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# Proposition 9 and Conflicts of Interest: Scrambling to Close the Barn Door

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# Proposition 9 And Conflicts Of Interest: Scrambling To Close The Barn Door

*The best way to make a man trustworthy is to trust him.*

—Bayless Manning<sup>1</sup>

*Thrust ivrybody—but cut th' cards.*

—Mr. Dooley<sup>2</sup>

Do the conflict of interest provisions of the Political Reform Act of 1974 prevent a doctor from serving on the governing board of a local hospital district because his actions may affect him as a member of his profession? May a city councilman, who is also a businessman, continue to vote on issues involving business taxes? May a planning commissioner who owns \$100 worth of oil company stock vote on a rezoning issue which would allow the company to erect a service station on the rezoned property? These questions are typical of those posed to the Fair Political Practices Commission in recent months as the Commission has struggled to interpret and enforce the Political Reform Act, more popularly known as Proposition 9. At issue in these three queries is whether or not the officials involved have conflicts of interest between their personal financial interests and their official duties such that they must divorce themselves from the decisions in question. The Political Reform Act [hereinafter referred to as the Act] regulates conflicts of interest situations with the intent that “[p]ublic officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.”<sup>3</sup>

This comment will survey the conflict of interest provisions of Proposition 9 in light of the opinions and regulations of the Fair Political Practices Commission [hereinafter referred to as the FPPC, or the Commission] to determine how conflict situations are being resolved pursu-

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1. Manning, *The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation*, 24 *FED. B.J.* 239, 254 (1964) [hereinafter cited as Manning].

2. F. DUNNE, *MR. DOOLEY ON THE CHOICE OF LAW*, xxiii (Bander ed. 1963).

3. CAL. GOV'T CODE §81001(b) [hereinafter all references to code sections will be to the California Government Code unless otherwise specified].

ant to the Act. The focus will be on the newly promulgated regulations of the FPPC, for it is through these regulations that the impact and the shortcomings of the Act may best be illustrated. The FPPC has struggled to discern the mandate of the Act, reconcile the spirit of Proposition 9 with day-to-day realities of governmental operations, and at the same time develop guidelines for those persons subject to the Act. The FPPC regulations will be evaluated in terms of whether the officials and their advisors will know when a conflict exists, and in terms of their compliance with the spirit of Proposition 9 as the FPPC has discerned the intent of Californians in passing this initiative.<sup>4</sup>

#### THE CONFLICT OF INTEREST ISSUE

The essence of a republican form of government is found in the notion that the holding of office is a public trust, bestowed for the protection of the public interest and not for the private gain of an individual or a party. This means that those who conduct public business must be guided by the highest standards of ethical behavior. As President John F. Kennedy stated in a 1961 message to Congress on "Ethics in Government":

No responsibility of government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality and complete devotion to the public interest.<sup>5</sup>

Thus, the most serious charge which can be leveled against a public official is that of betrayal of the public trust by the use of public office to advance private financial interests.<sup>6</sup>

Bribery and embezzlement are the extreme forms of this unethical conduct, but a lesser form of the same evil is the conflict of interest. A conflict of interest exists whenever two interests, here the public interest and the private financial interest of an official, *clash or appear to clash*.<sup>7</sup> Both actual and potential conflicts are matters of concern, for much of the discontent with the government stems from ambiguous

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4. On June 4, 1974 the voters of California passed Proposition 9, the Political Reform Act of 1974, with a statewide vote of 69.8 percent. STATE OF CALIFORNIA, STATEMENT OF VOTE, PRIMARY ELECTION JUNE 4, 1974, at 40 (1974) (compiled by Edmund G. Brown, Jr., Secretary of State). The Act became effective on January 7, 1975, except for Chapter 8 (ballot pamphlet provisions) which went into effect immediately. CAL. GOV'T CODE §81016.

5. 107 CONG. REC. 6835 (1961).

6. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON CONGRESSIONAL ETHICS, CONGRESS AND THE PUBLIC TRUST 34 (1970).

7. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 3 (1960).

—or not so ambiguous—circumstances which cause suspicions that officials are promoting their individual welfare above that of the public.<sup>8</sup> The very fact that a public official has investments, financial interests in private holdings, or income in addition to his official salary may give the appearance of a conflict of interest even though no unethical conduct actually occurs.<sup>9</sup> If a government is to maintain public confidence, these “appearances” must be regulated, because an official in a position of conflicting interests is subject to temptation regardless of how a particular decision is resolved. As the United States Supreme Court said in *United States v. Mississippi Valley Generating Co.*<sup>10</sup> regarding the federal conflicts of interest law:

[T]he statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant’s conflict of interest. . . . [T]he statute establishes an objective standard of conduct, and . . . whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.<sup>11</sup>

Regulation of conflicts of interest seeks to prevent these temptations, and the public’s suspicions, from arising.

Prior to the passage of Proposition 9, conflict of interest statutes were scattered throughout the codes,<sup>12</sup> without the development of a comprehensive approach or a master plan for dealing with complex ethical issues.<sup>13</sup> Furthermore, the conflicts laws suffered from the lack of effective enforcement mechanisms.

8. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON CONGRESSIONAL ETHICS, CONGRESS AND THE PUBLIC TRUST 34 (1970).

9. STATE OF CALIFORNIA, CALIFORNIA ASSEMBLY OFFICE OF RESEARCH & COMMITTEE ON GOVERNMENTAL ORGANIZATION, ETHICAL CONDUCT AND GOVERNMENTAL INTEGRITY: THE CONFLICT OF INTEREST ISSUE 11 (1970) [hereinafter cited as ASSEMBLY REPORT].

10. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961).

11. *Id.* at 549.

12. Statutory history in this state is replete with examples of enactments designed to disclose, avoid or eliminate such conflicts. According to our count, there can presently be found in the Constitution and statutes of California more than 85 separate provisions . . . concerning conflicts of interests of public officers and employees.

*City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 262, 466 P.2d 225, 227, 85 Cal. Rptr. 1, 3 (1970).

13. For a discussion of the history of conflict of interest laws in California see ASSEMBLY REPORT, *supra* note 9, at 15-17. Appendix A, 27, 29-32; Kaufmann and Widiss, *The California Conflict of Interest Laws*, 36 S. CAL. L. REV. 186 (1963).

In 1973, the first extensive conflicts of interest law was passed. The act, which was to become known as the Moscone Governmental Conflict of Interests and Disclosure Act<sup>14</sup> (hereinafter referred to as the Moscone Act), adopted a two-pronged attack on the conflicts problem: prohibition against decision-making when a conflict of interest existed, and disclosure of a public official's financial interests. Public officials were forbidden to participate in or attempt to influence decisions in which they had economic interests,<sup>15</sup> and specified public officials were required to disclose designated assets, sources of income and employment.<sup>16</sup> This act was a more narrowly drawn successor to the disclosure law held unconstitutional in *City of Carmel-by-the-Sea v. Young*.<sup>17</sup> Overcoming the constitutional infirmities of overbreadth and invasion of privacy which concerned the court in *Carmel*,<sup>18</sup> the Moscone Act required disclosure of financial interests only when an interest could be materially affected by the official's decision in the scope of his official capacity,<sup>19</sup> and disclosure of specific dollar values was not mandated.<sup>20</sup> This Act was held constitutional in *County of Nevada v. MacMillen*.<sup>21</sup>

However, the Moscone Act was not without its shortcomings. The Act applied only to governmental officers and not to employees,<sup>22</sup> a provision which arguably ignored the realities of governmental decision-making, where employees often have a substantial impact on a decision. Furthermore, agency officials were not necessarily subjected to the Moscone provision since public agencies were only *permitted*, and not required, to develop conflict of interest guidelines for their officials.<sup>23</sup> Non-development of these agency conflict of interest codes severely limited the scope of the Moscone Act's coverage.<sup>24</sup>

14. CAL. GOV'T CODE §§3600 *et seq.* (the Moscone Governmental Conflict of Interests and Disclosure Act), enacted, CAL. STATS. 1973, c. 1166, §3, at 2429, amended, CAL. STATS. 1974, c. 48, §1, at 106. Government Code Section 3800 was added by CAL. STATS. 1975, c. 145, §2, amended, CAL. STATS. 1975, c. 1211, §28, making the Moscone Act inoperative. Sections 3704, 3705, 3706, 3709, and 3710 are to remain in effect concerning a public agency until a conflict of interest code is adopted pursuant to Government Code Section 87300, but the balance of the Moscone Act shall remain inoperative unless the conflicts of interest portion of Proposition 9 is repealed, invalidated by a court of appeal, or otherwise made inoperative. CAL. GOV'T CODE §3800.

15. CAL. GOV'T CODE §3625(a) (currently inoperative, see note 14 *supra*).

16. CAL. GOV'T CODE §3700(b) (currently inoperative, see note 14 *supra*).

17. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (construing CAL. GOV'T CODE div. 4.5 [commencing with §3600], as enacted, CAL. STATS. 1969, c. 1512, §1, at 3093, repealed, CAL. STATS. 1973, c. 1166, §2, at 2429).

18. *Id.* at 269-70, 466 P.2d at 232-33, 85 Cal. Rptr. at 8-9.

19. CAL. GOV'T CODE §3700(c) (currently inoperative, see note 14 *supra*).

20. See text accompanying notes 93-96 *infra*.

21. 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).

22. CAL. GOV'T CODE §3610(h) (currently inoperative, see note 14 *supra*).

23. CAL. GOV'T CODE §3704(a) (currently inoperative, see note 14 *supra*).

24. George Moscone testified before the FPCC that the permissive language was substituted for mandatory requirements in order to save the bill. Moscone indicated that

## CONFLICTS OF INTEREST: PROPOSITION 9

Conflicts of interest is not a phenomenon new to California or to the federal government, nor are legislative attempts to combat conflicts of interest unique. The argument will be made, particularly in periods relatively free from public scandal, that the best way to make a person trustworthy is to trust him, and the best way to attract people of dignity to public office is to treat them with dignity.<sup>25</sup> While it is true that high ethical standards stem primarily from individual conscience and dedication to the public trust, the judgment of history is that public officials need the aid of a statutory framework setting out limits of permissible conduct.<sup>26</sup>

In 1974, the citizens of California rewrote California's conflicts of interest law by passing the initiative known as Proposition 9.<sup>27</sup> The new conflicts law is aimed at the broadest definition of conflicts of interest, that is, it is meant to govern not only those situations in which the public interest and an official's personal financial interest *actually* clash, but also those instances in which they *appear* to clash.<sup>28</sup> Through disclosure of financial interests and disqualification from decision-making whenever personal financial interests may be affected by the decision in question, *potential* conflict situations may be avoided under the Proposition 9 provisions.

The Political Reform Act again adopts the two-pronged approach to conflicts of interest, that of prohibition against decision-making and disclosure of financial interests. The prohibition provisions are found in Government Code Sections 87100 through 87103. These sections provide that a public official at any level of state or local government is forbidden to participate in decision-making when the official has a financial interest in the decision at issue,<sup>29</sup> unless his participation is legally required.<sup>30</sup> To facilitate discovery of potential conflicts, Government Code Sections 87200 through 87207 provide for disclosure of

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he had acquiesced in this language after being assured by the League of California Cities that cities would approve the plan for conflict of interest codes without the mandatory provisions. The author of the Moscone Act told the FPPC that the failure on the part of the cities to adopt the codes was "symbolic of the type of government which erodes the trust of the people in public officials." *Hearings on the Conflict of Interest Provisions of Proposition 9 Before the Fair Political Practices Commission* Oct. 22, 1975, at 7-9 [hereinafter cited as FPPC Hearings No. 1].

25. Manning, *supra* note 1, at 254.

26. See Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 RUTGERS L. REV. 666, 669-700 (1959); Note, *State Conflict of Interest Laws: A Panacea For Better Government?* 16 DEPAUL L. REV. 453, 464 (1967).

27. See note 4 *supra*.

28. See text accompanying notes 7-11 *supra*.

29. CAL. GOV'T CODE §87100.

30. CAL. GOV'T CODE §87101.

certain financial interests of the official. Thus, public officials described in Section 87200, as well as candidates for any of the offices described in that section, must disclose direct and indirect investments, interests in real property, and sources of income.<sup>31</sup> Furthermore, disclosure statements are made public records<sup>32</sup> so that the public may ascertain whether or not an official has a conflict of interest between his public duties and private financial interests, or has participated in decision-making when a conflict existed.

Every state and local government agency is required, pursuant to the Act, to promulgate and adopt its own conflicts of interest code.<sup>33</sup> The agencies will determine what agency personnel will be covered by the codes, which must contain prohibition and disclosure provisions consistent with those imposed by Sections 87100 and 87200 through 87207.<sup>34</sup> By requiring annual disclosure as well as disqualification prior to decision-making, the new conflicts law is designed not only to protect the decision-making process in the first instance, but also to rectify unethical conduct situations through numerous sanctions and enforcement provisions.<sup>35</sup>

#### A. *The Fair Political Practices Commission*

One of the most significant features of Proposition 9 is the creation of the Fair Political Practices Commission. Pursuant to Chapter 3 of the Political Reform Act, the five member, multi-partisan, independent Commission is charged with the administration and implementation of the Act.<sup>36</sup> The Commission may adopt necessary administrative regulations,<sup>37</sup> investigate possible violations of the Act,<sup>38</sup> and order compliance therewith.<sup>39</sup> The establishment of the FPPC was important to the success of the new conflicts law, since the common fault with previous conflicts of interest laws was the lack of an effective enforcement vehicle.<sup>40</sup>

Permitted to act on its own initiative or on receipt of a sworn complaint,<sup>41</sup> the Commission has at its disposal several potent weapons to

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31. CAL. GOV'T CODE §§87201-87204.

32. CAL. GOV'T CODE §81008.

33. CAL. GOV'T CODE §87300. See note 75 *infra* for definition of state and local government agency.

34. CAL. GOV'T CODE §87302.

35. See text accompanying notes 48-63 *infra*.

36. CAL. GOV'T CODE §83111.

37. CAL. GOV'T CODE §83112.

38. CAL. GOV'T CODE §83115.

39. CAL. GOV'T CODE §83116.

40. See ASSEMBLY REPORT, *supra* note 9, at 14, 24-26.

41. CAL. GOV'T CODE §83115.

combat conflicts of interest. The FPPC is empowered to hold hearings,<sup>42</sup> subpoena witnesses and documents,<sup>43</sup> issue cease and desist orders,<sup>44</sup> and impose penalties of up to \$2000 for a violation of the Act.<sup>45</sup> The Commission is also authorized to grant witnesses immunity from penalty, forfeiture, or criminal prosecution.<sup>46</sup> The power to issue formal opinions upon request is also part of the FPPC's arsenal.<sup>47</sup>

### B. *Enforcement*

Injunctive relief is the sole remedy for violation or threatened violations of the prohibition provision of Section 87100;<sup>48</sup> however this remedy is not available against elected state officers.<sup>49</sup> In an enforcement action against any other official, the court may require the exhaustion of administrative remedies prior to granting injunctive relief.<sup>50</sup> Upon a preliminary showing to the court that there has been a violation of the *disqualification* provision of Section 87100 or of an agency's conflicts of interest code, the court may restrain the execution of any official action pending adjudication. Upon an ultimate determination of a violation, the court may void the official action if already executed.<sup>51</sup> Any official action, except the enactment of state legislation,<sup>52</sup> may be enjoined or voided, but injury to innocent persons relying upon the official action will be considered in determining the appropriateness of preliminary or permanent injunctive relief.<sup>53</sup>

A public official who violates the *disclosure* provisions of the Act or of his agency's conflicts of interest code may be subject to applicable agency discipline,<sup>54</sup> civil suit,<sup>55</sup> and, if the violation was knowing or wilful, criminal liability.<sup>56</sup> The knowing or wilful violation of a disclosure provision is a misdemeanor and heavy fines may be imposed,<sup>57</sup> as

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42. CAL. GOV'T CODE §83116.

43. CAL. GOV'T CODE §83118.

44. CAL. GOV'T CODE §83116(a).

45. CAL. GOV'T CODE §83116(c).

46. CAL. GOV'T CODE §83119.

47. CAL. GOV'T CODE §83114.

48. CAL. GOV'T CODE §87102. Injunctive relief is available for all violations of the conflicts of interest law, CAL. GOV'T CODE §91003(a), but injunctive relief is the exclusive remedy for Section 87100 violations.

49. CAL. GOV'T CODE §87102.

50. CAL. GOV'T CODE §91003(a).

51. CAL. GOV'T CODE §91003(b).

52. CAL. GOV'T CODE §91003(b).

53. CAL. GOV'T CODE §91003(b).

54. CAL. GOV'T CODE §91003.5.

55. CAL. GOV'T CODE §91004. See text accompanying note 60-61 *infra*.

56. CAL. GOV'T CODE §91000(a). Section 87300 provides that any violation of a conflict of interest code by a designated employee is a violation of Chapter 7 (§§87100-87312), the conflict of interest portion of the Political Reform Act. Thus, knowing or wilful violation of the disclosure provisions of an agency's code also subjects the designated employee to criminal liability.

57. CAL. GOV'T CODE §91000(a), (b).



well as a prohibition against office-holding and lobbying activity for a period of four years following conviction.<sup>58</sup> Failure to disclose pursuant to the Act or an agency promulgated conflicts of interest code may also result in injunctive relief pursuant to Section 91003.<sup>59</sup> Moreover, any public official who intentionally or negligently violates the reporting requirements<sup>60</sup> may be liable in a civil suit for the amount or value not properly reported,<sup>61</sup> and any designated employee who realizes an economic benefit as a result of a violation of a disqualification provision of his agency's conflicts of interest code may be liable in a civil action for an amount up to three times the value of the benefit.<sup>62</sup> Although a private plaintiff may be required to post a bond to guarantee such costs, Section 91012 provides for the payment of litigation costs, including attorneys' fees, to the prevailing party.<sup>63</sup>

The Attorney General is responsible for enforcing the criminal provisions of the conflicts of interest law with respect to state agencies;<sup>64</sup> city and district attorneys of any city or county in which a violation occurs have concurrent powers and responsibilities with the Attorney General.<sup>65</sup> The civil prosecutor is primarily responsible for enforcing the civil penalties and remedies of the conflicts law,<sup>66</sup> although persons

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58. CAL. GOV'T CODE §91002. This prohibition is applicable at the discretion of the judge at the time of sentencing. Violation of this prohibition is a felony.

The FPPC has proposed amendment of the Act to provide courts with the discretion to remove from office persons convicted of intentionally violating the Political Reform Act. STATE OF CALIFORNIA, FAIR POLITICAL PRACTICES COMMISSION, *Proposals to Amend the Political Reform Act*, Proposal 44 (Feb. 27, 1976) [hereinafter cited as *Proposals to Amend the Political Reform Act*].

59. CAL. GOV'T CODE §91003(a) (violation of Title 9, the Political Reform Act).

60. CAL. GOV'T CODE §§87201-87207, as applicable to those officials specified in §87200.

61. CAL. GOV'T CODE §91004.

62. CAL. GOV'T CODE §91005(b). See Section 91009 regarding the disposition of judgments recovered in civil actions brought pursuant to Section 91004 and Section 91005.

63. Only plaintiffs and defendants other than an agency may recover costs pursuant to this section.

64. CAL. GOV'T CODE §91001(a).

65. CAL. GOV'T CODE §91001(a).

66. Government Code Section 91001(b) provides that the Commission is the civil prosecutor with respect to the state or any state agency, the city attorney with respect to a city or city agency, and the district attorney with respect to any other agency. Concern was voiced in FPPC hearings that enforcement at the local level would be less than vigorous since most city attorneys are appointed rather than elected, and would be reluctant to bring suit against public officials. FPPC Hearings No. 1, *supra* note 24, transcript at 86-89 (testimony of Sanford T. Autumn).

In *Hays v. Barry Wood*, Superior Court, Mendocino County, #36319, the court determined that the Attorney General has independent authority as chief law officer of the state (CAL. CONST. art. 5, §13) to file civil actions for violations of the conflict of interest law. Superior Court, Mendocino County, #36319 (Aug. 11, 1975), (Minute Order on Demurrer as to the Attorney General). The court also determined that the FPPC has no inherent power to initiate suits at the local level, is not a "person residing within the jurisdiction" within the meaning of the Act, and that "primarily responsible" refers to the sharing of responsibility with voters or residents of the jurisdiction not with the Commission. *Id.* (Minute Order Sustaining demurrer as to the Fair Political Practices Commission Without Leave to Amend).

residing in the jurisdiction are authorized to initiate civil actions under certain circumstances.<sup>67</sup>

### C. *Conflicts of Interest: Disclosure*

Public disclosure of officials' financial interests may not totally prevent the occurrence or suspicion of venality, but it is a method of collecting relevant information and allowing the public to judge what is proper conduct in a particular instance. Hopefully, disclosure will dispel the suspicions of nest-feathering so prevalent in the post-Watergate era and restore confidence in the integrity of government. A secondary function of disclosure is to sensitize officials to potential conflicts situations involving personal financial affairs.

#### 1. *Disclosure Generally*

Government Code Section 87200 provides that elected state officers,<sup>68</sup> members of the board of supervisors and chief administrative officers of counties, mayors, city managers, chief city administrative officers, and city council members must disclose their financial interests. Candidates for these offices must also file a statement of economic interest.<sup>69</sup> While members of some commissions were not included in the Political Reform Act,<sup>70</sup> subsequent legislation<sup>71</sup> has subjected them to the disclosure requirements of the Act.<sup>72</sup> State and local agency officials and employees will be required<sup>73</sup> by their own agency's con-

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The FPPC staff has recommended that Government Code Section 91001(b) be amended to substitute local district attorneys for city attorneys as the civil prosecutor except when the city attorney is an elected official. *See Proposals to Amend the Political Reform Act, supra* note 58, Proposal 36.

67. Persons residing within the jurisdiction (Government Code Section 82035) may seek injunctive relief pursuant to Government Code Section 91003, may initiate a civil suit for an amount not reported on a disclosure statement pursuant to Section 91004, and may sue for the value of the benefit received by a designated employee who failed to disqualify himself from decision-making pursuant to Section 91005. Prior to initiating a civil suit, citizens must request the civil prosecutor to commence suit.

68. Elected state officers are the Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, members of the Legislature, and members of the State Board of Equalization. CAL. GOV'T CODE §§82021, 82024.

69. CAL. GOV'T CODE §87201.

70. Public Utilities Commission, State Energy Resources Conservation and Development Commission, state and regional coastal zone conservation commissions, and Fair Political Practices Commission members. CAL. GOV'T CODE §87200, *as amended* CAL. STATS. 1975, c. 499, §3, CAL. STATS. 1975, c. 797, §§3, 4.

71. A.B. 872, CAL. STATS. 1975, c. 797, §§3, 4.

72. A.B. 959, CAL. STATS. 1975, c. 499, §3, was also passed, and, in addition to the above-named officials, included judges and district attorneys within the disclosure provisions. Due to the order of passage, however, A.B. 872 takes precedence. Local planning commissioners and directors, moreover, are still subject to the filing requirements of the Moscone Act, *see* A.B. 494 (CAL. STATS. 1975, c. 145, §2).

73. CAL. GOV'T CODE §87300 (adoption of agency conflict of interest codes).

licts of interest code to disclose financial interests likely to be affected by agency decisions.<sup>74</sup>

The impact of the disclosure provisions can be appreciated only when the statutory definitions of a state and local government agency are examined.<sup>75</sup> There are 58 counties and 412 cities in California whose political subdivisions will be required to develop a conflicts of interest code. It has been estimated that there are approximately 5000 different types of districts, including school districts, covered by the Act,<sup>76</sup> necessitating the promulgation of at least 30,000 codes.<sup>77</sup> An agency's code must designate the positions within the agency involving decision-making which may affect personal financial interests and provide for disclosure by employees or officers occupying those positions.<sup>78</sup> An FPPC regulation attempts to clarify the type of decision-making responsibility which will subject an official or employee to his agency's conflicts of interest code.<sup>79</sup> A connection with the actual decision-making, a capability of influencing the decision, or the exercise of discretionary or managerial authority are key factors in determining designated employees. Even with these limitations, Marin County, for example, anticipates that disclosure will be required of 2000 employees, whereas in the city and county of Los Angeles 180,000 employees will be required to comply with the codes.<sup>80</sup>

An official's financial interests will undergo continuous monitoring from the candidate or appointee stage of his public career until the time the official leaves office. Candidates specified in Section 87200 are required to file their disclosure statements at the same time the declaration of candidacy is filed,<sup>81</sup> and successful candidates must file

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74. CAL. GOV'T CODE §87302(b).

75. CAL. GOV'T CODE §82041 provides that:

"Local government agency" means a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of these, but does not include any court or any agency in the judicial branch of government.

CAL. GOV'T CODE §82049 provides that:

"State agency" means every state office, department, division, bureau, board and commission, and the Legislature, but does not include the courts or any agency in the judicial branch of government.

76. FPPC Hearings No. 1, *supra* note 24, transcript at 120 (remarks by Commissioner Carpenter).

77. *Meeting of the Fair Political Practices Commission*, Jan. 7, 1976 (testimony of Doug Maloney). The development of these agency conflict of interest codes is beyond the scope of this comment, except as the codes will be affected by the Commission regulations, or as the completed codes will reflect upon the impact of the Political Reform Act.

78. CAL. GOV'T CODE §87302(a).

79. 2 CAL. ADMIN. CODE §18700(a).

80. *Meeting of the Fair Political Practices Commission*, Jan. 7, 1976 (testimony of Doug Maloney).

81. CAL. GOV'T CODE §87201.

again within 30 days after assuming office.<sup>82</sup> Every person appointed to an office specified in Section 87200 must file a disclosure statement not less than ten days prior to the assumption of office.<sup>83</sup> Thereafter, statements of economic interest must be filed within 30 days after each anniversary of assuming office,<sup>84</sup> and within 30 days after leaving office.<sup>85</sup> Similar time limitations will be imposed on "designated employees" by their agency's conflicts codes. Late filing of disclosure statements will result in fines of ten dollars per late day.<sup>86</sup>

Candidates and newly-elected or appointed officials must disclose investments and real property interests possessed at the time of filing with fair market values exceeding \$1000.<sup>87</sup> Officials filing anniversary statements and persons leaving office must reveal their investments, real property interests and income held or received at any time since the last filing;<sup>88</sup> investments and real property interests of the spouse and dependent children must also be disclosed.<sup>89</sup> While investments<sup>90</sup>

82. CAL. GOV'T CODE §87202.

83. CAL. GOV'T CODE §87202.

84. CAL. GOV'T CODE §87203. For determination of the anniversary date, *see* CAL. GOV'T CODE §87205; 2 CAL. ADMIN. CODE §18725.

85. CAL. GOV'T CODE §87204.

86. CAL. GOV'T CODE §91013.

87. CAL. GOV'T CODE §§87201, 87202. Government Code Section 87206 outlines the contents of the statements.

88. CAL. GOV'T CODE §§87203, 87204. Disclosure of income received prior to the time of assuming office is not required. Although not reportable, it may create a conflict of interest which would disqualify the official from decision-making, should the official engage in decision-making within 12 months after assuming office. CAL. GOV'T CODE §§87100, 87103(c). *See* 2 CAL. ADMIN. CODE §18704 (emergency regulation of the FPPC concerning "source of income" as defined in Government Code Section 87103(c)).

89. CAL. GOV'T CODE §§82029, 82033, 82034.

90. CAL. GOV'T CODE §82034 provides that:

"Investment" means any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights, warrants, options, debt instruments and any partnership or other ownership interest, if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. No asset shall be deemed an investment unless its fair market value exceeds one thousand dollars (\$1,000). The term "investment" does not include a time or demand deposit in a financial institution, shares in a credit union, any insurance policy, or any bond or other debt instrument issued by any government or government agency. Investments of an individual includes a pro rata share of investments of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a ten percent interest or greater. The term "parent, subsidiary or otherwise related business entity" shall be specifically defined by regulations of the Commission.

For Commission interpretation of "investment," *see* 1 F.P.P.C. Ops. 54 (No. 75-036, July 2, 1975) (where the value of a 1/5 interest in a trust exceeds the statutory amount in §82034, official must disclose his interest in trust and must disclose the trust's stock holdings; subsidiary of company in which official held stock did business within the jurisdiction).

91. CAL. GOV'T CODE §82033 provides that:

"Interest in real property" includes any leasehold, beneficial or ownership in-

and real property<sup>91</sup> interests located in an official's *jurisdiction*<sup>92</sup> must be disclosed, the official need only state whether the value of the investment or property interest exceeds \$10,000; he need not disclose specific dollar values. Although no declaration of value need be provided for the filer's residence, any source of income<sup>93</sup> aggregating \$250 or more must be reported.

Gifts are also deemed "income" within the meaning of the Act, and must be disclosed when the value equals or exceeds \$25.<sup>94</sup> Moreover, Section 82030 provides that a discount in the price of anything of value, unless the discount is available to members of the public without regard to official status, is a gift. Thus, a discount on rooms at a hotel<sup>95</sup> and a campus parking pass<sup>96</sup> have been deemed by the FPPC to be reportable income. An official's community property interest in the income of a spouse is reportable, as well as the official's interest in wedding gifts.<sup>97</sup> By regulation,<sup>98</sup> the Commission has determined that "home hospitality" may be a source of income. Honoraria and awards are income to a public official, as are payments for speaking engagements, unless the payment received is insufficient consideration for services rendered.<sup>99</sup> Prizes are gifts which must be reported pursuant to Section 87207, unless they result from a bona fide competition unrelated to an official capacity.

It is evident from the opinions and regulations of the FPPC that all gifts and income sources which could influence an official's decisions are subject to the disclosure provisions. Unless subject to other reporting requirements of Proposition 9, such as the lobbyist provisions,<sup>100</sup>

terest or an option to acquire such an interest in real property located in the jurisdiction if the fair market value of the interest is greater than one thousand dollars (\$1,000). Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a ten percent interest or greater.

92. CAL. GOV'T CODE §82035 provides that:

"Jurisdiction" means the state with respect to a state agency and, with respect to a local government agency, the region, county, city, district or other geographical area in which it has jurisdiction. The jurisdiction of a member of a regional coastal zone conservation commission shall be the permit area in which the regional commission has jurisdiction. Real property shall be deemed to be "within the jurisdiction" with respect to a local government agency if the property or any part of it is located within or not more than two miles outside the boundaries of the jurisdiction or within two miles of any land owned or used by the local government agency.

93. CAL. GOV'T CODE §82030 (definition of "income"); CAL. GOV'T CODE §87207 (contents of statement of "income").

94. CAL. GOV'T CODE §87207(a)(1).

95. 1 F.P.P.C. OPS. 191 (No. 75-135, Dec. 3, 1975).

96. 1 F.P.P.C. OPS. 99 (No. 75-047, Aug. 7, 1975).

97. 2 F.P.P.C. OPS. 31 (No. 75-163, Feb. 4, 1976).

98. 2 CAL. ADMIN. CODE §18727.

99. 2 CAL. ADMIN. CODE §18728.

100. E.g., CAL. GOV'T CODE §86107.

some income and gifts will not be readily discoverable, and the cooperation of the official must be relied upon to effectuate disclosure. Obviously, many undisclosed and undiscoverable gifts, discounts, passes, and entertainment situations will present precisely the type of conflict of interest which Proposition 9 was intended to prevent.<sup>101</sup> If a city councilman, for example, is preparing to vote on a redevelopment plan, and the official receives gifts from the president of a construction firm likely to contract for the redevelopment work, the potential for partiality exists.<sup>102</sup> These gifts should be reported, and if they are not, the nondisclosure is a violation of the Act. Imposition of civil or criminal sanctions, however, will be impossible unless someone knows of or discovers the gift-giving.

Disclosure of the public official's financial interests has been recognized many times by federal and state courts as a valid public purpose sufficient to override claims of invasion of privacy.<sup>103</sup> However, the extent of the inquiry into an official's personal financial affairs may be limited. Most of the Proposition 9 conflict of interest disclosure provisions have been judicially validated, or have been drafted to withstand invasion of privacy attacks. Both *Carmel-By-The-Sea v. Young and County of Nevada v. MacMillen* require that financial disclosure be related to financial interests which might be expected to give rise to a conflict of interest in relation to the official's duties and functions.<sup>104</sup> Restricting disclosure of investments and real property interests to those located within the jurisdiction of the official should satisfy the relevancy requirement enunciated in *Carmel* and *Nevada*.<sup>105</sup> Employ-

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101. See CAL. GOV'T CODE §81001(a), (b).

102. Senator Leo McCarthy maintains that "many kinds of gifts, if large and coming from inappropriate sources, could consciously or unconsciously affect the independence of legislators. . . . With a gift of significant value, there is a fair chance a legislator's judgment could be affected." San Francisco Examiner, Jan. 19, 1976, at 5, col. 2-3.

103. Federal disclosure laws have been upheld in *United States v. Harriss*, 347 U.S. 612, 625 (1954), in *Burroughs and Cannon v. United States*, 290 U.S. 534, 548 (1934), and similar state laws have been upheld in *Washington, Fritz v. Gorton*, 83 Wash. 2d 275, 517 P.2d 911 (1974), and *Illinois, Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972).

104. *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 269-272, 466 P.2d 225, 232-234, 85 Cal. Rptr. 1, 8-10 (1970), *County of Nevada v. MacMillen*, 11 Cal. 3d 670, 670-71, 522 P.2d 1345, 1350, 114 Cal. Rptr. 345, 349-350 (1974).

105. Disclosure of income or sources of income is not subject to jurisdictional limitations, and income wherever located must be reported. CAL. GOV'T CODE §82030. The rationale for this nonjurisdictional basis for income disclosure is recognition that sources of income may be easily manipulated. *Meeting of the Fair Political Practices Commission*, Dec. 3, 1975, transcript at 115-16 (testimony of Delbert Spurlock). Lack of a jurisdictional basis, or some other rational connection with income outside the official's jurisdiction, however, may make the income disclosure provision constitutionally overbroad. *Id.*

Legislation has been suggested which would exclude from the reporting requirements of the Act income, other than gifts, which originates outside the jurisdiction and which is "not of a type readily susceptible to manipulation." *Proposals to Amend the Political*

ees covered by state and local agency conflicts codes will be required to disclose only those financial interests which may "foreseeably be affected materially" by the exercise of the designated employee's decision-making authority.<sup>106</sup> Revelation of only categorical values of financial interests, rather than specific amounts, was approved in the *Nevada* decision as a less intrusive means to accomplish legitimate aims.<sup>107</sup> Furthermore, disclosure of a spouse's and dependent children's financial interests was held not to be an unreasonable invasion of privacy given the purposes of the disclosure laws.<sup>108</sup> Thus, most of the conflict of interest disclosure provisions will not be challengeable; Section 87207(b), however, raises unanswered constitutional questions.

## 2. Disclosure of Clients' Names

Section 87207(b) provides that when the income of a business entity<sup>109</sup> must be reported,<sup>110</sup> the names of clients who paid fees to the business entity must be disclosed under the following circumstances: (1) when the business provides legal or brokerage services, if the filer's pro rata share of the fees paid by that client equals \$1000; and (2) when other services are provided by a business entity, if the filer's pro rata share of gross receipts from the client is \$10,000 during a calendar year.<sup>111</sup> The constitutional issues raised by this section are now before the California courts, in a challenge instituted by an attorney/city councilman who has refused to disclose his clients' names.<sup>112</sup>

### a. Privileged Information

There are no privileges in California except those provided by statute,<sup>113</sup> which pertain to the legal,<sup>114</sup> medical,<sup>115</sup> psychotherapeutic,<sup>116</sup>

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*Reform Act, supra* note 58, Proposal 21 (Feb. 27, 1976). "Not of a type readily susceptible to manipulation" would undoubtedly require Commission interpretation.

106. CAL. GOV'T CODE §87302(b).

107. 11 Cal. 3d at 671, 522 P.2d at 1350, 114 Cal. Rptr. at 350. The *Nevada* court acknowledged its statement in *Carmel* that "[t]he public's right to know of matters which might bring about a conflict of interest between the public employment and the private financial interests of those holding public office is a laudable and proper legislative concern and purpose." 11 Cal. 3d at 671 n.7, 522 P.2d at 1350 n.7., 114 Cal. Rptr. at 350 n.7.

108. 11 Cal. 3d at 675-76, 522 P.2d at 1353-54, 114 Cal. Rptr. at 353-354.

109. CAL. GOV'T CODE §82005 (definition of business entity).

110. Income of a business entity must be reported when an individual or a spouse owns a ten percent interest or greater in a business entity. CAL. GOV'T CODE §82030(a).

111. CAL. GOV'T CODE §87207(b)(2), (3).

112. *Hayes v. Barry Woods*, Superior Court, Mendocino County, #36319, Aug. 11, 1975.

113. CAL. EVID. CODE §911.

114. CAL. EVID. CODE §§950-962.

115. CAL. EVID. CODE §§990-1007.

116. CAL. EVID. CODE §§1010-1028.

and clerical<sup>117</sup> relationships. Presently, no privilege exists which would prevent compulsory disclosure of the names of the clients of business entities providing services other than these, but the Political Reform Act raises the issue of whether public officials may be required to disclose the names of their clients when a recognized confidential relationship exists.

The holder of the privilege in a confidential relationship is the client or the patient and not the professional.<sup>118</sup> Thus the client or patient may object to the disclosure required by this section. Although the claim of privilege is generally raised in a judicial setting, the rationale behind the privilege doctrine is to foster a confidential relationship which exists independently of the courtroom. Presumably, then, the client should be able to protect this confidential relationship with respect to FPCC proceedings and requirements, and prevent disclosure of privileged information.<sup>119</sup> Nevertheless, the client's *name* is generally not privileged information unless it is intended to be confidential.<sup>120</sup> Thus, in the normal disclosure situation, the name of the client would not be privileged, and that client could not resist such a disclosure on the basis of privilege.

#### *b. Invasion of Privacy Rights*

The right of privacy is not mentioned in the United States Constitution, but a series of United States Supreme Court cases have recognized that a right of personal privacy is implicit within the Constitution.<sup>121</sup> Construing this implicit federal right, the California Supreme Court in *Carmel-By-The-Sea v. Young*<sup>122</sup> found that there was a right to privacy in one's personal financial affairs, and that the government could not intrude into these affairs absent a showing of compelling need. Although the California Constitution specifically provides for the right of privacy,<sup>123</sup> California courts have also held that the right may be over-

117. CAL. EVID. CODE §§1030-1034.

118. CAL. EVID. CODE §953.

119. *Cf. McMann v. S.E.C.*, 87 F.2d 377, 378 (2d Cir. 1937).

120. *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965).

121. *Roe v. Wade*, 410 U.S. 113, 152 (1973). Although the court has had difficulty in finding the source of the privacy right (see cases cited in *Roe*, 410 U.S. at 152) the *Roe* court maintained that it is founded in the fourteenth amendment's concept of personal liberty. *Id.* at 153. *Roe* emphasizes that the

"decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education" (citations omitted).

*Id.* at 152-53.

122. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

123. CAL. CONST., art. 1, §1.



ridden in the presence of a compelling state interest.<sup>124</sup>

Given the constitutional right to privacy and the right to privacy in personal financial affairs, the question arises whether the revelation of clients' names invades a public official's right to privacy. The *Carmel* court recognized that the public has a right to know of matters which might bring about a conflict of interest between the public duties and private financial interests of public officials, and that statutes effecting this right promote a laudable and proper legislative purpose.<sup>125</sup> As the *Nevada* court stated, "neither the right to privacy, nor the right to seek and hold public office, must inevitably prevail over the right of the public to an honest and impartial government."<sup>126</sup>

Honest and impartial government is the goal of the conflicts of interest law. The state's interest in governmental integrity and the public's right to know of those matters bearing on a public official's fitness for office,<sup>127</sup> coupled with the recognition in the Political Reform Act that wealth can be an unfavorable influence on governmental affairs,<sup>128</sup> should suffice to make the disclosure of clients' names a valid intrusion upon an official's privacy. Income from a client is a financial interest which may influence decision-making, and the public has a right to know of potential conflicts.

An invasion which is justified by a valid public policy may still be subject to an overbreadth attack. Overbreadth becomes a problem when officials are required to disclose non-jurisdictional sources of income, since they may not be affected by any decision. Although disclosure of income generated from non-jurisdictional sources may or may not be an overbroad intrusion on a public official's privacy given the intent of the disclosure provisions,<sup>129</sup> the disclosure of the non-jurisdictional clients generating that income may go a step too far. The *Nevada* court indicated that only substantial overbreadth would invalidate a disclosure statute,<sup>130</sup> but avoided ruling on whether disclosure

124. *E.g.*, *White v. Davis*, 13 Cal. 3d 757, 776, 533 P.2d 222, 234-35, 120 Cal. Rptr. 94, 106 (1975).

125. 2 Cal. 3d at 262, 466 P.2d at 226-27, 85 Cal. Rptr. at 3.

126. 11 Cal. 3d at 672, 522 P.2d at 1351, 114 Cal. Rptr. at 351 (emphasis added).

127. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), *rev'd on other grounds*, 388 U.S. 134 (1967).

128. CAL. GOV'T CODE §81001(a), (c), (d), (f).

129. See note 105 *supra*.

130. [P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep . . . .

[W]hatever overbreadth may exist should be cured through case-by-case analysis . . . .  
11 Cal. 3d at 672, 522 P.2d at 1350-51, 114 Cal. Rptr. at 351, *quoting* *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The court also approved the validation of financial disclosure statutes by the Washington and Illinois Supreme Courts despite claims of substantial overbreadth. *Id.*

of clients' names was such substantial overbreadth as to invalidate the Moscone Act. The Secretary of State had interpreted the Moscone provisions as requiring a listing of clients' names under some circumstances,<sup>131</sup> but the *Nevada* court looked at the provisions in light of legislative amendments to the Moscone Act, and held that they did not require the disclosure of clients' names.<sup>132</sup> Hence, the constitutional issue was avoided in *Nevada*. Faced with an examination of the issues raised by Section 87207(b), the courts must resolve the aforementioned constitutional questions.

Requiring public officials to disclose their clients' names, although perhaps not an invalid intrusion upon the official's privacy, may be a violation of the *client's* right to privacy. The fundamental right of privacy has been recognized in sexual, marital, and family affairs, and it is arguable that personal financial privacy is a fundamental right which should be included in this constitutional right to privacy.<sup>133</sup> The family is the basic economic and social unit of society, and financial affairs are such an integral part of the familial unit that they should be accorded the same privacy protection as other family affairs.<sup>134</sup> This does not mean that there can be no intrusion into financial affairs,<sup>135</sup> but a compelling state interest must justify the privacy intrusion. While the state's interest in preventing conflicts of interest through disclosure is a compelling one, as recognized in *Carmel* and *Nevada*, Section 87207(b) may be invalid nevertheless. Although a public official may be required to relinquish a degree of personal privacy when he chooses to hold a public office, there is an element of choice involved. The official's clients do not have that choice, and this complete lack of control over personal financial matters may be so invasive of the right to privacy that the need to protect this right is more compelling than the state's interest.

On the other hand, should the level of skepticism about governmen-

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131. SECRETARY OF STATE, INFORMATION MANUAL, DISCLOSURE OF ASSETS AND INCOME BY OFFICEHOLDERS AND CANDIDATES (CALIFORNIA GOVERNMENT CODE §§3600-3760), at 7.

132. 11 Cal. 3d at 674-75, 522 P.2d at 1352-53, 114 Cal. Rptr. at 352-53.

133. See note 121 *supra*.

134. This reasoning is similar to that used by the court in *Carmel*. 2 Cal. 3d at 268, 466 P.2d at 231, 85 Cal. Rptr. at 7. Although the court's use of the terminology "adjunct to the domestic economy" has been criticized, Comment, *Financial Disclosure by Public Officials and Public Employees in Light of Carmel-by-the-Sea v. Young*, 18 U.C.L.A. L. REV. 534, 539-52 (1971), the language indicates that financial privacy is essential to family and individual security. *Id.* See Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws*, 73 MICH. L. REV. 758, 771-73 (1975).

135. See Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws*, 73 MICH. L. REV. 758, 773-74 (1975) (compulsory disclosure constitutional in variety of situations); see 2 Cal. 3d at 281, 466 P.2d at 241, 85 Cal. Rptr. at 17 (Mosk, J., dissenting).

tal integrity continue to rise, even the client's right of privacy may succumb to the need for public confidence. If only expanded disclosure such as that required by Section 87207(b) will furnish that confidence, then the state's interest may ultimately prevail.

*c. Equal Protection of the Laws*

In Section 87207(b), public officials have been segregated into disclosure classes depending upon the services provided by the business entity with which they are associated. Officials connected with legal or brokerage firms must divulge a client's name when the official's share of the income generated by a client is only \$1000, whereas officials associated with other business entities are not required to disclose a pro rata share unless it equals or exceeds \$10,000. This classification raises an equal protection issue. The disparity of treatment received by attorneys and brokers pursuant to Section 87207(b) may violate their rights to equal protection of the laws as guaranteed by both the United States<sup>136</sup> and California Constitutions.<sup>137</sup> Equal protection does not require that all persons be treated equally, but it does require that all similarly situated persons, such as public officials, be treated equally.<sup>138</sup> Statutory classification of persons for dissimilar treatment is constitutional only if the classification is reasonable.

The right of privacy is a constitutional right, and when a classificatory scheme touches upon a "fundamental freedom" such as privacy, it is an unreasonable classification unless it passes the courts' more stringent compelling state interest test.<sup>139</sup> Therefore, to satisfy this test, it must be demonstrated that the classification in Section 87207(b) of the Act is "necessary" to promote such a "compelling state interest." Perhaps some justification for the disparity may be found in the nature of the services rendered. Section 87207(b)(2), relating to attorneys and brokers, contemplates a business relationship of a more sporadic nature; when a fee received is \$1000 or more, the client must be revealed. However, Section 87207(b)(3) refers to the amount of an annual fee, and perhaps a more continual relationship between the client and business entity is thought to require a higher disclosure threshold.

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136. "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

137. "All laws of a general nature shall have a uniform operation." CAL. CONST. art. 1, §11. "No . . . citizen, or class of citizens, [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art. 1, §21.

138. *Skinner v. Oklahoma*, 316 U.S. 536 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

139. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Whatever rationale may be advanced for the classification, it arguably bears little relationship to the governmental interests promoted by Proposition 9. The purpose of the conflicts of interest provisions is to ensure that official decision-making is free from influence, in fact or in appearance, caused by personal financial interests, and although this *is* a compelling state interest, the method of promoting that interest in Section 87207(b) is impotent. Not only does the classification appear “unnecessary”; it also defeats the purposes of the Act. Surely no valid purpose is served in terms of ferreting out conflicts of interests if attorneys disclose their client’s names, while the official who supplies the construction industry is allowed greater laxity in disclosure. Chances are equally as great that the supplier/official will be confronted with a decision involving the interests of the construction industry as it is that the attorney/official will face a decision involving the interests of his client.

#### D. *Conflicts of Interest: Disqualification*

Section 87100 of the Government Code provides that “[n]o 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.”<sup>140</sup> Although the statutory language is deceptively simple, the application of the statute is more difficult. Before a public official’s abstention is required, it must be determined that the official has a financial interest in the decision. Section 87103 provides that the forbidden financial interest is present if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on specified investments, real property interests, sources of income, or business entities in which the official holds a management position.<sup>141</sup> However, nowhere in the Act are the terms “reasonably foreseeable”, “material financial effect”, or “distinguishable from the public generally” defined. While it is relatively easy to determine who may be disqualified,<sup>142</sup> the threshold question of when they must be prohibited from decision-making is unanswered by the Act itself. It is imperative that these terms be defined in some workable manner, because execution of official actions may be enjoined in potential conflicts situations, and set aside

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140. CAL. GOV’T CODE §87100 (emphasis added).

141. CAL. GOV’T CODE §87103.

142. CAL. GOV’T CODE §82048 (public official defined); CAL. GOV’T CODE §§82049, 82041 (state and local government agency defined); see note 75 *supra* for the full text of these provisions.

where a violation has occurred.<sup>143</sup> Since any order, permit, resolution, or contract may be subsequently voided, official decisions will lack finality. Further, the lack of any statute of limitations on Section 91003 relief renders the prohibition particularly lethal and adds uncertainty to governmental decision-making.<sup>144</sup>

The disqualification provision is not new to California conflicts of interest law; the Moscone Act contained a similar provision.<sup>145</sup> However, the scope of persons subject to disqualification under the Political Reform Act is much broader than under previous law, and therefore many more governmental decisions may be put in jeopardy. The FPPC has promulgated administrative regulations outlining more precisely the requirements of the Act. The Commission's struggles illustrate the difficulties of reconciling the theory of Proposition 9 with the realities of conducting governmental affairs.

### 1. *Disqualification: Who is a Public Official?*

Every member, officer, employee, or consultant of a state or local government agency is a public official within the meaning of the Act.<sup>146</sup> When the broad definitions of "state and local agency" are considered, the extent of the prohibition is evident; vast numbers of persons meeting the requirements of officialdom must disqualify themselves from decision-making whenever they have a financial interest in the decision.<sup>147</sup> Disclosure cannot eliminate the conflict,<sup>148</sup> and if the prohibited financial interest exists in a decision-making situation, an official participates at the risk of having any decision set aside for conflict of interest reasons. Thus, it is vitally important to determine initially who is a public official.

Whereas officers, employees, and consultants of state and local government agencies can be public officials by virtue of their position alone,<sup>149</sup> only those members of boards and commissions with decision-making authority are deemed public officials.<sup>150</sup> According to an

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143. CAL. GOV'T CODE §91003. See text accompanying notes 50-53 *supra*.

144. Although in deciding whether to grant injunctive relief pursuant to §91003 the judge may accord due weight to injury suffered by innocent persons relying on the official decision, CAL. GOV'T CODE §91003(b), the uncertainty is still present. Legislation has been suggested creating a statute of limitations on challenges to governmental decision-making. *Proposals to Amend the Political Reform Act, supra* note 58, Proposal 23 (Feb. 27, 1976).

145. CAL. GOV'T CODE §3625(b) (currently inoperative, *see* note 14 *supra*).

146. CAL. GOV'T CODE §82048.

147. *See* CAL. GOV'T CODE §87302(c) (disqualification by designated employees).

148. The requirements of §87100 are separate from and in addition to the disclosure requirements of the Act and of the agency conflict of interest codes. CAL. GOV'T CODE §87102.

149. CAL. GOV'T CODE §82048.

150. CAL. GOV'T CODE §82019.

FPPC regulation, a board or commission possesses decision-making authority not only when it may make a final governmental decision, but also when it may compel a decision by another governmental agency, board, or commission, or when its action is a pre-requisite to a final decision.<sup>151</sup> Decision-making authority is also attributed to the board or commission which functions in an advisory capacity, whose decisions or recommendations are merely "rubber stamped" by the body with the actual authority.<sup>152</sup>

The denomination of consultants as public officials caused much consternation in government circles and represented, for the FPPC, a head-on collision between the theory and reality of administering and interpreting the Act. The term may be used to define two quite different kinds of working relationships. The term "consultant", for example, may refer to an individual hired by an agency for a period of time, perhaps under contract, to produce a specified piece of work. Basically this individual functions in an employer-employee relationship, under the direction and control of the agency.<sup>153</sup> On the other hand, there are those professional consultants or consultant firms who provide consultation services to the legislature or a state or local agency under independent contract.<sup>154</sup> These independent contractor consultants use their own facilities and laboratories and compile their own research data to arrive at conclusions independently of the agency. Thus, in interpreting the term "consultant", the Commission was faced with conflicting, and mutually exclusive, policy considerations.

Strong rationale exists for including both such relationships within the prohibitions of the Act. Contract services by independent consulting firms have become an increasingly important source of public decision-making as the demarcation lines between the public and private sectors of society have become increasingly blurred,<sup>155</sup> and thus should be viewed in the public trust context of decision-making. The professionals who provide these contract services are as prone to bias because of personal financial interests as are public employees and officials. Just as public employees and officials have outside financial interests

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151. 2 CAL. ADMIN. CODE §18700(a)(1), (A), (B), (C).

152. 2 CAL. ADMIN. CODE §18700(a)(1)(D).

153. *Meeting of the Fair Political Practices Commission*, Nov. 5, 1975, transcript at 17-20 (testimony of Delbert Spurlock).

154. In F.P.P.C. Opinion No. 75-120 (Tentative Draft No. 1, Nov. 24, 1975), the Commission determined that for the purposes of Chapter 6 of the Act (regulation of lobbyists), an independent contractor was not a "consultant." The Commission declined to make the same statement concerning conflicts of interest at that time, and recognized that independent contractors might need to be defined as "consultants" for conflicts of interest purposes.

155. See Manning, *supra* note 1, at 248-51; See also D. GUTTMAN & B. WILLNER, *THE SHADOW GOVERNMENT* (1976).

which may make their decisions suspect, independent consultant firms have other clients who may be affected, or the firm may be affected directly by the decision based upon the contract results. Similarly, the consultant who is actually an employee of the agency or who operates within an employee-employer relationship with the agency should be within the ambit of the Act's prohibition. It would be anomalous to treat governmental functions performed under contract differently from the same functions performed by regular agency employees. A loophole in the coverage of the Act could result, since functions not performable by the agency employee because of his public official status could be delegated to the employee-consultant with impunity.<sup>156</sup>

However, including the independent contractor within the purview of the consultant concept is not so simple. Because of the highly technical nature of many of their functions, governmental agencies rely on private consulting firms for expert advice and technical information. These private organizations, however, are providing similar expert information to the industries or groups being regulated by the agency. This may result in a serious conflict of interest problem.

If the intent of Proposition 9 is to lessen the effects of wealth on government,<sup>157</sup> it would seemingly do violence to that intent to allow the Energy Commission, for example, to formulate energy policies and programs on the basis of advice supplied by a group closely allied to Pacific Gas and Electric, or from PG & E itself.

Although the spirit of Proposition 9 may dictate that the independent contractor should be designated a public official, there are also pragmatic considerations. If the independent contractor is included within the definition of "consultant", governmental agencies will be precluded from utilizing this information source. The rendering of advice by a consultant would be a decision by a public official which affects the official's financial interests (his other sources of income). Any agency decision based upon the contract information would be suspect, and subject to being voided pursuant to Section 91003. Agencies which require technical advice to administer their programs must deal with a relatively small body of public and private entities qualified to do the required research. Finding firms who have the requisite knowledge, but have not had income from someone who might be affected by a resulting decision, is a near impossibility.<sup>158</sup> Nor, as a practical

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156. See *Meeting of the Fair Political Practices Commission*, Nov. 5, 1975, transcript at 11-12 (testimony of Delbert Spurlock).

157. CAL. GOV'T CODE §81001(a).

158. *Hearings on the Conflict of Interest Provisions of Proposition 9 Before the Fair Political Practices Commission* Oct. 23, 1975, transcript at 44 (testimony of Irwin Lichten) [hereinafter cited as FPPC Hearings No. 2].

matter, could the governmental agency tell an independent contractor that the firm would become a public official by virtue of the contractual relationship; the agencies would have few takers for their projects. The situation was summarized by an Air Resources Board representative who indicated that if the independent contractor was designated as a consultant, it would "bring our research program to a screeching halt."<sup>159</sup> A similar state of affairs exists in other agencies.<sup>160</sup>

This was the dilemma facing the FPPC as it struggled to clarify the term "consultant". While the drafters of Proposition 9 may have intended a broad definition of consultant which would include all independent contractors,<sup>161</sup> this approach<sup>162</sup> was rejected. Since it would be both physically and fiscally burdensome for governmental agencies to develop in-house expertise and research facilities, the agencies necessarily must rely on outside sources of information and advice.

In adopting its regulations, the FPPC has limited "consultants" to natural persons<sup>163</sup> who have a certain qualitative relationship with the agency. A consultant includes any natural person who contracts to provide information, advice, recommendation, or counsel to a state or local government agency, but does not include persons who are independent of the agency and possess no authority with respect to decision-making beyond the rendition of the information or advice.<sup>164</sup> It was felt that a basic distinction between the employee and the independent contractor was the exercise of independent methodology, judgment, and responsibility for the results under the contract on the part of the independent contractor.<sup>165</sup> Thus, those private contract consultants who

159. FPPC Hearings No. 2, *supra* note 158, transcript at 55 (testimony of Larry Haas).

160. See FPPC Hearings No. 2, *supra* note 158 transcript at 44-50 (testimony of Irwin Lichten, Energy Comm'n); see *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 43 (testimony of David Kaplan, Sacramento Municipal Utility District).

161. See generally *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 53-54 (remarks by Commissioner Brosnahan).

162. STATE OF CALIFORNIA, FAIR POLITICAL PRACTICES COMMISSION, *Proposed Regulations on Conflicts of Interest*, Alternative I, Draft of "Consultant," for 2 CAL. ADMIN. CODE §18700(a)(2) (Dec. 23, 1975) (not adopted).

163. 2 CAL. ADMIN. CODE §18700(a)(2). The term "public official" as used in Government Code Section 87100 has also been limited to natural persons. 2 CAL. ADMIN. CODE §18700(a). This is a reconciliation between the definition of "person" contained in Government Code Section 82047, which defines "person" as both individuals and business entities, and the language of Section 87100, which provides that "no official shall . . . use his official position . . ." (emphasis added).

164. 2 CAL. ADMIN. CODE §18700(a)(2).

165. *Meeting of the Fair Political Practices Commission*, Nov. 5, 1975, transcript at 15-16 (testimony of Delbert Spurlock). Agency representatives equate the information and advice provided by the independent contractor with the scientific method, and maintain that the utilization of this "value free" scientific research by the decision-maker involves no conflict of interest problem. FPPC Hearings No. 2, *supra* note 158, at 42-44 (testimony of Irwin Lichten).



function basically as part-time employees of the agency will be covered by the Act's prohibition, whereas those independent contractor consultants who do independent research using their own facilities and research data and have no decision-making authority would not be covered by Section 87100's prohibition.<sup>166</sup>

Underlying the definition of a consultant in the FPPC's regulation is the belief that recommendations and information produced independently of the agency will be impartial. However, the impartiality which Proposition 9 requires means that the consultant should act independently of any outside influence, not independently of the agency. Although the consultant may arrive at conclusions without agency direction and may have no connection with the agency other than the delivery of a report or recommendation, he may still have a financial interest in its other customers and those "other customers" may well be affected by the agency decision based upon the consultant's advice.<sup>167</sup>

While all contingencies cannot be anticipated and resolved by the FPPC's regulations, precautions must be taken not to compromise the concept of the consultant as a public official to the point of meaninglessness. Although the regulations will not cover the independent contractor who may have financial interests which would prompt disqualification pursuant to Section 87100, the FPPC feels that governmental agencies can promulgate their own conflicts of interest codes to focus on these persons.<sup>168</sup> Defining public officials to include persons who contract to provide advice to an agency would only make those persons public officials; it would not establish the violation of the conflicts of

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166. In recent application of this regulation, the FPPC found that in the case of a Sonoma County project architect authorized by contract to represent the county in the administration of the construction contract and in the county's dealings with the contractor, authorized to supervise any project inspector that might be hired, and authorized to issue payment certificates for work completed in amounts the architect deemed proper, the architect's authority clearly exceeded the giving of advice or recommendation. F.P.P.C. Opinion 75-159, at 4 (Tentative Draft No. 1, Jan. 23, 1976). The FPPC determined that:

The standard established by the Commission's regulation, *supra*, in defining the term "consultant" excludes from the coverage of the Act a broad array of functions which may be performed by a contract consultant. However, where, as here, there is a significant delegation of governmental power and authority to a contract consultant to commit the agency to a particular course of conduct, the consultant's activities do not place him within the excluded category.

*Id.* at 4-5.

167. Since the consultant concept has been limited to "natural persons," the consulting organization or firm with whom the government contracts will not be the "consultant" in this instance; the *employee* who actually does the work on behalf of the firm and delivers the service would be identified as the consultant. *Meeting of the Fair Political Practices Commission*, Nov. 5, 1975, transcript at 29 (discussion between Delbert Spurlock and Commissioners). See note 163 *supra*.

168. FPPC Hearings No. 2, *supra* note 158, transcript at 59-60 (testimony of Delbert Spurlock).

interest law. By defining the term "consultant" in this manner, the Commission's regulation gives each agency the opportunity to deal specifically, in its own conflicts of interest code, with problems encountered in the agency's utilization of independent contractors.<sup>169</sup> Agencies may develop specified prohibition and disclosure requirements tailored to their own needs.<sup>170</sup> Disqualification in certain aggravated circumstances could be required by the agencies.<sup>171</sup> The FPPC is the code reviewing body for many agencies,<sup>172</sup> and can review the appropriateness of the agency codes with the consultant problems in mind.<sup>173</sup> Although independent contractors are not subject to the prohibition of Section 87100, particularized treatment in agency codes should prevent this exception from becoming a large loophole in the Act.

## 2. Disqualification: What is forbidden?

Government Code Section 87100 forbids officials with conflicts of interest to make, participate in making, or in any way attempt to influence a governmental decision. The FPPC has adopted regulations defining these activities,<sup>174</sup> and the primary consideration in the regulations is the connection with making the decision or the capability of influencing it. Thus, the making or participating in a governmental decision does not include those actions of a public official which are solely ministerial, secretarial, manual, or clerical; nor does it include appearances by the official as a member of the general public before an agency regarding solely personal interests.<sup>175</sup> Otherwise, an official makes a governmental decision whenever, within the authority of his office, he votes on a matter, appoints a person, obligates the agency to any course of action, or enters into any contractual agreement on behalf of the agency.<sup>176</sup> Similarly, an official who negotiates in any manner with a governmental entity or private person regarding a decision, who participates in discussions or debates, or who advises or makes recommendations to the decision-maker is participating in the making of a governmental decision.<sup>177</sup> Furthermore, an official who

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169. *Id.*

170. *Meeting of the Fair Political Practices Commission*, Nov. 5, 1975, transcript at 15-16 (testimony of Delbert Spurlock).

171. *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 57-58 (remarks by Chairman Daniel Lowenstein).

172. CAL. GOV'T CODE §82011.

173. *See* CAL. GOV'T CODE §87303. *Meeting of the Fair Political Practices Commission*, Jan. 6, 1976 (testimony of Delbert Spurlock). The Commission may also assist in the formulation of the codes. CAL. GOV'T CODE §83113(c). *See* CAL. GOV'T CODE § 87312.

174. 2 CAL. ADMIN. CODE §18700(b).

175. 2 CAL. ADMIN. CODE §§18700(d)(1), (2).

176. 2 CAL. ADMIN. CODE §18700(b)(1)(2)(3)(4).

177. 2 CAL. ADMIN. CODE §18700(c)(1)(A), (D), (E).

conducts research or investigations, or prepares any report, analysis, or opinion regarding the decision also "participates" when these materials are made available to the decision-makers. The proscription against attempting to use an official position to influence a governmental decision applies not only to the furtherance or promotion of a decision within or before the official's own agency, but also includes such activities before any agency appointed by, or subject to the budgetary control of, the official's agency.<sup>178</sup>

### *3. Disqualification: When is Decision-Making Prohibited?*

A public official who has a financial interest which may be affected by his decision in a given instance is not automatically disqualified from the decision-making process. The prohibition of Section 87100 is applicable only after it has been determined that: (1) the official's participation is not legally required; (2) the decision may affect an economic interest of the official described in Section 87103; (3) the effect on the official's interest is "reasonably foreseeable"; (4) the financial effect on the official's interest will be material; and (5) the effect on the official's interest is distinguishable from the effect on the public generally. Each of these elements must be present before disqualification occurs.<sup>179</sup> The Political Reform Act, however, does not define these threshold requirements, necessitating interpretation by FPPC regulation and opinion.

#### *a. Legally required participation*

The fact that an official's participation in decision-making is legally required is an affirmative defense to liability for an existing conflict of interest.<sup>180</sup> In interpreting this disqualification exception, the FPPC regulation<sup>181</sup> adopts the common law rule of necessity, that is, the official may participate despite a conflict if there is no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.<sup>182</sup> Thus, if the one person with decision-making authority has a conflict of interest, the official's participation will be deemed legally required. The official may participate only after the conflict's existence has been disclosed, described, and the official

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178. 2 CAL. ADMIN. CODE §18700(e)(1)(2).

179. CAL. GOV'T CODE §§87101, 87103; *See* 1 F.P.P.C. OPS. 198 (No. 75-089, Dec. 4, 1975).

180. CAL. GOV'T CODE §87101.

181. 2 CAL. ADMIN. CODE §18701.

182. 2 CAL. ADMIN. CODE §18701(a). The existence of the official's financial interest must be made part of the agency's public record.

has indicated why there is no alternative to his participation.<sup>183</sup> To further prevent the rule of necessity from becoming a loophole, the regulation provides that the exception should be narrowly construed, and reiterates the provision that tie-breaking is not "legally required" participation.<sup>184</sup>

*b. Foreseeability and Material Financial Effect*

Central to the purpose of the conflicts of interest law is the prevention of personal enrichment at the expense of the public interest, or even the appearance of this enrichment. By requiring that the effect on an official's financial interest be foreseeable and material before disqualification occurs, the Act contemplates situations in which the effect of an official's decision on any investment, property, or income source will be so minimal that it cannot be reasonably inferred that the official's decision would be partial.<sup>185</sup>

*i. Foreseeability*

The disqualification provisions require that the material financial effect be foreseeable, not certain. The point at which likelihood or probability becomes foreseeability was considered in an FPPC opinion<sup>186</sup> requested on behalf of the Board of Directors of the Marin Municipal Water District (hereinafter MMWD). In that opinion, a construction industry supplier, McPhail, was a member of the Board of Directors, and the director's ability to participate in discussions or to vote regarding the lifting of a moratorium on new water connections was questioned. Over half of McPhail's business was conducted within the MMWD, and his organization had relative market shares of business within the MMWD of approximately one-third of all ready-mix concrete, approximately one-fourth of all building materials, and approxi-

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183. 2 CAL. ADMIN. CODE §18701(b)(1), (2). In a proposed draft of this regulation, it was provided that the official could participate in the decision if his disqualification would result in "immediate and irreparable injustice," and if there was no alternative source of decision. STATE OF CALIFORNIA, FAIR POLITICAL PRACTICES COMMISSION, *Proposed Regulations on Conflicts of Interest*, Draft of "Legally Required Participation," for 2 CAL. ADMIN. CODE §18701 (Dec. 23, 1975) (not adopted). California case law supported this approach, see, e.g., *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal. 2d 344, 139 P.2d 908 (1943), but the Commission felt that the unquantifiable concept of injustice broadened the definition of "legally required participation" significantly, especially since "irreparable injustice" to the official could become confused with "injustice" to the public interest. Consequently, the irreparable injustice provision was stricken. *Meeting of the Fair Political Practices Commission*, Jan. 6, 1976 (remarks by Commissioner Carpenter).

184. 2 CAL. ADMIN. CODE §18701(c).

185. *Meeting of the Fair Political Practices Commission*, Dec. 4, 1975, transcript at 3-5 (testimony of Delbert Spurlock).

186. 1 F.P.P.C. OPS. 198 (No. 75-089, December 4, 1975).

mately one-fifth of all major appliances.<sup>187</sup> The Commission determined that since building activity would definitely increase within the MMWD as a result of lifting the moratorium, McPhail would be provided with significant opportunities for his business to increase its sales within the MMWD. These factors were sufficient to meet the "reasonably foreseeable" requirement of Section 87103.<sup>188</sup>

In the same opinion, the Commission reached a contrary result regarding another MMWD director. This director had a financial interest in the decision to lift the moratorium by virtue of a community property interest in a spouse's salary; however, the FPPC found that the effect of the decision on this income interest was not reasonably foreseeable. The spouse was employed as a project engineer for a construction firm specializing in large commercial structures. Although currently engaged in a project within the MMWD, the firm's project did not require a variance from the moratorium. The firm's only other jobs within the MMWD occurred ten years previously. Furthermore, the director's spouse was assigned to a project outside of the MMWD, and was expected to be employed in that capacity until 1978. This opinion seems to indicate that remoteness in time is a factor to be considered in determining whether an effect is foreseeable; that something *may occur sometime* in the future cannot be reasonably associated with a decision that must be made *now*.

## ii. Material Financial Effect

The FPPC regulation regarding material financial effect provides a general theory of materiality through a "reasonable person" approach, as well as more specific guidelines which will enable officials to apply the "reasonable person" theory to specific factual situations. According to the regulation, the financial effect is material if a reasonable person viewing the nature of the decision and its potential effect on the official's interest would conclude that the existence of the financial interest might interfere with an impartial exercise of an official's judgment.<sup>189</sup> Although the regulation sets forth dollar and percentage amounts which approach "materiality", it specifically states that the figures are for guidance only and should be considered only in conjunction with all other relevant factors in determining whether a financial effect is material and if it will interfere with impartial decision-making.<sup>190</sup> Other relevant factors might be the size or amount of diversification

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187. *Id.* at 207-208.

188. *Id.* at 207.

189. 2 CAL. ADMIN. CODE §18702.

190. 2 CAL. ADMIN. CODE §18702(b).

of the business entity, or the percentage of the relevant market held by the business.<sup>191</sup>

There was some concern prior to the adoption of the regulation as to the proper treatment of a "continuing relationship" situation. For example, could an architect who advises a city regarding the need for a new library submit a project plan that the city would be able to accept? Could the attorney who recommends to a city that it pursue litigation prosecute the subsequent lawsuit? In each case a financial interest of the consultant would be materially affected by his decision, and cause for suspicion as to the decision's impartiality would exist. The regulation, however, provides that the effect is not material if the decision comprehends only the modification, perpetuation, or renewal of a contractual or retainer agreement, and/or the opportunity to bid competitively upon a project or contract.<sup>192</sup>

The continuing relationship concept has undergone further interpretation by FPPC opinion. In the *Botz* opinion,<sup>193</sup> a Sonoma County project architect had the authority to make decisions and render advice which would increase the cost of the project and thereby increase the architect's fees, the fee being based upon a fixed percentage of the final project cost. This was held not to be a "modification" of the contract, and thus did not fall within the regulation's exclusion. The Commission held that the terms "modification, perpetuation, and renewal" were descriptive of separately concluded formal or informal agreements between the parties, and that the "exclusion would allow consultants to render advice or make recommendations which, if adopted, might lead to subsequent action by the governmental agency that would result in an increased use of the consultant's services."<sup>194</sup> This provision does contemplate, for example, the subsequent retainer of the attorney who recommended litigation and the submission of final design plans by an architect who furnishes advice concerning the construction of a new public building.

While this provision regarding contract consultants and advisors will eliminate the duplication and waste which could result in some project situations, the arrangement does not necessarily protect the public's in-

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191. The FPPC found, for example, that the financial effect of MMWD Director McPhail's decision to lift the moratorium would not only be foreseeable, but also material, given the size of his business, the portion of his total business conducted within the MMWD, his percentage of the total market for his products, and the "significant opportunities for McPhail's business to increase its sales within the MMWD." 1 F.P.P.C. Ops. 198, 207-208 (No. 75-089, Dec. 4, 1975).

192. 2 CAL. ADMIN. CODE §18702(c).

193. F.P.P.C. Opinion No. 75-159 (Tentative Draft No. 1, Jan. 23, 1976).

194. *Id.*

terest in impartial decisions. The consultant may have conflicts which should trigger the prohibition provision in Section 87100, but which will not because the regulation specifies that the advisor's decision has no material financial effect on his financial interests. It is not uncommon for the initial plans of a project to be structured so that the "consultant" is in a good position to receive the final contract.<sup>195</sup> Since a material financial effect is a prerequisite to disqualification pursuant to Section 87100, these potential conflicts of interest have been defined into non-existence.

While monetary values meant to approximate materiality may be somewhat unrealistic in terms of the existence of a conflict, other factors are also considered. The regulation suggests a case-by-case approach wherein the regulation guidelines will become more concrete through Commission opinions. The flexibility of this approach will be particularly useful when specific dollar amounts of a financial effect are not ascertainable, or where absolute numbers do not represent a financial effect.

*c. Effect on the Public Generally*

The primary requisite of a disqualifying interest is that the effect of the decision on the financial interest of the public official must be distinguishable from its effect on the public generally.<sup>196</sup> Although the other elements may be present, if a decision's effect on the official's financial interest is indistinguishable from its effect on the public generally, the official may participate in the decision-making. In defining "the public generally", a FPPC regulation<sup>197</sup> provides that a material financial effect of a governmental decision on an official's financial interest is distinguishable from its effect on the public generally unless the decision affects at least a significant segment of the public in the same manner. It is not necessary for every citizen of the jurisdiction to be affected identically by every governmental decision,<sup>198</sup> but unless a substantial number of citizens are affected in the same way as the official, an official may be susceptible to charges of acting in his own self-interest on a particular decision. This regulation attempts to dis-

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195. *Meeting of the Fair Political Practices Commission*, Dec. 4, 1975, transcript at 46 (testimony of Mike Burkhart, Common Cause).

196. CAL. GOV'T CODE §87103. If an official's participation is legally required, the official may participate in decision-making even though the effect will be distinguishable, CAL. GOV'T CODE §87101. See text accompanying notes 180-184 *supra*.

197. 2 CAL. ADMIN. CODE §18703.

198. Memorandum to the Fair Political Practices Commission from Chairman Daniel Lowenstein, "Distinguishable from the public generally" at 1-2 & n.1 (Dec. 29, 1975).

tinguish between very general economic interests shared by other members of the public, and the very particularized interests of an official which should cause disqualification.

The principal question facing the Commission in adopting this regulation was: How much of the public constitutes a "significant segment"? While this concept is not reducible to a numerical or mechanical solution, certain situations were encountered so frequently among public officials that they required Commission interpretation. The primary issue with which the Commission struggled was whether an industry, trade, or profession could constitute such a significant segment of the public that it is tantamount to the public generally. If a trade, industry, or profession is a significant segment, there is no conflict of interest if any benefit which results from a governmental decision accrues to the official as well as to members of such trade, industry, or profession. The interests of these groups, however, do not necessarily coincide with the public interest, and state and local governments are well-populated with members of trades, industries, and professions who are serving in a dual capacity. For a member of a council, board, or commission, or other governmental agency to make decisions which will benefit his own industry or group is precisely the type of conflict that the Act was intended to obviate, and the consensus of the Commission was that such groups should not be defined as constituting a significant segment of the public generally.<sup>199</sup>

A provision of the Moscone Act clearly permitted an official to act when his financial interests were affected in the same manner as the rest of the industry, profession, or occupation.<sup>200</sup> Although it could be argued that the same doctrine was intended to be embodied in the Political Reform Act, a more persuasive argument reveals that since the same language could have been specifically included in the Act and was not, its omission was intentional. Given this intentional omission and the purposes of the Act, it would have been a simple matter for the FPPC to exclude trades, industries, and professions from the purview of the significant segment concept.

However, the problem is complicated by the fact that certain boards and commissions have been established expressly for the purpose of serving particular industries. Participation on these boards by members of a specified group or by members of an industry is legislatively mandated by the authorizing body. Marketing order advisory boards

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199. *Meeting of the Fair Political Practices Commission*, Jan. 6, 1976 (discussion concerning "effect on the public generally").

200. CAL. GOV'T CODE §3625(e) (currently inoperative, *see* note 14 *supra*).



and professional licensing boards are examples of this legislatively mandated participation.<sup>201</sup> Financial interests dictate the composition of these boards and commissions. Furthermore, many of these boards include public members, an apparent recognition that the board or commission is not representative of the public generally.<sup>202</sup> Proposition 9 establishes a broad prohibition which states that public officials should not participate in the decision in which they have a financial interest. If the Act is interpreted strictly, industry representatives could never participate in matters affecting their industry or profession; where the entire board or commission is composed of industry representatives, the board would have to be disbanded. The Commission was faced with reconciling the intent of Proposition 9 with these statutorily authorized conflicts of interest.

The Commission was of the opinion that, given the blanket prohibition of the conflicts law, to carve an exception for a particular type of agency or group would border on legislating by the Commission rather than merely interpreting and clarifying the meaning of the statute.<sup>203</sup> It was suggested that where the legislature has established programs which specifically benefit particular groups, such as the agriculture department's marketing boards,<sup>204</sup> perhaps the private interest is identical to the public interest as defined by the legislative purposes of the programs being administered.<sup>205</sup> That is, if the boards and commissions, by benefitting a particular industry or group, actually benefit the public generally, the interests of the board members are indistinguishable from those of the public generally.

Early drafts of the regulation provided that when a statute expressly required or authorized the appointment or election of representatives of a trade, industry, or profession, such groups constituted a significant segment of the public generally.<sup>206</sup> This classification, however, was deemed too blatantly contradictory to both the intent and language of

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201. CAL. AGRIC. CODE §58842 (marketing advisory boards); see, e.g., CAL. BUS. & PROF. CODE §2101 (qualifications of the members of the Board of Medical Examiners).

202. *Meeting of the Fair Political Practices Commission*, Jan. 16, 1976 (testimony of Ken Finney). See STATE OF CALIFORNIA, FAIR POLITICAL PRACTICES COMMISSION, *Alternative Proposed Regulation, for 2 CAL. ADMIN. CODE §18703(b)* (Jan. 15, 1976) (not adopted).

203. See note 218 *infra* and accompanying text. See *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 150 (testimony of Ken Finney).

204. CAL. AGRIC. CODE §§58841-58851 (Marketing Act of 1937, advisory boards and committees).

205. Memorandum to the Fair Political Practices Commission from Chairman Daniel Lowenstein, "Distinguishable from the public generally" at 6 (Dec. 29, 1975).

206. See, e.g., STATE OF CALIFORNIA, FAIR POLITICAL PRACTICES COMMISSION, *Proposed Regulations on Conflicts of Interest*, Draft of "Effect on the Public Generally," for 2 CAL. ADMIN. CODE §18703(b) (Dec. 23, 1975) (not adopted).

Proposition 9, especially since many of these boards and commissions have been attacked in recent years by critics charging that they protect the industry or profession at the expense of the public interest.<sup>207</sup> The FPPC has declined to presume a present legislative intent to create exceptions to the general conflict of interest rules on the basis of previously enacted statutes; statutes passed under circumstances which could not have contemplated the sweeping prohibition of Proposition 9. The Commission's regulation in effect requires the legislature or other governmental authority which created the boards to re-legislate the boards and commissions with a specific reference to the Political Reform Act. The new legislation will have to contain a specific finding by the authorizing body that for the purposes of membership of the boards, the trade, industry or profession constitutes the public generally within the meaning of Government Code Section 87103.<sup>208</sup> This provision is intended to prompt the Legislature or local legislative body to reconsider, in light of the Act, whether the occupational group ought to be represented.<sup>209</sup> Specifically, until January 1, 1979, a trade, industry, or profession will constitute a significant segment of the public if the provision of law creating the officials' agency, board, or commission requires or authorizes members of the trade, industry, or profession to hold such office.<sup>210</sup> After that date, absent the re-legislation of the board or commission, which includes the finding and declaration regarding the Political Reform Act and "the public generally," the group will constitute a significant segment if the Commission so determines.<sup>211</sup>

Other trade and professional groups will constitute a significant segment of the public only if an *elected* official represents a constituency wherein the particular trade, industry, or profession is the predominant one in the official's jurisdiction.<sup>212</sup> This provision recognizes that a district composed primarily of farmers or university employees may elect members of the prevailing group to a governmental body, the rationale being that the private interest of the official will coincide with the public interest of the district under these circumstances. The FPPC regulation also provides that in the case of an elected state officer,<sup>213</sup> an industry, trade or profession of which he is a member consti-

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207. See *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 176-183 (testimony of Lisa Speer, Representative of California Citizens' Action Group).

208. 2 CAL. ADMIN. CODE §18703(c).

209. *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 198 (remarks by Chairman Daniel Lowenstein).

210. 2 CAL. ADMIN. CODE §18703(d).

211. See 2 CAL. ADMIN. CODE §18703(d).

212. 2 CAL. ADMIN. CODE §18703(b).

213. See note 68 *supra*.

tutes a significant segment of the public.<sup>214</sup>

The FPPC regulation concerning the "public generally" was not adopted in a vacuum. The Commission had been confronted with the problem in the case of the director of the Marin Municipal Water District.<sup>215</sup> Recognizing that the lifting of the moratorium would have a financial effect upon most business entities, investments in real property, and thus sources of income within the MMWD, the Commission found that because of the market share held by McPhail within the district, the financial effect of the decision upon McPhail's business was "distinguishable from the financial effect of the decision on business entities, investments in real property and sources of income within the district in general."<sup>216</sup> Moreover, the FPPC held that the effect differed "demonstrably."<sup>217</sup>

In determining whether an industry, trade, or profession could constitute a significant segment of the public generally when its members sit on boards and commissions designed to benefit the trade, industry, or profession, the FPPC encountered its only irreconcilable conflict between the theory and language of Proposition 9 and the realities of conducting government. Perhaps it was correct in deferring to the legislature and local legislative bodies on this matter, since resolution would entangle the Commission in legislative policy decisions.<sup>218</sup>

The legislature is now faced with effecting the reconciliation between theory and reality, and this may be possible if the *overall* intent of Proposition 9 is given an added dimension. The concept of "the

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214. 2 CAL. ADMIN. CODE § 18703(a).

215. 1 F.P.P.C. OPS. 198 (No. 75-089, Dec. 4, 1975).

216. *Id.* at 207.

217. *Id.* at 208. The Commission found that while "[b]usiness entities and persons in the district may benefit in a general way since some property values may increase, retail sales may increase or employment and investment opportunities may increase," McPhail would be in a position "to realize immediate, substantial and specific financial gains as a result of renewed building activity." *Id.*

218. Critics of the boards disavow their protection of the public interest, see *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 176-83 (testimony of Lisa Speer), defenders of the advisory boards insist that they operate in the public interest in the long run, *Meeting of the Fair Political Practices Commission*, Dec. 2, 1975, transcript at 144-49 (testimony of Tim Wallace). The Commission felt it was not its function to resolve such policy disputes, but that of the legislative bodies. Memorandum to the Fair Political Practices Commission from Chairman Daniel Lowenstein, "Distinguishable from the public generally" at 6 (Dec. 29, 1975). As FPPC Chairman Lowenstein stated the issue for the commission:

The Political Reform Act, which is concerned with the integrity of governmental processes and not with the content of governmental programs, does not purport to prevent the legislature from setting up programs to benefit particular industries. Nor does the Act prevent the legislature from creating boards and commissions to administer such programs and directing such boards and commissions to carry out the legislative purpose to benefit the particular industries.

*Id.*

public" is not synonymous with that of the "public interest." The public consists of a number of competing groups with different goals, policies and demands, whereas the public interest emerges from the competing interests of various societal groups. It is this public interest with which Proposition 9 should ultimately be concerned. What the FPPC regulation apparently ignores, and what the State Legislature and local legislative bodies should focus upon, is this ingredient of competition. A trade, industry, or profession, for instance, may constitute a significant segment of the public when elected state officers and certain other elected officials are members of these groups.<sup>219</sup> This is a realistic acceptance of the idea of competing interests. These officials have competed for their positions and have been chosen to represent the interests of their constituents. Their financial interests and affiliations have been disclosed and the "public trust" has been placed in their hands. Should they violate this trust at the expense of the public interest, elected officials may be turned out of office.

Competition is lacking, however, when the special interests of trades, industries, and professions are promoted by administrative control bodies. Lack of competition breeds neglect of the public interest. Although the boards and commissions affect the public interest, they do not necessarily represent the public interest, nor are they accountable for protecting it. It is recognized that the expertise and specialized knowledge of these board members are necessary for the proper functioning of the boards, and membership by representatives of the affected group should not be eliminated altogether. While competition and accountability are unavailable in the selection of these boards and commissions, the public interest can still be achieved by introducing competition to the boards' deliberative processes. Industry representatives should not be allowed to dominate these boards; the public's representation should equal or exceed that of the industry. The proposals and recommendations of industry representatives would have to *compete* with the public interest as represented by the public members. These boards and commissions would be a microcosm of "the public generally." Care must be taken, however, to ensure that the public members are truly representative of the public, and not representative only of a different trade, industry, or profession. If the public interest is to emerge, special interest groups should not be allowed to dominate the determination of what is in the public interest. This is a conflict of interest in fact as well as in appearance.

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219. 2 CAL. ADMIN. CODE §18703(a), (b).

### CONCLUSION

"All basic reforms face a moment, early in their lives, when they either improve the level of conduct or increase the level of hypocrisy in their fields."<sup>220</sup> The FPPC confronted that "moment of truth" for the conflict of interest portion of the Political Reform Act in the adoption of the administrative regulations governing conflicts; for the most part the Act has emerged the victor. Through a set of strict disclosure and disqualification provisions and their attendant publicity, tough penalties, and an effective enforcement mechanism, Proposition 9 provides a potent conflicts of interest law. However, the language of the law, particularly in the prohibition sections, is amorphous, and the FPPC was faced not only with the task of rendering the Act more understandable to the broad spectrum of "public officials" subject to the Act's provisions, but also had to reconcile the spirit of Proposition 9 with the realities of public office holding.

The regulations were not meant to be the definitive answer to the myriad of problems raised by the complex Act. Many of the questions posed to the Commission apparently defy definite solution. Many cases must be dealt with individually, and for these cases the FPPC has available its opinion-rendering powers.<sup>221</sup> Some questions are sufficiently recurring and capable of definition, and the Commission has been able to provide some guidelines as to their resolution. Given the far-reaching effects of the conflicts of interest law, a combination of opinions and guidelines is the most appropriate method of dealing with the diverse problems which will arise.

There have been some instances in which the spirit of Proposition 9 has collided with the realities of politics. The Commission has been less than diligent in keeping within the spirit of the Act in its treatment of "consultants," but the agency conflicts of interest codes can rectify the deficiencies in the regulations, and the agency codes may even be the most appropriate vehicle with which to handle the problem.<sup>222</sup> There is no harm done by reading "significant segment" back into the definition of "the public generally", and without that qualification the "public generally" would cease to be a meaningful limitation on official decision-making. The Commission's alternatives regarding the boards and

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220. Broder, *Political Spending Spending: Reform and Hypocrisy*, Los Angeles Times, Sept. 24, 1975, pt. II, at 7, col. 3.

221. The FPPC is considering amendments to previously adopted regulations, 2 CAL. ADMIN. CODE §§18320-18325, which will make its opinion-rendering process more efficient. STATE OF CALIFORNIA, FAIR POLITICAL PRACTICES COMMISSION, *Proposed Regulation Amendment*, Draft No. 1, for 2 CAL. ADMIN. CODE §§18320-18325.

222. See CAL. GOV'T CODE §87312 (each agency is responsible for the adoption of a code appropriate to its individual circumstances).

commissions with built-in conflicts of interest have been limited, and the FPPC has correctly chosen to defer to the legislative bodies.<sup>223</sup>

Since every question cannot be answered in advance, nor can every problem be solved before it arises, guidelines are the most workable technique to resolve conflicts problems. Guidance is what the Commission has provided.

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223. As this volume goes to press, a suit by various consumer groups challenging the Commission's interpretation of "distinguishable from its effect on the public generally" is pending. The suit requests, *inter alia*, the vacation of the FPPC regulation concerning "the public generally," 2 CAL. ADMIN. CODE §18703, and the enforcement of the conflicts of interest provisions against all state agencies, boards, bureaus, and officials whose members have a conflict of interest by reason of their industry, trade, or profession. Consumers Union of United States, Inc., et al. v. California Milk Advisory Board, et al. Superior Court, City and County of San Francisco, #705856, May 5, 1976.