



July 2010

Fact Sheet

Conflict of Interest: Overview of key issues for governing board members

As locally elected officials, district and county office governing board members are subject to the state's laws regarding conflict of interest. These laws are based on the premise that a public official's personal or private financial considerations should not be part of the governmental decision-making process. While that premise may sound simple, the laws governing conflict of interest are incredibly complex and fact-intensive. To determine whether a conflict of interest exists, the situation 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) and (2) Government Code 1090-1098. Even when a conflict does not exist pursuant to those statutes, a conflict may still exist under the common law doctrine against conflict of interest.

This fact sheet provides a summary of these laws and outlines key issues for board members to consider. In addition, CSBA's sample board bylaw BB 9270 - Conflict of Interest, updated in July 2010, clarifies the application of these laws and reflects recent Attorney General opinions and court decisions. E 9270 presents a sample board resolution comprising the terms of the district's/county office's conflict of interest code and an Appendix of sample disclosure categories and designated positions.

Conflict of Interest Code and Statement of Economic Interest/Form 700

The PRA (Government Code 87100-87500.1) requires all public agencies, including school districts and county offices of education (COEs), to adopt a conflict of interest code and to review that code biannually. The law requires that the conflict of interest code contain three components:

1. An incorporation statement, which states the terms of the code and incorporates relevant Fair Political Practices Commission (FPPC) regulations by reference.
2. Designated positions, which lists the specific positions in the district/COE that make or participate in making governmental decisions.
3. Disclosure categories, which specify the types of investments, income and interests in property that must be disclosed by each person holding a designated position.

The district's/COE's conflict of interest code is the basis for the information that is reported on the Statement of Economic Interest/Form 700. All board members and staff who hold a designated position must file a Form 700 by April 1 of each year.

Submission to the code reviewing body

The district's/COE's adopted conflict of interest code must be submitted to the appropriate code reviewing body in even-numbered years. For school districts located entirely in one county and COEs, the code reviewing body is the board of supervisors of the county in which the district/COE is located. The FPPC is the code reviewing body for school districts with jurisdiction in more than one county.

CSBA's sample E 9270 simplifies the information that must be submitted to the code reviewing body. The resolution comprises the terms of the district's/COE's conflict of interest code, in compliance with FPPC requirements, and the Appendix contains the list of designated positions and disclosure categories. A district/COE wishing to use the resolution as its conflict of interest code should adopt BB 9270 and the resolution.

In even-numbered years, the code reviewing body is required to notify a district and COE of the need to review its conflict of interest code. Upon receipt of this notification, districts/COEs should review the Appendix and make necessary changes. In some counties, the code reviewing body may require that the resolution be readopted during the district's/COE's biannual review and that the resolution and Appendix be submitted to the code reviewing body while in other counties, the district/COE may need to only submit a revised Appendix.

Districts/COEs adopting this resolution and Appendix will no longer need to review BB 9270 during the biannual review and submit it to the code reviewing body, since that bylaw contains additional materials that are not relevant to the code reviewing body's purpose.

Note: Some Boards of Supervisors have developed a conflict of interest code, resolution and appendix for use by all local agencies within their jurisdiction. Districts/COEs should check with their code reviewing body for specific requirements.

Categories of Form 700 disclosures

Under the law, there are two separate categories of Form 700 disclosures – what the FPPC calls “Article 2” or “Article 3” filers. While by statute all county supervisors and city council members are Article 2 filers, most school board and county board members are Article 3 filers pursuant to Government Code 87302. For Article 3 filers, the disclosure requirements for the Form 700 are determined by the board as set forth in the district's/COE's conflict of interest code.

Article 2 filers pursuant to Government Code 87200 are districts in which the board and superintendent “manage public investments.” Those board members and designated employees must file broader disclosure statements pursuant to statute and FPPC regulation. 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. For COEs and county superintendents, a different analysis may apply. This is a complex determination and districts or COEs with questions as to its applicability should contact the FPPC or legal counsel.

Note: If the county has provided a sample conflict of interest code for use by the district, this sample may reflect the broader (full) disclosure categories pursuant to Article 2 that are applicable to county boards of supervisors and city council members. Although school board members who do not manage public investments have the option of filing a Form 700 pursuant to the broader categories specified in Article 2, it is not required by law.

When reviewing CSBA's sample BB/E 9270, districts/COEs should ensure that they select the appropriate options and modify the Appendix to specify the disclosure categories and designated positions applicable in the district/COE.

“Article 3” filers should:

1. In the bylaw, delete the section entitled “Additional Requirements for Boards that Manage Public Investments.”
2. In the Exhibit's Appendix, in the section entitled “Disclosure Categories,” delete item #3 Full Disclosure.
3. In the Exhibit's Appendix, in the section entitled “Disclosure Categories,” modify the categories to reflect any specific district/COE requirements.
4. In the Appendix, in the section entitled “Designated Positions,” modify the list to reflect specific district/COE positions that the board has designated to file the Form 700 and the applicable disclosure category for each position.

Article 2 districts/COEs should:

1. In the Exhibit's Appendix, in the section entitled “Disclosure Categories,” modify the categories to reflect any specific district/COE requirements.
2. In the Appendix, in the section entitled “Designated Positions,” change the Disclosure Category for Governing Board Members and the Superintendent from Category 1 to “Full Disclosure.”
3. In the Appendix, in the section entitled “Designated Positions,” revise the list to reflect specific district/COE positions that the board has designated to file the Form 700 and the applicable disclosure category for each position.

When a conflict exists

The Political Reform Act: Prohibition against participation in decision making

The PRA prohibits a public official from participating in a governmental decision that affects his/her financial interest. The goal is to avoid having a public official be put in a position of choosing between the public's interest and his/her own financial interest. When such a conflict of interest exists, the board member must step aside from the decision-making process. While it may sound straightforward, the analysis is incredibly complex and not necessarily logical. The FPPC's basic rule is that a public official may not make, participate in, or influence a governmental decision that will have a reasonably foreseeable material financial effect on the official, the official's immediate family, or any of the official's economic interests. The FPPC has developed an eight-step analysis defining the terminology. Several different statutes, regulations, and interpretive opinions by the FPPC underlie each of the eight steps. This analysis is separate from analysis for determining the disclosure requirements for Form 700 discussed above since not all of the economic interests that may cause a conflict of interest under the PRA are required to be disclosed on a board member's Form 700.

The FPPC has defined "economic interest" very broadly and each type of interest may be subject to different dollar limits. Examples of economic interests include income from a business, interest in real property, investments, business employment or management, business-owned property, loans and gifts. A board member's spouse, domestic partner, or dependent child's income or real property interest may also be a factor in the analysis.

Penalties for violations of the PRA may include criminal or civil sanctions or penalties imposed by the FPPC.

Government Code 1090: Prohibition against interest in district contracts

In addition to the prohibitions in the PRA, a potential conflict of interest must also be examined under Government Code 1090 which specifies that, when a board member has a financial interest in a contract, the district may not enter into the contract. This statute is different than the PRA in that (1) disqualification of the board member with the conflict will not fix the problem and (2) "financial interest" is defined more broadly to include both direct and indirect interests. 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 early as possible in the process.

There are two limited exceptions to this general prohibition. If a board member's interest is deemed a "remote interest" pursuant Government Code 1091, then the district/COE can enter into the contract as long as certain conditions are satisfied. 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/COE 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 to his/her spouse'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.

Another issue is what constitutes a "new contract" (which would prohibit the action) when a board member's spouse, who has been employed by the district for at least one year prior to the board member's election, is promoted or transferred to another position within the district during the board member's term of office. Generally, the Attorney General has opined 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 a "noninterest" which allows the district to enter into the contract. However, when a new contract or board approval is required (e.g., a promotion of the spouse from classroom teacher to principal, substitute employee becoming a probationary employee), then the exception in Government Code 1091.5 does not apply and the action would be prohibited under Government Code 1090.

Common law doctrine: Applicability to noneconomic interests

Even when there is not a conflict pursuant to the PRA 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 agency 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 avoid the appearance of impropriety.

Cautions

To avoid improper action in the event of a conflict or interest, board members should:

1. Get advice early

This cannot be overemphasized! Attorneys regularly tell their board clients that the most important thing they can do is to get advice as early in the process as possible—if a person doesn't start looking for a conflict until the item appears on the agenda then it may be too late to stay out of trouble. If a board member thinks he/she may have a potential conflict or has a question about an economic interest, legal counsel should be consulted immediately.

CSBA often recommends that newly elected board members with potential conflicts (such as employment with a company that does business with the district) talk to district legal counsel right after the election and get advice as to possible conflicts that may come up. That way the entire governance team – board members and the superintendent – are aware of any possible limitations from the beginning, which can help prevent future misunderstandings and possible legal violations. Penalties for violations of these laws are severe. Willful violation is a felony which could result in a fine, imprisonment and disqualification from holding public office. If a contract is made in violation of Government Code 1090, the contract is null and void.

2. Remember, there's more than just voting involved

The PRA covers more than just a board member's vote on an issue at the meeting and applies to the entire process leading up to voting. The law prohibits a board member with a conflict of interest from making, participating in, or influencing a governmental decision. This means, for example, that the conflicted board member may not participate in conversations with fellow board members or staff prior to the meeting or participate in the discussion of the agenda item at the meeting prior to the vote. According to the FPPC, a good rule of thumb is to ask whether the board member is exercising discretion or judgment with regard to the decision. If the answer is yes, then the action is probably covered.

Similarly, the prohibitions in Government Code 1090 apply to more than voting on the contract during a board meeting. They include preliminary discussions, negotiations, planning and solicitation of bids.

Resources

California School Boards Association | www.csba.org

Provides policy briefs, fact sheets, sample policies and other resources on a variety of issues related to effective governance, including sample board bylaw BB 9270 - Conflict of Interest.

Fair Political Practices Commission | www.fppc.ca.gov

Provides information about conflict of interest, the PRA, and the FPPC's eight-step analysis. See the FPPC publication *Can I Vote? A Basic Overview of Public Officials' Obligations Under the Conflict-of-Interest Rules*. See www.fppc.ca.gov/library/CanIVote7-05.pdf

Institute for Local Government | www.ca-ilg.org

Publishes *Understanding the Basics of Public Service Ethics: Personal Financial Gain Laws*. See www.ca-ilg.org/ethicsbasics