

CONFLICTS OF INTEREST: KNOW WHO YOUR “FRIENDS” ARE

Presentation by Grant Herndon

The year was 1922. President Warren G. Harding found himself embroiled in a scandal following his transfer of Naval oil reserves at Elk Hills, California, and Teapot Dome, Wyoming, to the Department of the Interior. The Wall Street Journal reported that Harding's Secretary of the



Interior leased the oil fields without competitive bidding to two oil company executives who had lent him large sums of money, much of it interest-free, which he used to improve his New Mexico ranch. A lengthy Senate investigation followed. The Secretary resigned from office a year later and was found guilty of bribery, for which he was fined \$100,000 and sentenced to a year in prison. This and other scandals involving his political appointees prompted Harding to remark, “I have no trouble with my enemies.

I can take care of my enemies all right. But my damn friends. They're the ones that keep me walking the floor nights.” The oil fields were returned to the government when the Supreme Court invalidated the leases in a 1927 decision.

“I have no trouble with my enemies. I can take care of my enemies all right. But my damn friends. They're the ones that keep me walking the floor nights.”

-Warren G. Harding

➡ **FAST FORWARD TO THE PRESENT:** It is more important than ever for California education officials to know who their “friends” are for conflict of interest purposes. Understanding some of the basic relationships which can trigger a conflict of interest will help superintendents/chancellors and board members steer clear of the serious consequences and negative press that can result from conflict of interest violations.

California has two major conflict of interest laws: Government Code section 1090 (a version of which was on the books before Harding's presidency) can prohibit the entire board from approving a transaction in which just one member has a financial interest. The post-Watergate Political Reform Act requires key decision makers to file annual statements of their economic interests (Form 700) and to abstain from decisions impacting their finances. It requires officials to disqualify themselves from decisions which will impact their financial interests. Severe penalties, including criminal penalties, can result from violations of either statute, not to mention grave political consequences.

This article is intended to help educational officials continue to hone their instincts in the area of conflict of interest. It is not intended to be an exhaustive discussion of all of the many legal aspects of this topic. The law contains numerous exceptions and “safe harbors” that may allow a transaction to proceed despite an apparent conflict. The application of these exceptions can turn on the smallest nuances of fact, and many remain subject to interpretation by the Attorney General, Fair Political Practices Commission and the Courts. The exceptions will be generally discussed in this article, but any actual issue facing a district should be carefully reviewed with legal counsel as early as possible in the process. In some instances, a transaction can proceed with proper planning if conflict issues are spotted early on. In other instances, a transaction is simply prohibited and prompt discussion helps make officials aware of the issues and avoid serious consequences. Important tools will include your district’s local “conflict of interest code,” FPPC Forms 700 filed by employees and board members, and any board policies on the subject.¹

WHAT KINDS OF DECISIONS CAN TRIGGER A CONFLICT OF INTEREST?

Government Code section 1090 focuses on financial interests on the part of an official or a board on which the official serves. These can include contracts, employment of a person connected with the official, and other financial transactions. The Political Reform Act looks at any official government decisions which may impact by the financial interests of officials involved in the making of the decision.

Officials who learned too late the impact of conflict of interest rules:

*~~**Bill Honig**, State Superintendent of Public Instruction, was convicted on felony conflict of interest charges relating to transactions with a nonprofit group headed by his wife.*

*~~**Hubert Call**, a San Francisco city council member who sold land to the city through third parties. The city was permitted to keep the land, and Call was ordered to disgorge the amounts paid to him by the city.*

WHOSE FRIENDS DOES THE DISTRICT NEED TO WORRY ABOUT?

Government Code section 1090 applies to the principal decision-makers in a school or community college district.² Its impact is not limited to board members who vote on transactions with the district. Staff members (and in some instances even consultants) who advise the board or are involved in the preliminary steps of the contractual process can trigger a 1090 violation.

¹ K-12 districts which are CSBA members should consult Board Bylaw 9270, last amended in November 2003. It is important to keep this Bylaw updated and review it with your Board.

² While this article focuses on school and community college districts, the principles discussed will also apply to county boards of education, county superintendents of schools, and other education entities such as regional occupation programs.

Relationships on the part of staff members may trigger a conflict of interest if the role of a staff member (or the staff member's spouse or registered domestic partner ["RDP"]) is any of the following:

- ✓ Participation in the negotiations, reasoning, planning, and other preliminary matters prior to concluding a contract. (85 Ops.Cal.Atty.Gen. 34 (2002))
- ✓ Conducting extensive investigations and preparation of detailed proposals relating to the contract. (*San Diego City Council v. McKinley* (1978) 80 Cal.App.3d 204)
- ✓ "Give and take which goes beforehand." (*Stigall v. City of Taft* (1962) 58 Cal.2d 565)
- ✓ Advising the Board regarding a contract. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278)

EXAMPLE: A facilities employee who is a partial owner of a construction company has no contact with the Board concerning a construction contract on which the construction company is likely to bid. However, the employee works on the initial planning for the project and helps draft contract specifications. The employee's participation in the contractual process may trigger a 1090 conflict.

The Political Reform Act focuses on "public officials," defined as every member, officer, employee of a local government agency, as well as certain consultants who function in a staff capacity or as agents of the agency.³ The Act extends to anyone involved in the "making" of a governmental decision. An official is considered to be participating in the making of a governmental decision when doing any of the following:

- ✓ Voting on a matter or otherwise obligating the agency to a course of action
- ✓ Negotiating, without significant substantive review, with a governmental entity or private person regarding a governmental decision;
- ✓ Advising or making recommendations to the decision maker either directly or without significant intervening substantive review.
- ✓ Conducting research or making any investigation which requires the exercise of judgment on the part of the official in order to influence a governmental decision.
- ✓ Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official in order to influence of governmental decision.
- ✓ Attempting to influence a governmental decision, such as through contacts with agency personnel or other attempts to influence on behalf of the official's business entity, customers or other financial interests.

³ Government Code section 82048, 2 California Code of Regulations section 18701

For spouses and RDPs, use the rule that "any friend of yours is a friend of mine." In other words, if an official's spouse/RDP has a connection which would trigger a conflict, the official is considered to have the same conflict due to the operation of community property and reciprocal support laws.⁴

Finally, the Education Code contains specific requirements for K-12 districts relating to the approval of personnel decisions which uniquely affect a board member's relative (Education Code section 35107). With the exception of collective bargaining agreements and personnel matters affecting a class of employees to which the relative belongs, board members must abstain from any such decision. A "relative" for this purpose is defined as a relative by blood, affinity, or adoption within the third degree.

A DISTRICT'S "DAMN FRIENDS" FOR PURPOSES OF GOVERNMENT CODE SECTION 1090 AND THE POLITICAL REFORM ACT

A. 1090 Friends.

Government Code section 1090 and following prohibit governing boards from approving transactions in which one of their members (and in some cases employees or consultants) have a prohibited financial interest. A transaction approved in violation of section 1090 will be considered void, and those who approved it may be subject to civil and even criminal penalties.

Transactions with certain "friends" can be approved if the relationship qualifies as one of a series of "remote interests" described in the Code. A district can do business with these friends if the affected board member declares the relationship on the record and abstains from participation in the discussion and voting on the matter. Still other relationships may qualify as a "non-interest," which will not require abstention. Again, the use of these exceptions is highly dependent upon the facts in a particular case and is subject to legal interpretation. Review with legal counsel at the earliest possible stage is highly recommended. (Copies of Government Code sections 1091 and 1091.5, containing most of the available remote and non-interests, are included with the materials.) Remember also that there may be situations where a board member will be well-advised to abstain to avoid the appearance of impropriety even where the relationship falls short of a legal conflict of interest.

If a relationship between a board member or other education official and a person or entity seeking to do business with the district involves a financial interest and is NOT one of the remote interests or non-interests described, it will likely be presumed a prohibited financial interest. This may mean that the transaction, if approved, will be void, and the board members approving the transaction may be subject to fines and even criminal penalties.

⁴ The Political Reform Act looks at the impact on official decisions on the economic interests of the official or the official's "immediate family," which is defined as the spouse and dependent children of the official (Government Code section 82029).

The following are some examples of friends to be on the lookout for (likely prohibited financial interests). In each case, several exceptions may apply to “save” the transaction, but the idea is to develop instincts as to the kinds of relationships to look for so that you can examine the possible conflict of interest beforehand.

SHAREHOLDERS	The district official or the official’s spouse/ registered domestic partner (“RDP”) is a share- holder in a corporation seeking to do business with the district.
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Several exceptions may apply. The transaction may qualify for a remote interest, for example, if the official’s only connection is ownership of less than 3 percent of the shares and the ownership derived from employment with the company. Another remote interest applies if the transaction is a bank or savings and loan with which the district a relationship of borrower or depositor, debtor or creditor, where a district official involved in the transaction has a 10 percent or higher stake in the bank. A noninterest may be available if total annual income from dividends, including the value of stock dividends, from the corporation, does not exceed 5 percent of the district official’s annual income, and any other payments made to the official do not exceed 5 percent of total annual income.

An additional remote interest may be available for certain contracts with law firms, stock brokerages and real estate agencies in which a district official has a partial ownership interest.

CORPORATE BOARD MEMBERS	The district official (or the official’s spouse/RDP) is a member of the board of directors of a corporation seeking to do business with the district.
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A remote interest applies in a transaction involving a bank or savings and loan with which the district has a relationship of borrower or depositor, debtor or creditor where the district official’s only relationship to the contracting party is that of a director of a bank or savings and loan association.

EMPLOYEE OR “AGENT” (FOR-PROFIT COMPANY)	The district official or spouse/RDP is the employee or agent of a for-profit company seeking to do business with the district.
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No remote or non-interest is available for district officials employed by very small companies seeking to do business with the district. Two remote interests which would permit a transaction where a board member is an employee of a contractor/vendor apply only to companies with 10 or more employees where the district official-employee did not participate in formulating the bid: (1) the first focuses on long term affiliation with the company (3+ years), lack of participation in bid formulation and ownership of less than 3 percent of the company’s shares; and (2) the second focuses on the employee’s primarily non-management status, lack of ownership of any company

shares, and lack of other roles in the company, and is available where the company is eligible for the contract as the low bidder in a competitive bidding process.⁵

An additional remote interest may be available in certain transactions with engineering, geology or architectural firms employing a district official in a non-management capacity.

EMPLOYEE OR AGENT (NONPROFITS AND GOVERNMENT ENTITIES)	The district official or spouse/RDP is the employee or agent of a nonprofit organization or a government agency seeking to do business with the district.
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Where a district seeks to enter into a contract with another government entity employing a district official, a remote interest is available where the official's only role in the other agency is receipt of a salary, per diem or expense reimbursement. The transaction will qualify for a non-interest (provided it does not involve the specific department which employs the district official) if the district official's relationship is disclosed to the Board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

Transactions with certain tax-exempt nonprofits qualify for a remote interest where a district official's only tie is the official's status as an officer or employee of the nonprofit. A non-interest may be available where the district official serves as a non-compensated officer of a tax-exempt nonprofit the primary purpose of which is to support the functions of the district, provided the relationship is noted in the official records of the transaction.

SOLE PROPRIETORS AND PARTNERS	The district official or spouse/RDP is a sole proprietor or a partner in a business seeking to do business with the district.
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A remote interest may be available in the case of a transaction with a bank or savings and loan where the district official's only relationship to the contracting party is that of an ownership interest of 10 percent in the company.

SUPPLIERS	The district official or spouse/RDP is a supplier of goods or services to a vendor doing business with the district
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Yes, even suppliers to district contractors and vendors can trigger a 1090 violation. A remote interest may be available where the district official has been a supplier for at least five years prior to election or appointment to office. Special rule for directors and 10 percent owners of banks, bank holding companies may be applicable.

⁵ This second remote interest is available only in counties with population of less than 4,000,000. Government Code section 1091.

DEBTOR/CREDITOR	The district official or spouse/RDP is a debtor or creditor of the person or entity seeking to do business with the district.
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If a district official involved in the transaction is the landlord or tenant of the person or entity seeking to contract with the district, a remote interest may be available. (If the contracting party is a federal, state, county, city or other specified public agency, a non-interest is available).

DISTRICT EMPLOYEE SPOUSE	The district official's spouse/RDP is employed by the district.
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A non-interest is available if the spouse was employed for at least one year prior to the district official's election or appointment and continues in the same employment. A board cannot approve most transactions which would be considered to change the employee spouse's employment (promotion, salary increase, etc.)

"MEMBER" OF A NONPROFIT CORPORATION	The district official is a "member" of a nonprofit corporation seeking to do business with the district. A member is a person with special status under the nonprofit corporation laws permitting the person to vote on certain matters. This is NOT the same as a member of the nonprofit board of directors.
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A non-interest may apply where the district official's only relationship to the nonprofit corporation is that of a nonsalaried "member," provided that this interest is disclosed to the board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records. If the contracting party is a nonprofit, tax-exempt corporation a primary function of which is to support the district, a non-interest may apply where a district official is a noncompensated officer of the corporation.

B. Political Reform Act Friends

The Political Reform Act calls for a detailed multi-step review to analyze how an official decision may impact economic interests. Once the economic interest potentially affected by the decision is identified, the analysis under the Political Reform Act examines whether the interest is "direct" or "indirect," applying detailed criteria to determine whether disqualification is required.⁶ It must also be determined whether it is "reasonably foreseeable" that the official's

⁶ See the FPPC publication entitled *Can I Vote?* which is included with your materials. Note that this publication focuses on the Political Reform Act only, and not Government Code section 1090.

economic interest will be “materially” affected in a manner which is distinguishable from the decision’s impact on the general public.

Each of these factors is the subject of detailed regulations. The following are the kinds of relationships regulated under the Act.

INVESTMENT IN BUSINESS ENTITY (\$2,000)	The district official has a minimum \$2,000 investment in a business entity seeking to do business with the district.
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An interest in a parent company will likely be considered an interest in the subsidiary and vice-versa. Various potential exceptions exist for specific vehicles such as mutual funds, or where the business entity does not do business in the jurisdiction. Employees may be exempt if the entity is not one requiring disclosure on Form 700 under the district’s Conflict of Interest Code.

INTEREST IN REAL PROPERTY (\$2,000)	The district official has a minimum \$2,000 investment in real property which is involved in the transaction.
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This is generally an issue where the transaction involves real property within 2 miles of the district boundaries. Numerous exceptions may apply.

INCOME SOURCE (\$500)	The party seeking to do business with the district provides an income source to the district official or the official’s spouse/RDP of at least \$500.
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A transaction with anyone from whom the official received \$500 within the 12 months prior to the decision may trigger a conflict. This can include individual clients of a business entity in which the official has an interest.

GIFT SOURCE (\$440)	The party seeking to do business with the district provides has provided gifts to the district official or the official’s spouse/RDP.
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In general, Board transactions or decisions which impact a person who is a gift source to a district official can trigger a violation. There are numerous exceptions and exemptions which may apply. Employees may not be disqualified if the source is not one they are required to disclose on Form 700.

BUSINESS POSITION (OFFICER, DIRECTOR, EMPLOYEE, OTHER)	The district official is an officer, director, employee or holds another business position with an entity seeking to do business with the district.
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The official is an officer, director, employee or holds another business position.

PERSONAL FINANCIAL EFFECT	The decision before the district may result in an increase or decrease in the personal expenses, income, assets, or liability of a district official.
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Generally, this will not be an issue with respect to real property and investment interests, which are treated separately.

DISTRICT EMPLOYEE (IMMEDIATE FAMILY)	The district official's spouse/RDP or dependent child is an employee of the district.
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The district official is disqualified from voting on any decision to hire, fire, promote, demote, suspend without pay or take other disciplinary action against the family member-employee, or to set the employee's salary (unless the salary is the same as salaries paid to other employees of the district in the same job classification).

CONCLUSIONS

This article is intended to help education officials spot potential conflicts of interest on the horizon before they become a problem. Form 700 may help identify some relationships which can lead to conflicts of interest, but others may surface only by training board and staff to be aware of the issues and to report possible problems to the appropriate administrator as early as possible.

With some training and protocols in place, a Superintendent/Chancellor need not walk the floors at night on account of the friends and relations of district officials.

Attachments: Government Code sections 1091 and 1091.5
Board Bylaw 9270

GOVERNMENT CODE

§ 1091. "Remote interest" in contract; Disclosure of interest; Penalty for willful failure to disclose

(a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

(1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)), pursuant to Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(5)), or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

(2) That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

For purposes of this paragraph, time of employment with the contracting party by the officer shall be counted in computing the three-year period specified in this paragraph even though the contracting party has been converted from one form of business organization to a different form of business organization within three years of the initial taking of office by the officer. Time of employment in that case shall be counted only if, after the transfer or change in organization, the real or ultimate ownership of the contracting party is the same or substantially similar to that which existed before the transfer or change in organization. For purposes of this

paragraph, stockholders, bondholders, partners, or other persons holding an interest in the contracting party are regarded as having the "real or ultimate ownership" of the contracting party.

(3) That of an employee or agent of the contracting party, if all of the following conditions are met:

(A) The agency of which the person is an officer is a local public agency located in a county with a population of less than 4,000,000.

(B) The contract is competitively bid and is not for personal services.

(C) The employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party.

(D) The contracting party has 10 or more other employees.

(E) The employee or agent did not directly participate in formulating the bid of the contracting party.

(F) The contracting party is the lowest responsible bidder.

(4) That of a parent in the earnings of his or her minor child for personal services.

(5) That of a landlord or tenant of the contracting party.

(6) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm that renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(7) That of a member of a nonprofit corporation formed under the Food and Agricultural Code or a nonprofit corporation formed under the Corporations Code for the

sole purpose of engaging in the merchandising of agricultural products or the supplying of water.

(8) That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.

(9) That of a person subject to the provisions of Section 1090 in any contract or agreement entered into pursuant to the provisions of the California Land Conservation Act of 1965.

(10) Except as provided in subdivision (b) of Section 1091.5, that of a director of, or a person having an ownership interest of, 10 percent or more in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor or creditor.

(11) That of an engineer, geologist, or architect employed by a consulting engineering or architectural firm. This paragraph applies only to an employee of a consulting firm who does not serve in a primary management capacity, and does not apply to an officer or director of a consulting firm.

(12) That of an elected officer otherwise subject to Section 1090, in any housing assistance payment contract entered into pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. Sec. 1437f) as amended, provided that the housing assistance payment contract was in existence before Section 1090 became applicable to the officer and will be renewed or extended only as to the existing tenant, or, in a jurisdiction in which the rental vacancy rate is less than 5 percent, as to new tenants in a unit previously under a Section 8 contract. This section applies to any person who became a public official on or after November 1, 1986.

(13) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity.

(14) That of a person owning less than 3 percent of the shares of a contracting party that is a for-profit corporation, provided that the ownership of the shares derived from the person's employment with that corporation.

(15) That of a party to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:

(A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.

(B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.

(C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.

(c) This section is not applicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which he or she is a member to enter into the contract.

(d) The willful failure of an officer to disclose the fact of his or her interest in a contract pursuant to this section is punishable as provided in Section 1097. That violation does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

§ 1091.5. Interest in contract; Quantity and quality of interest; Relation to contracting party

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

(2) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duties.

(3) That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.

(4) That of a landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.

(5) That of a tenant in a public housing authority created pursuant to Part 2 (commencing with Section 34200) of Division 24 of the Health and Safety Code in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 (commencing with Section 34100) of Division 24 of the Health and Safety Code.

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

(7) That of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records.

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

(10) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(11) Except as provided in subdivision (b), that of an officer or employee of, or a person having less than a 10-percent ownership interest in, a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower, depositor, debtor, or creditor.

(12) That of (A) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the

conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, which corporation enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are found by the public agency, prior to entering into the agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes and (B) any officer, director, or employee acting pursuant to the agreement on behalf of the nonprofit corporation. For purposes of this paragraph, "agreement" includes contracts and grants, and "park," "natural lands," and "historical resources" shall have the meanings set forth in subdivisions (d), (g), and (i) of Section 5902 of the Public Resources Code. Services to be provided to the public agency may include those studies and related services, acquisitions of property and property interests, and any activities related to those studies and acquisitions necessary for the conservation, preservation, improvement, or restoration of park and natural lands or historical resources.

(13) That of an officer, employee, or member of the Board of Directors of the California Housing Finance Agency with respect to a loan product or programs if the officer, employee, or member participated in the planning, discussions, development, or approval of the loan product or program and both of the following two

conditions exist:

(A) The loan product or program is or may be originated by any lender approved by the agency.

(B) The loan product or program is generally available to qualifying borrowers on terms and conditions that are substantially the same for all qualifying borrowers at the time the loan is made.

(14) That of a party to a contract for public services entered into by a special district that requires a person to be a landowner or a representative of a landowner to serve on the board of which the officer or employee is a member, on the same terms and conditions as if he or she were not a member of the body or board. For purposes of this paragraph, "public services" includes the powers and purposes generally provided pursuant to provisions of the Water Code relating to irrigation districts, California water districts, water storage districts, or reclamation districts.

(b) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor.

CSBA Sample

Board Bylaw

Conflict Of Interest

BB 9270

Board Bylaws

***Note: The determination as to whether a conflict of interest exists must be analyzed under two separate sets of statutes: (1) the conflict of interest provisions of the Political Reform Act (PRA) (Government Code 87100-87500.1), detailed in the section below entitled "Conflict of Interest under the Political Reform Act," and (2) Government Code 1090-1098, detailed in the section below entitled "Financial Interest in Contracts under Government Code 1090."

However, even when a conflict does not exist pursuant to those statutes, the Attorney General has found that special situations may still exist under the common law doctrine against conflict of interest; see the section below entitled "Common Law Doctrine Against Conflict of Interest. ***"

***Note: Because the law and definitions are quite complex, it is strongly recommended that districts consult with legal counsel and staff from the Fair Political Practices Commission (FPPC) as soon as a potential conflict is presented. ***

The Governing Board desires to maintain the highest ethical standards and help ensure that decisions are made in the best interest of the district and the public. In accordance with law, Board members and designated employees shall disclose any conflict of interest and, as necessary, shall abstain from participating in the decision.

(cf. 9005 - Governance Standards)

***Note: The Governing Board is required to adopt a conflict of interest code in compliance with Government Code 87300-87313. Board members and employees designated in the district's conflict of interest code are required by Government Code 87500 to annually file a Statement of Economic Interest/Form 700 to disclose any assets and income which may be materially affected by official actions. Under the PRA, there are two separate categories of Form 700 disclosure requirements. For the first category pursuant to Government Code 87302, which is applicable to most school districts, the disclosure requirements are determined by the district and set forth in the district's conflict of interest code. The second category, pursuant to Government Code 87200, is only applicable to Board members and designated employees who "manage public investments"; see section below entitled "Additional Requirements for Boards that Manage Public Investments." Those Board members and designated employees, referred to by the FPPC as Government Code 87200/Article 2 filers, must file broader disclosure statements pursuant to the disclosure requirements specified in law and FPPC regulation. ***

***Note: Pursuant to Government Code 87303, the district's conflict of interest code must be approved by the appropriate code reviewing body. For districts located entirely in one county,

the code reviewing body is the board of supervisors of the county in which the district is located. The FPPC is the code reviewing body for those school districts located in more than one county.

***Note: Pursuant to 2 CCR 18730, the requirements of the Government Code are satisfied if a district adopts a conflict of interest code that incorporates 2 CCR 18730 by reference, along with a list of designated positions and disclosure categories. The accompanying exhibit (E 9270) contains a sample resolution which includes an appendix with designated positions and disclosure categories which, once adopted by the Board, will comprise the terms of the district's conflict of interest code that should be submitted to the code reviewing body. Districts that do not wish to adopt a resolution as their conflict of interest code should modify the following paragraph accordingly. ***

The Board shall adopt a resolution that specifies the terms of the district's conflict of interest code, the district's designated positions, and the disclosure categories required for each position.

Upon direction by the code reviewing body, the Board shall review the district's conflict of interest code and submit any changes to the code reviewing body.

When a change in the district's conflict of interest code is necessitated due to changed circumstances, such as the creation of new designated positions, changes to the duties assigned to existing positions, amendments, or revisions, the amended code shall be submitted to the code reviewing body within 90 days. (Government Code 87306)

When reviewing and preparing the district's conflict of interest code, the Superintendent or designee shall provide officers, employees, consultants, and members of the community adequate notice and a fair opportunity to present their views. (Government Code 87311)

(cf. 9320 - Meetings and Notices)

Board members and designated employees shall annually file a Statement of Economic Interest/Form 700 in accordance with the disclosure categories specified in the district's conflict of interest code. A Board member who leaves office or a designated employee who leaves district employment shall, within 30 days, file a revised statement covering the period of time between the closing date of the last statement and the date of leaving office or district employment. (Government Code 87302, 87500)

(cf. 4117.2/4217.2/4317.2 - Resignation)

(cf. 9222 - Resignation)

Conflict of Interest under the Political Reform Act

***Note: The FPPC has adopted an eight-step analysis, detailed in Government Code 87100-87500, 2 CCR 18700-18755, and interpretive opinions, to determine whether a conflict of interest exists under the PRA. When such a conflict exists, the affected Board member must disclose the interest and disqualify himself/herself from participating in the decision, as specified

below. Because Family Code 297.5 grants a registered domestic partner the same rights, protections, and benefits as a spouse under state law, analysis of a conflict of interest with regards to a Board member's spouse is also applicable to a registered domestic partner. ***

A Board member or designated employee shall not make, participate in making, or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know that he/she has a disqualifying conflict of interest. A conflict of interest exists if the decision will have a "reasonably foreseeable material financial effect" on one or more of the Board member's or designated employee's "economic interests," unless the effect is indistinguishable from the effect on the public generally or the Board member's or designated employee's participation is legally required. (Government Code 87100, 87101, 87103; 2 CCR 18700-18709)

A Board member or designated employee makes a governmental decision when, acting within the authority of his/her office or position, he/she votes on a matter, appoints a person, obligates or commits the district to any course of action, or enters into any contractual agreement on behalf of the district. (2 CCR 18702.1)

A Board member who has a disqualifying conflict of interest on an agenda item that will be heard in an open meeting of the Board shall abstain from voting on the matter. He/she may remain on the dais, but his/her presence shall not be counted towards achieving a quorum for that matter. A Board member with a disqualifying conflict of interest shall not be present during a closed session meeting of the Board when the decision is considered and shall not obtain or review a recording or any other nonpublic information regarding the issue. (2 CCR 18702.1)

Additional Requirements for Boards that Manage Public Investments

***Note: The following optional section is for use only by districts in which the Board and/or the Superintendent or designee are considered to be "officials who manage public investments" and who are required to file a full financial disclosure statement in accordance with Government Code 87200. It should be deleted by all other districts. See the accompanying exhibit for further information. ***

***Note: According to the FPPC, officials who manage public investments are Boards or designated employees who manage the investment of district surplus or special reserve funds in permitted securities and investments pursuant to Education Code 41015. Those Boards that direct the investment of these funds, formulate or approve policies for the investment of these funds, or approve investment transactions involving these funds are considered officials who manage public investments. Even if the Board delegates day-to-day investment decisions to district staff, Board members are considered officials who manage public investments if they set or approve policy as to the investment of these funds. ***

***Note: The Board does not manage public investments when the district does not have any surplus or special reserve funds to invest and merely deposits all funds it receives (1) in the county treasury pursuant to Education Code 41001-41002.5 or (2) in a fund where a Tax and Revenue Anticipation Note (TRANS) is issued. Board members and Superintendents in these

types of situations are not considered to have discretion regarding the investment of the district's money and are therefore not officials who manage public investments. ***

A Board member who manages public investments pursuant to Government Code 87200 and who has a financial interest in a decision shall, upon identifying a conflict or potential conflict of interest and immediately prior to the consideration of the matter, do all of the following: (Government Code 87105; 2 CCR 18702.5)

1. Publicly identify each financial interest that gives rise to the conflict or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required.
2. Recuse himself/herself from discussing and voting on the matter, or otherwise acting in violation of Government Code 87100. The Board member shall not be counted toward achieving a quorum while the item is discussed.

However, the Board member may speak on the issue during the time that the general public speaks on it and may leave the dais to speak from the same area as members of the public. He/she may listen to the public discussion of the matter with members of the public.

3. Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.

If the item is on the consent calendar, the Board member must recuse himself/herself from discussing or voting on that matter, but the Board member is not required to leave the room during consideration of the consent calendar.

4. If the Board's decision is made during closed session, disclose his/her interest orally during the open session preceding the closed session. This disclosure shall be limited to a declaration that his/her recusal is because of a conflict of interest pursuant to Government Code 87100. He/she shall not be present when the item is considered in closed session and shall not knowingly obtain or review a recording or any other nonpublic information regarding the Board's decision.

(cf. 3430 - Investing)

Conflict of Interest under Government Code 1090

***Note: Pursuant to Government Code 1090, if a Board member has a financial interest in a contract, it is an absolute bar for that district to enter into the contract. The Attorney General has opined in 69 Ops.Cal.Atty.Gen. 255 (1986) that, unlike the PRA, the prohibitions in Government Code 1090 cannot be resolved by having the financially interested Board member abstain from participating in the matter. However, there are two categories of exceptions. If a financial interest meets the definition of a "noninterest" as specified in Government Code 1091.5, then the restrictions in Government Code 1090 do not apply and the district can enter into the

contract. Secondly, if a Board member's interest is deemed a "remote interest" pursuant Government Code 1091, then the district can enter into the contract as long as certain conditions are satisfied, as specified below. ***

***Note: While the prohibitions in the PRA only apply to designated employees, the prohibitions in Government Code 1090 apply to all district employees and consultants. However, the Attorney General has opined in 63 Ops.Cal.Atty.Gen. 868 (1980) that an employee's financial interest would not prohibit the district from entering into a contract as long as the employee has not participated in the making of the contract, such as in discussions and planning, as detailed below. ***

***Note: Government Code 1090 does not define financial interest, but courts have held that, for the purposes of this statute, the definition of "financial interest" is not the same as the definition in the PRA which requires a "material financial effect" in order for a conflict to exist. Because the determination of whether a financial interest exists involves a review of statutes, court decisions, and Attorney General opinions as they apply to the particular facts at issue, the analysis can be complex and legal counsel should be consulted as appropriate. ***

Board members, employees, or district consultants shall not be financially interested in any contract made by the Board on behalf of the district, including in the development, preliminary discussions, negotiations, compromises, planning, reasoning, and specifications and solicitations for bids. If a Board member has such a financial interest, the district is barred from entering into the contract. (Government Code 1090; *Klistoff v. Superior Court*, (2007) 157 Cal.App. 4th 469)

***Note: Pursuant to Government Code 1091.5, certain financial interests are defined as "noninterests," meaning a conflict of interest does not exist and the district can enter into the contract. One of the noninterests listed in Government Code 1091.5 is when a Board member's spouse has been employed by the district for at least one year prior to the Board member's election or appointment. If the spouse has not been employed by the district for at least one year prior the Board member's election or appointment, the exception does not apply and Government Code 1090 prohibits the district from entering into a new contract to hire the spouse. (80 Ops.Cal.Atty.Gen. 320 (1997)) ***

***Note: Attorney General opinions and case law have further clarified the application of this noninterest exception when a previously employed spouse changes to a different position during the Board member's term. Generally, these opinions have held that a lateral transfer or change of classification that does not require Board approval (e.g., second year probationary teacher automatically achieving permanent status, step increase) is the same employment not requiring a new contract and thus constitutes a noninterest. (92 Ops.Cal.Atty.Gen. 26 (2009), 87 Ops.Cal.Atty.Gen. 23 (2004)) However, when a new contract is involved (e.g., promotion from classroom teacher to principal, substitute employee becoming a probationary employee), the exception in Government Code 1091.5 does not apply and the action would be prohibited under Government Code 1090 because Board approval of the contract is required. (*Thorpe v. Long Beach Community College District*, 69 Ops.Cal.Atty.Gen. 255 (1986)) ***

***Note: Because this area of law is complex, it is strongly recommended that district legal counsel be consulted if a Board member's spouse is an employee of the district or when analyzing whether an interest is a noninterest or remote interest. ***

A Board member shall not be considered to be financially interested in a contract if his/her interest is a "noninterest" as defined in Government Code 1091.5. One such noninterest is when a Board member's spouse/registered domestic partner has been a district employee for at least one year prior to the Board member's election or appointment. (Government Code 1091.5)

***Note: The district may enter into a contract when a Board member's interest is a "remote interest" as defined in Government Code 1091. Generally, this issue arises when the district wishes to enter into a contract with the Board member's employer. When the conditions specified in Government Code 1091 are satisfied (e.g., Board member is an employee of a nonprofit organization, the employer has at least 10 employees, and the Board member has been employed more than three years), then the district may enter into the contract as long as the affected Board member discloses the remote interest and abstains from the matter. ***

A Board member shall not be considered to be financially interested in a contract if he/she has only a "remote interest" in the contract as specified in Government Code 1091 and if the remote interest is disclosed during a Board meeting and noted in the official Board minutes. The affected Board member shall not vote or debate on the matter or attempt to influence any other Board member to enter into the contract. (Government Code 1091)

***Note: Board members who willfully fail to disclose a remote interest in a contract may be subject to a fine or imprisonment pursuant to Government Code 1097. ***

Even if there is not a prohibited conflict of interest, a Board member shall abstain from voting on personnel matters that uniquely affect his/her relatives. However, a Board member may vote on collective bargaining agreements and personnel matters that affect a class of employees to which his/her relative belongs. Relative means an adult who is related to the Board member by blood or affinity within the third degree, as determined by the common law, or an individual in an adoptive relationship within the third degree. (Education Code 35107)

***Note: The following paragraph reflects the common law definition of "relative within the third degree." ***

A relationship within the third degree includes an individual's parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, brothers, sisters, aunts, uncles, nieces, nephews, and the similar family of the individual's spouse/registered domestic partner unless the individual is widowed or divorced.

Common Law Doctrine Against Conflict of Interest

***Note: Even when there is not a conflict pursuant to the PRA (Government Code 87100-87500.1) or Government Code 1090, the Attorney General has found that special situations may still exist under the common law doctrine against conflict of interest which,

unlike the statutes, extends to noneconomic interests. In 92 Ops.Cal.Atty.Gen. 19 (2009), the Attorney General opined that a redevelopment board member should abstain from voting on a loan agreement where the recipient of the loan was a corporation owned by the board member's adult son. Although the board member was not financially interested in the contract under the PRA or Government Code 1090, the Attorney General determined that abstention was necessary in order to avoid a conflict between the member's official and personal interests and to avoid the appearance of impropriety. ***

***Note: Districts are encouraged to consult legal counsel if situations arise that raise the question as to whether such a conflict exists. ***

A Board member shall abstain from any official action in which his/her private or personal interest may conflict with his/her official duties.

Rule of Necessity or Legally Required Participation

***Note: Pursuant to Government Code 87101, when a conflict exists under the PRA, the district may still enter into a contract if the rule of necessity or legally required participation applies. In general, this rule will permit a district to acquire an essential supply or service. The rule also permits a Board member to carry out an essential duty of his/her office in accordance with 2 CCR 18708, where he/she is the only one who may legally act and there is no alternative source of decision-making authority. It is recommended that legal counsel be consulted when situations arise involving the rule of necessity. ***

On a case-by-case basis and upon advice of legal counsel, a Board member with a financial interest in a contract may participate in the making of the contract if the rule of necessity or legally required participation applies pursuant to Government Code 87101 and 2 CCR 18708.

Incompatible Offices and Activities

***Note: Government Code 1099 and 1126 prohibit Board members and employees from engaging in any employment or activity which is inconsistent, incompatible, in conflict with, or inimical to their duties with the district. Government Code 1126 mandates the district to adopt procedures regarding this prohibition. See BP 4136/4236/4336 - Nonschool Employment for language implementing this mandate relative to employees. ***

***Note: Attorney General opinions have indicated that it would be incompatible for Board members to serve on other elected or appointed boards, councils, or commissions that have interests which may conflict with the interests of the district (85 Ops.Cal.Atty.Gen. 60 (2002); 68 Ops.Cal.Atty.Gen. 171 (1985); 65 Ops.Cal.Atty.Gen. 606 (1982)). If a Board member is sworn into an incompatible office, then his/her position in the prior office is automatically terminated. ***

***Note: Pursuant to Education Code 35107, an employee of a school district may not be sworn into office as an elected or appointed member of that district's Board unless he/she resigns as an employee. If the employee does not resign, the employment automatically terminates when

he/she is sworn into office. See BB 9220 - Governing Board Elections. ***

***Note: The determination as to whether an activity or office is incompatible is complex and requires a case-by-case analysis of the particular activities or duties of the office; therefore, it is recommended that district legal counsel be consulted as appropriate. ***

Board members shall not engage in any employment or activity or hold any office which is inconsistent with, incompatible with, in conflict with, or inimical to the Board member's duties as an officer of the district. (Government Code 1099, 1126)

(cf. 4136/4236/4336 - Nonschool Employment)

Gifts

***Note: Pursuant to 2 CCR 18730, the gift limitation is currently \$420. This amount is adjusted in odd-numbered years by the FPPC. However, this limit may not be applicable to gifts from every source. For those Board members who file a Form 700 based on the disclosure categories specified in the district's conflict of interest code pursuant to Government Code 87302 (see the accompanying exhibit), the gift limit is only applicable to those individuals and entities that are disclosed on the Form 700. ***

***Note: Exceptions exist within the Government Code's definitions of gifts, income, interest in real property, and investment; see Government Code 82028, 82030, 82033, and 82034. ***

Board members and designated employees may accept gifts only under the conditions and limitations specified in Government Code 89503 and 2 CCR 18730.

The limitation on gifts does not apply to wedding gifts and gifts exchanged between individuals on birthdays, holidays, and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value. (Government Code 89503)

Gifts of travel and related lodging and subsistence shall be subject to the current gift limitation except as described in Government Code 89506.

A gift of travel does not include travel provided by the district for Board members and designated employees. (Government Code 89506)

Honoraria

Board members and designated employees shall not accept any honorarium, which is defined as any payment made in consideration for any speech given, article published, or attendance at any public or private gathering, in accordance with law. (Government Code 89501, 89502)

The term honorarium does not include: (Government Code 89501)

1. Earned income for personal services customarily provided in connection with a bona fide

business, trade, or profession unless the sole or predominant activity of the business, trade, or profession is making speeches

2. Any honorarium which is not used and, within 30 days after receipt, is either returned to the donor or delivered to the district for donation into the general fund without being claimed as a deduction from income for tax purposes

Legal Reference:

EDUCATION CODE

1006 Qualifications for holding office

35107 School district employees

35230-35240 Corrupt practices, especially:

35233 Prohibitions applicable to members of governing boards

41000-41003 Moneys received by school districts

FAMILY CODE

297.5 Rights, protections, and benefits of registered domestic partners

GOVERNMENT CODE

1090-1099 Prohibitions applicable to specified officers

1125-1129 Incompatible activities

81000-91014 Political Reform Act of 1974, especially:

82011 Code reviewing body

87100-87103.6 General prohibitions

87200-87210 Disclosure

87300-87313 Conflict of interest code

87500 Statements of economic interests

89501-89503 Honoraria and gifts

91000-91014 Enforcement

PENAL CODE

85-88 Bribes

CODE OF REGULATIONS, TITLE 2

18110-18997 Regulations of the Fair Political Practices Commission, especially:

18702.5 Public identification of a conflict of interest for Section 87200 filers

COURT DECISIONS

Klistoff v. Superior Court, (2007) 157 Cal.App.4th 469

Thorpe v. Long Beach Community College District, (2000) 83 Cal.App.4th 655

Kunec v. Brea Redevelopment Agency, (1997) 55 Cal.App.4th 511

ATTORNEY GENERAL OPINIONS

92 Ops.Cal.Atty.Gen. 26 (2009)

92 Ops.Cal.Atty.Gen. 19 (2009)

89 Ops.Cal.Atty.Gen. 217 (2006)

86 Ops.Cal.Atty.Gen. 138(2003)

85 Ops.Cal.Atty.Gen. 60 (2002)

82 Ops.Cal.Atty.Gen. 83 (1999)

81 Ops.Cal.Atty.Gen. 327 (1998)

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69 Ops.Cal.Atty.Gen. 255 (1986)
68 Ops.Cal.Atty.Gen. 171 (1985)
65 Ops.Cal.Atty.Gen. 606 (1982)
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Management Resources:

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Conflict of Interest: Overview of Key Issues for Governing Board Members, Fact Sheet, July 2010

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Can I Vote? A Basic Overview of Public Officials' Obligations Under the Conflict-of-Interest Rules, 2005

INSTITUTE FOR LOCAL GOVERNMENT PUBLICATIONS

Understanding the Basics of Public Service Ethics: Personal Financial Gain Laws, 2009

Understanding the Basics of Public Service Ethics: Transparency Laws, 2009

WEB SITES

CSBA: <http://www.csba.org>

Fair Political Practices Commission: <http://www.fppc.ca.gov>

Institute of Local Government: <http://www.ca-ilg.org>

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