section 87103.<sup>3</sup> Therefore, we do not discuss the lessees further.

Thus, the appropriate inquiry in Section 87103 is whether the decision in question will have a foreseeable and material financial effect on Stanford.<sup>4</sup> Stanford is an owner of real property in the Stanford Research Park that is zoned for commercial (Office and Research and Development) use.

You stated that the Cap will regulate the commercial real estate activity in which Stanford is engaged because the Cap could impact Stanford's ability to develop its commercial real property for more intensive uses. Moreover, a Cap on property owned by others could affect the marketability of Stanford's property. Thus it appears a financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical.

However, a foreseeable financial effect must also be material to result in a conflict of interest. As relevant to your facts, the financial effect on a nonprofit (Stanford) is material if the nonprofit will receive a measurable financial benefit or loss by virtue of the decision, or the official knows or has reason to know that the nonprofit has an interest in real property that will be financially affected under the standards applied to a financial interest in Regulation 18702.2. (Regulation 18702.3(a)(3).) Regulation 18702.2 provides that the financial effect of a governmental decision on a parcel of real property is material whenever the governmental decision:

“(1) Involves the adoption of or amendment to a general (except as provided below) or specific plan, and the parcel is located within the proposed boundaries of the plan;

\* \* \*

“(5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, that real property....;

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<sup>3</sup> You also asked about the possibility that sources of income to Stanford (lessees) might somehow be considered sources of income to the councilmember. Generally we will not pierce through the employer to get sources of income to the employer unless there are unusual circumstances (such as where the official has an ownership interest in a business entity of 10 percent or more (Section 82030(a).)

<sup>4</sup> An official may also have an interest in a decision based on effects on the personal finances of the official or his or her spouse. (Section 87103.) Again, your facts have not indicated that the salary of the councilmember's spouse will be affected by the decisions so we do not analyze personal financial effects on the councilmember's spouse.

“(7) Would change the development potential of the parcel of real property;

“(8) Would change the income producing potential of the parcel of real property. However, if the real property contains a business entity, including rental property, and the nature of the business entity remains unchanged, the materiality standards under Regulation 18705.1 applicable to business entities would apply instead;

“(9) Would change the highest and best use of the parcel of real property in which the official has a financial interest;

\* \* \*

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.

Based on the facts presented, several of these materiality factors appear to apply to the decision’s effect on Stanford. Therefore, the effect on the councilmember’s source of income is foreseeable and material and the councilmember may not participate in the decision.<sup>5</sup>

You also asked whether the councilmember could participate if Stanford was removed from the ordinance. However, you stated that restrictions on property owned by others would also affect the marketability of Stanford’s property and therefore the conflict would exist whether Stanford is subject to the Cap or not.

*Councilmembers Scharff:* Councilmember Scharff has an interest in commercial real property within 500 feet of the University Avenue downtown area). This is an interest in real property under Section 87103(b). This property is zoned for multi-family residential, with commercial uses permissible through a conditional use permit or grandfathering. The University Avenue property is leased to a medical office for five years, running June 2018. The lessee has an option to extend for one additional five year period, running June 2023. The lessee is a source of income to the councilmember under Section 87103(c) and the councilmember’s lease of property may constitute a business interest of the councilmember. (Section 87103(a).)

*Councilmembers Berman, Filseth and Kniss, and City Manager Keene:* These individuals have interests in residential real property within 500 feet of the CD district, with the exception of Councilmember Berman who has an interest in residential real property approximately 600 feet

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<sup>5</sup> A councilmember who is disqualified from voting on, participating in, or influencing a governmental decision must announce the conflict of interest, publicly identify each type of interest involved in the decision, as well as details of the interest, and leave the room for the duration of the discussion and/or vote on the item(s). (Section 87105.)

from the CD district. However, you noted that there are no pending discretionary applications within 500 feet of any of the officials' properties that would be affected by the Cap decision.

*Foreseeability:* With respect to all these officials, it is doubtful that any financial impact is reasonably foreseeable. While the limit will clearly affect the property within 500 feet of the councilmember's property (the subject property) by not allowing certain uses of those properties, it is not foreseeable at this time that it will affect the fair market value of the officials' property.

More importantly, any future uses of these properties will comply with an independent review and evaluation of the proposal. Thus, absent extraordinary circumstances, it is not foreseeable that the decision will financially affect the officials' properties that are in proximity to properties subject to the decision.

Moreover, with respect to the business of renting these properties near the CD district and tenants on these properties, no facts suggest that the decision will have a foreseeable material financial affect on the businesses or tenants. Therefore, Councilmembers Scharff, Berman, Filseth and Kniss, and City Manager Keene do not have a conflict of interest.<sup>6</sup>

## **A-15-060. TEMPORARY REGULATORY PROPOSALS TO PRESERVE RETAIL USES**

### **QUESTION**

May Councilmember Kniss participate in the discussion and decision regarding a retail preservation ordinance despite owning residential real property within 500 feet of an existing retail establishment and approximately 3,000 feet from a project proposing a net reduction in retail square footage?

### **CONCLUSION**

Yes. Councilmember Kniss may participate in the discussion and decision. It is not foreseeable that the decisions will materially financially affect the councilmember's property.

### **FACTS**

The City will be considering a range of temporary regulatory proposals aimed at preserving retail uses. On March 2, 2015, the City Council identified the loss of ground floor retail and services as one impact of increased office rents and office development in the City and directed staff to return with an urgency ordinance and subsequent zoning amendments to address this issue. The City Manager's report stated that data showed a net loss of retail square footage of approximately 37,500 sq. ft. between 2001 and 2015, and a net loss of approximately 70,500 square feet between 2008 and 2015. The data suggested that existing ground floor retail protections may

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<sup>6</sup> We have not responded to your public generally exception questions since we have concluded that based on your facts these officials have no conflict of interest

not be sufficient where they exist, and may be needed where they do not. The City Council directed staff to investigate the following: (1) an urgency or interim ordinance that could go into effect quickly and remain in place until permanent zoning changes are adopted; and (2) permanent zoning changes.

It is possible that a decision on a citywide retail preservation strategy may affect pending projects as well as new development. While the City's historical practice has been to exempt such "pipeline projects" from new regulation, the Council retains the discretion to apply a retail preservation requirement on pending development applications. Staff proposed the following:

1. Prohibit existing retail uses in all commercial zones (or alternatively in designated zones with the highest risk of retail conversion) from converting to office use. Extend the same protections to eating and drinking uses, personal services, hotels, theatres, and travel agencies.
2. The prohibition would apply to those retail services operating as of March 2, 2015 and for which no application involving a change of use has been submitted to the City by March 2, 2015.
3. The ordinance should establish an appeal process to allow conversion in cases of financial hardship or showing that the facility is unsuited for successful retail use.
4. Existing retail service facilities can be demolished and rebuilt as long as the retail square footage is only reduced by the minimum amount needed to provide access to any new upper floors and/or lower level parking.
5. Retail services that are grandfathered in as legal non-conforming shall not be protected or required to remain.
6. The basic definition of retail services in the Municipal Code shall be continued.
7. The ordinance will be effective for an initial 45 days with an option to extend for an additional 10 months and 15 days if the urgency continues, with the potential for another year extension if a permanent ordinance(s) has not been adopted by the end of the first year.
8. Clarify that the ordinance does not affect the ability to change from one of the preserved uses to another (e.g. from retail to eating and drinking) and that nothing in the ordinance shall alter requirements of site-specific Planned Community zoning ordinances or adopted conditions of approval. Also, clarify that nothing in the ordinance shall affect the need for a conditional use permit for certain allowed uses where such requirements currently exist, although use permit requirements and affected uses could be adjusted in the permanent ordinance that follows.

Councilmember Kniss owns residential real property within 500 feet of an existing retail establishment and approximately 2,500 to 3,000 feet from a project proposing a net reduction in retail square footage. On April 24, 2015, you supplemented these facts as follows:

- The retail establishments within 500 feet of Councilmember Kniss' include a supermarket, a Domino's Pizza, a local pharmacy, a post office, and an office building. You further stated that you are not aware of plans to change/move any of the retail businesses.
- You also noted that within 3,000 feet of Councilmember Kniss' property, there are a wide variety of retail and office uses in the California Avenue downtown area. You are not aware of plans to change/move any particular retail business.
- Between 2,500 and 3,000 feet of Councilmember Kniss' property there is a large retail space currently anchored by Fry's Electronics. This site has been the subject of discussion regarding potential redevelopment for some time, and has been a part of the City's planning agenda for at least the past year. An application for a residential project on part of the property is expected imminently.

You stated that you believed any actual impacts will depend on the specific details of each the retail establishment (e.g. economic viability, ownership of property or length of lease).

### ANALYSIS

Regulation 18701(b), applicable to your facts, provides that in determining whether a governmental decision will have a reasonably foreseeable<sup>7</sup> financial effect on a financial interest the following factors should be considered.

“(1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

“(2) Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

“(3) Whether the public official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has a financial interest.

“(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interest might

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<sup>7</sup> In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

compromise a public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

“(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision.

“(6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position.

*Existing Retail Establishment:* Councilmember Kniss has an interest in residential real property that is within 500 feet of an existing retail establishment. While it is true the ordinance could prevent a change in the use the retail business in the future, the extent to which that future decision will have a financial effect on the councilmember's residence is contingent upon intervening events and is better evaluated at the time a proposal is made. You stated that the retail establishments within 500 feet of Councilmember Kniss' include a supermarket, a Domino's Pizza, a local pharmacy, a post office, and an office building and that you are not aware of plans to change/move any of the retail businesses. Thus, a financial effect caused by the impact of the decision on the existing retail business is speculative and not foreseeable.

*Pending Project within 2,500 to 3,000 feet:* Councilmember Kniss' interest in real property is also within approximately 2,500 to 3,000 feet from a large retail space currently anchored by Fry's Electronics. An application for a residential project on part of the property is expected imminently and would result in a net reduction in retail square footage, if granted.

This site has been the subject of discussion regarding potential redevelopment for some time, and has been a part of the City's planning agenda for at least the past year and it does not appear that the specific application (for a residential use) will be impacted by an ordinance that will limit retail space conversion to office space. Based on these facts, a financial effect caused by the decision on the proposal on property within 2,500 to 3,000 feet of the councilmember's property is not foreseeable.

**A-15-066. APPEAL OF 429 UNIVERSITY AVENUE  
MIXED USE PROJECT (THE “429 PROJECT”)**

**QUESTION**

May Councilmember Berman, Scharff and City Manager Keene participate in the appeal decision despite owning property near the 429 Project site?

## CONCLUSION

Yes. Councilmember Berman, Scharff, and City Manager Keene may participate in the 429 Project since the decisions on the appeal will not have a foreseeable and material financial effect on the officials' interests.

## FACTS

The 429 Project is a new 31,407 square foot four story mixed-use building with two levels of subterranean parking. Retail is proposed on the ground floor, office space on the second floor, three residential units on the third floor, and office space and one residential unit on the fourth floor. The project is located on an 11,000 square foot site in the Downtown Commercial Zone District addressed as 429 University Avenue. The project replaces two existing one-story buildings.

The appeal of the 429 Project was based on the following:

1. Aesthetic quality of the approved design and its impact on the character of the Downtown University Avenue District.
  2. Aesthetic quality of the approved design and its impact on the surrounding heritage buildings on University Avenue and Kipling Street.
  3. The project's access, circulation, and parking provisions, and potential traffic and parking impacts on adjacent streets.
  4. The proposed ground-floor retail space as compared to the existing condition.
- Councilmember Marc Berman has an interest in residential real property approximately 600 feet from the 429 Project.
  - Councilmember Greg Scharff has an interest in commercial real property within 1,000 feet of the project site.<sup>8</sup> This property is zoned for multi-family residential with commercial uses permissible by conditional use permit or grandfathering. As noted above, the University Avenue property is leased to a medical office for five years, running June 2018. The lessee has an option to extend for one additional five year period, running June 2023. You noted on April 28, 2015, that the medical office has a large public parking garage (Webster/Cowper garage) around the corner and you have no facts that would lead you to believe the 420 Project would have any positive or negative effect on the business.
  - City Manager James Keene has an interest in residential real property more than 500 feet from 429 Project.

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<sup>8</sup> You supplemented the facts on April 27, 2015.

## ANALYSIS

*Councilmember Scharff:* As we discussed above, Councilmember Scharff has an interest in commercial rental property beyond 500 feet of the 429 Project and within 1,000 feet. This is an interest in real property under Section 87103(b). This property is zoned for multi-family residential, with commercial uses permissible through a conditional use permit or grandfathering. The University Avenue property is leased to a medical office for five years, running June 2018. The lessee has an option to extend for one additional five year period, running June 2023. The lessee is a source of income to the councilmember under Section 87103(c) and the councilmember's lease of property may constitute a business interest of the councilmember. (Section 87103(a).)

**Real Property:** Under recently revised Regulation 18702.2, the reasonably foreseeable financial effect of a governmental decision is material on an official's real property whenever the decision:

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

\* \* \*

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.

In contrast to the “Cap” on new office and research and development space discussed above which was unlikely to have an financial effect on the value of neighboring property not subject to the Cap, the 429 Project could have some immediate effects on property in proximity to it by increasing traffic or reducing available parking around the project site. However, the development, while more intense than the prior use, is still of a similar nature to what was already at the site. In addition, the staff report explains:

“The trip generation estimates outlined in the TIA applied the applicable trip generation rates, published in the Institute of Transportation Engineers (ITE) Trip Generation Manual, to the existing and proposed building, which is consistent with the City's guidelines for traffic analysis. Based on the project's size, the anticipated levels of traffic impacts are less than significant.”

Based on these facts, it does not appear the 429 Project decision will not have a material and foreseeable financial effect on the councilmember's property.

**Business Entity and the Source of Income:** As applicable to your facts, Regulation 18702.1(b) provides that the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately - held business entity. This would apply to the Councilmember's business of leasing his property, as well as his source of income (the lessee).<sup>9</sup>

The councilmember's property is separated from the site by approximately three developed blocks. While the 429 Project will affect the traffic near the councilmember's property, there are no facts to suggest it will substantially alter traffic levels or intensity of use, including parking, of the property surrounding his real property. Thus, it is not foreseeable that the decision will materially affect the market value of the councilmember's business.

You also stated that the lessee medical office business is approximately 1,000 feet away from 429 University. The medical office has a large public parking garage around the corner. You stated that you have no facts that would lead you to believe the 429 Project would have any positive or negative effect on the business. Consequently, neither the councilmember's interest in his business nor his source of income will create a conflict of interest.

*Councilmember Berman and City Manager Keene:* With respect to the 429 Project and Councilmember Berman and City Manager Keene, their residential properties are not the subject of the decision nor are the properties within 500 feet of the boundaries of the 429 Project. Thus, the effect of the decision will be material only as set forth above in Regulation 18702.2(a)(10) and (12).

Reviewing the materials that you provided, it appears the appeal relates to effects of the 429 Project in the immediate area of the project site. Moreover, traffic and parking effects will also appear to be limited primarily to the area immediately surrounding the 429 Project site and to specific streets that are not adjacent to the officials' properties. Moreover, in light of the current use of the 429 Project site and the change of use anticipated, it is not foreseeable that the 429 Project will materially affect the value of either officials' residential property.

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<sup>9</sup> Regulation 18702.3, applicable to the materiality determination with respect to sources of income, provides that the financial effect is material if the source (a business entity) will be materially affected under Regulation 18702.1.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla Wagner  
General Counsel



By: John W. Wallace  
Assistant General Counsel

JWW:jgl