State of California

M e m o r a n d u m

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To : State Client Agencies
State of California

Date : August 3, 2001

From : Peter Siggins
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Subject : "Consultants" Under the Political Reform Act / Conflict of Interest Code Disclosure

Introduction

Recently, questions have arisen concerning "consultants" and their obligations to file Statements of Economic Interests under the Political Reform Act ("Act").[1]

As we have discussed with several client agencies, the circumstances when "consultants" must file are not clear-cut. Given recent developments and inquiries, we believe it would be useful for all our clients to have the benefit of our analysis of this area of the Act. In general, the Act prohibits "public officials" from making, participating in making, or using their official position to influence a "governmental decision" in which they have a "financial interest." Certain "public officials" who are designated in statute or in their respective agency's conflict-of-interest code must also file financial disclosure statements. A private contractor may be *deemed* to be a "public official" if the contractor qualifies as a "consultant." In that case, the contractor is also subject to the Act's conflict-of-interest disqualification and disclosure requirements.

State and local agencies are required to determine who is, and who is not, subject to the Act's disclosure requirements as a "consultant," but there is no simple test for making that determination. When in doubt, you should direct questions to the Fair Political Practices Commission ("FPPC" or "Commission").[2] The FPPC is the agency that possesses primary

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[1] Gov. Code §§ 83111-83116. All statutory references are to the Government Code unless otherwise noted. This memorandum addresses only the FPPC's interpretations of the Act, not the application of other conflict-of-interest statutes, including section 1090. Only the Act has requirements for filing financial-disclosure statements.

[2] The FPPC is authorized as part of its role in interpreting and implementing the Act to issue opinions and "advice letters" to those who have duties or obligations under the Act and who wish guidance from the FPPC in advance of undertaking a particular course of action. Under certain circumstances, immunities from liability attach to advice rendered by the FPPC. (Gov. Code, §83114.) It should be noted, too, that although the Consultant Regulation was amended effective February 2001, it was also renumbered as part of a general reorganization of the FPPC regulations in late 1998. In the FPPC Advice Letters discussed herein, which *antedate* that amendment, the Consultant Regulation is cited as Regulation *18700*(a)(2)(A) or (B), rather than to the current *18701*(a)(2)(A) or (B). To avoid confusion, in this memorandum, the Regulation's current numbering will be shown in brackets within any quotations. In the citations to the FPPC Advice Letters, the WestLaw document number will be shown in brackets.

responsibility for implementing, interpreting and enforcing the Act. The FPPC is also charged with providing assistance to agencies in administering the provisions of the Act.[3] And, under section 87312, upon request, the FPPC must provide technical assistance to agencies in the preparation of conflict-of-interest codes.

By this memorandum, we will not be supplying the "answers." We endeavor only to assist you in understanding the broad outlines of this issue.[4] In those less-than-obvious situations, we hope by this memo to give you enough information to help you frame your questions to the FPPC.

The analysis begins with an understanding of the fact that the Political Reform Act defines the term "public official" to include "consultants." "Public Official" is defined in section 82048 to include: ". . . every member, officer, employee *or consultant* of a state or local government agency . . . ."

Who Is a "Consultant"? The Two-Part Test

The term "consultant" is not defined in statute. It is a term of art under the Act and does not necessarily equate to the term as used in the private-sector business world. The FPPC has adopted a regulation that defines the term. As amended effective February 1, 2001, the regulation now reads:

> "Consultant" means an individual who, pursuant to a contract with a state or local government agency:
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> (A) Makes a governmental decision whether to:
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> 1. Approve a rate, rule, or regulation;
> 2. Adopt or enforce a law;
> 3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
> 4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract which requires agency approval;
> 5. Grant agency approval to a contract which requires agency approval and to which the agency is a party, or to the specifications for such a contract;
> 6. Grant agency approval to a plan, design, report, study or similar item;
> 7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; *or*

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[3]Gov. Code, § 83113, subd. (c).

[4]We seek also to supplement the FPPC's "fact sheet" on "Consultants in a Conflict of Interest Code," a copy of which we have attached for your convenience.

> (B) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code Section 87302.[5]

Note that the regulation sets up a two-part test, and that part (B), in turn, has two sub-parts. As defined by Regulation 18701(a)(2), then, a "consultant" is an individual who, pursuant to a contract with the state, either (A) *makes* certain specified types of governmental decisions; or (B) *serves in a staff capacity* and in that capacity, either (1) *participates* in making a governmental decision, or (2) *performs the same or substantially all the same duties* for the agency that would otherwise be performed by an individual holding a position with the agency that is specified in the agency's conflict-of-interest code.

Not all contractors are "consultants;" most probably are not. As will be seen, determination of who is a "consultant" requires some understanding of the FPPC's interpretation of the italicized words and phrases.

Contractors Who "Make" a Governmental Decision: Paragraph (A) of the Two-Part Test

If a contracted service involves "making" one of the governmental decisions specified in Regulation 18701(a)(2)(A), the contractor may be a "consultant" within the meaning of the regulation and, therefore, deemed to be a "public official" within the meaning of section 82048 of the Act. In this regard, it is important to note the FPPC's advice that, "An individual under contract to make even a single governmental decision may be a consultant by virtue of Regulation [18701(a)(2)(A)]."[6] But what does it mean to "make" one of those governmental decisions?

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[5]Cal. Code Regs., tit. 2, § 18701(a)(2). FPPC regulations can be found on the Commission's web site www.fppc.ca.gov under "Library & Publications."

[6]Cronin Advice Letter, No. I-98-155 [1998 WL 390188] (July 7, 1998) at p. 1. This is an example of the independent operation of the two parts of the "consultant" test. As will be seen below, for purposes of applying paragraph (B) of the Regulation, a single project or series of related projects by a contractor may not support a conclusion that a contractor "serves in a staff capacity." But if a single act is the "making of a governmental decision," the FPPC has indicated that this single act may suffice to bring the contractor within paragraph (A) of the Regulation.

Another FPPC Regulation, 18702.1, does outline certain actions that, when taken by a public official "acting within the authority of his or her office or position," will constitute "making a governmental decision," such as when the official: votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, or enters into a contractual agreement on behalf of his or her agency.[7] Paragraph (A) of Regulation 18701(a)(2) is a further refinement of this outline, describing common activities that would ordinarily be engaged in by public officials, but are at times delegated to private persons by contract. In effect, then, when contractors make decisions that would normally be made by public officials, the FPPC will "deem" them to be "public officials" for purposes of the Act.

Only a few advice letters analyze the question of when a contractor "makes a governmental decision" for purposes of the Consultant Regulation. With respect to the question whether a contractor can be said to have been delegated official power so as to bring the contractor within paragraph (A) of the Regulation, the FPPC has advised that delegation to contract "plan checkers" (who review plans for building code compliance) of authority to approve plans or to issue or deny permits or approvals was sufficient to make the contractor a "consultant" within the meaning of the Regulation.[8]

Likewise, employees of investment management firms were found by the FPPC to be "consultants" because they made decisions regarding the investment of public funds that would otherwise have to be made by a public agency.[9] The underlying facts, here, were that the investment management firms were given discretion to, among other things, direct and manage the investment and reinvestment of assets, to direct trades to specific brokers, and to choose fee arrangements with the brokers.

When Is a Contractor "Serving in a Staff Capacity"? An Introduction to Paragraph (B) of the Two-Part Test

A determination that a contractor will not be "making" a governmental decision does not end the inquiry. If the contractor is a "de facto" government employee, i.e., he or she "serves in a

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[7]Cal. Code Regs., tit. 2, § 18702.1.

[8]Kalland Advice Letter, No. I-96-78 [1996 WL 621927] (May 3, 1996); by way of contrast, *see* Neils Advice Letter, No. A-95-380 [1995 WL 902207] (December 15, 1995) at p. 4, where the FPPC advised: ". . . [S]hould the contractual relationship between the City and [the contracting entity] be structured so that decision-making authority is not conveyed to Clemens . . . Clemens would not be considered a "consultant" within the meaning of the . . . Act."

[9]Randolph Advice Letter, No. I-95-045 [1995 WL 911886] (March 27, 1995).

staff capacity," the contractor may nevertheless come within the definition of "consultant" under paragraph *(B)* of the Regulation — and, therefore, will be deemed to be a "public official" for purposes of section 82048 of the Act.

Contract advisors who neither make governmental decisions nor serve in a staff capacity are not "consultants" within the meaning of the Regulation, and are, therefore, not "public officials" within the meaning of the Act. Thus, the FPPC, in its 1998 Cronin Advice Letter, stated:

> . . . [N]ot all persons advising government agencies are "consultants" within the meaning of the Act. Persons who do not actually make governmental decisions, or function as de facto agency staff, may not be "consultants" under the Act even if they do occasionally advise government agencies. Persons who are not "consultants," and who are not otherwise public officials, should not be designated in an agency's conflict of interest code.[10]

The Cronin Letter indicates that this is the case, even if the contractor "participates" in the making of governmental decisions (but, of course, does not "make" governmental decisions):

> Under [paragraph (B) of Regulation 18701(a)(2)], a person who provides advisory services related to a single project, or to a limited range of projects may not be classifiable as a consultant. This is true even if his or her services amount to participation in one or a few related governmental decisions. If such person is not otherwise a public official, he or she need not be designated in an agency's conflict of interest code.
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> . . . [N]ot all persons under contract to public agencies are "consultants," even if they do on occasion "participate in" governmental decisions. The dispositive question, for persons who "participate in" but do not "make" governmental decisions, is the extent of the services provided to the agency.[11]

In considering whether a contractor can be said to "serve in a staff capacity," the FPPC noted in its Ferber Advice Letter: "Implicit in the notion of service in a staff capacity is an ongoing

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[10]Cronin Advice Letter, *supra* note 5, at p. 1.

[11]*Id.*.at pp. 3-4.

relationship between the contractor and the public agency."[12] The Ferber letter set up a two-part test: First, the contractor must work on more than a single project or a limited range of projects for an agency. "However," noted the Letter, "this qualifier also includes a temporal element. Consequently, even if a contractor only works on a single project, the length of the individual's service to the agency is a relevant factor that must be considered."[13] The Letter then discussed these points as they had arisen in prior requests for advice:

> In the Sanchez Advice Letter, No. A-97-438, we advised a contractor who performed periodic biological and physical surveys of a project area over a two-year period for a local planning commission that he was not a "consultant" under the Act. In reaching that conclusion, we included the following caveat:
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> "Our only concern in reaching this conclusion is the duration of the contractual relationship, which will be over two years. However, in context, this duration is not indicative of an on-going relationship which might otherwise lead to the conclusion that there is a staff relationship . . . although the term of the contract is over two years, this duration is attributable to the need for periodic monitoring, not to perform continuous work during that time. Under these circumstances, the duration of the contractual relationship does not preclude the conclusion reached above."
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> In the Maze Advice Letter, No. I-95-296, we advised the employees of an accounting firm, who performed annual independent audits of municipal governmental entities pursuant to multi-year contracts, that they were not consultants under the Act. However, in that letter, we further advised the employees that if they provided other accounting services to the agencies, they may become consultants under the Act. Similarly, in the Parry Advice Letter, No. I-95-064, we concluded that employees of an engineering firm, who reviewed hydrological studies on a sporadic basis, were not consultants under the Act. However, in the Parry letter, we further advised that if the engineering firm provided consulting services on a regular basis, then the employees would be considered consultants.
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> In applying the first prong of the regulation, previous advice letters reveal that the length of a contractor's services to an agency is a significant factor where the

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[12]Ferber Advice Letter, No. A-98-118 [1998 WL 289989] (May 26, 1998), citing Sanchez Advice Letter, No. A-97-438[1997 WL 604012]; Maze Advice Letter, No. I-95-296 [1995 WL 912290] (October 16, 2995); Parry Advice Letter, No. I-95-064 [1995 WL 911913] (April 6, 1995).

[13]Ferber Advice Letter, *supra*, pp. 2-3.

> contract is for a term of more than one year and the services are rendered on a regular and continuous basis for the duration of the contract. Your inquiry concerns high-level contractors who have broad project roles of a duration of more than one year. Under these facts, [the contractors will be said to be serving in a staff capacity].[14]

The "temporal element" piece of this analysis was given further elaboration by the FPPC in February 2000, in the Smith Advice Letter, with respect to a contract for *less* than a year.[15] The Letter concerned the plan by the Bay Conservation Development Commission ("BCDC") to ". . . hire a consultant for nine months and have complete control over the consultant's work. The consultant in question has not provided any other service to BCDC . . . . [and BCDC's funding source] will pay the consultant . . . up to $100,000." The following analysis was provided:

> Overall, the length of a contractor's services is a significant factor where the contract is for a term of more than one year and the services are rendered on a regular and continuous basis for the duration of the contract. [footnote omitted] According to your facts, BCDC wants to hire an individual for nine months to review the technical aspects of the MHEA project. In addition, the individual your agency wishes to hire has not performed any other services for BCDC. Based on these facts, the individual will not be "serving in a staff capacity" and will therefore not be a "consultant" under the Act. As such, that individual will not be a public official subject to the Act's conflict-of-interest prohibition.[16]

This was consistent with earlier advice that FPPC staff had given to the BCDC in 1996 on another contract for less than one-year duration:

> Your letter indicated that the consultant would be hired for the specific purpose of bringing the Port's draft waterfront plan into compliance with the McAteer-Petris Act and the Commission's previously adopted plans. The position would be short-term;

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[14]Ferber Advice Letter, *supra* note 2, at pp. 2-3; *see also,* Thomas Advice Letter, No. A-98-185 [1998 WL 557973] (August 21, 1998) (the "staff capacity language generally excludes from the scope of the regulation those individuals who work on one project or a limited range of projects for an agency," but "if . . . a single project requires regular work over an extended period of time, persons charged with performing that work may well be 'consultants' within the meaning of the Act.")

[15]Smith Advice Letter, No. I-99-316 [2000 WL 248067] (February 28, 2000).

[16]*Id.* at pp. 2-3.

> you envision that the project will be completed by December, 1996 and the consultant will not be retained after the completion of the project. The consultant you plan to hire would not be a consultant under the Act based on the duties performed under this single contract.[17]

Similarly, in its still earlier Davidson Advice Letter,[18] the FPPC determined that an individual contractor was not a "public official" within the meaning of section 82048 where he first worked on a project that lasted six and one-half weeks, then subsequently worked on a related project that lasted about three weeks. In its Parry Advice Letter,[19] the FPPC advised about employees of a consulting firm where one contract was limited to "review of a hydrological study" and the other contract -- although on a retainer basis -- was occasional in frequency. The FPPC said that "since they only provide services on a sporadic basis for a single project" the contractor's employees were not "consultants" under the Act.[20]

When Is a Contractor Who "Serves in a Staff Capacity" a "Consultant" Under Paragraph (B)?

Not every contractor who serves in a staff capacity is a "consultant" for purposes of the Political Reform Act. For example, an agency might contract for typing services from a "temp" agency. Even if the contract-typist works full-time for more than a year, this contractor would not constitute a "consultant" or a "public official" under the Act. Under paragraph (B) of the Regulation, a contractor who *serves in a staff capacity* is a "consultant" only if he or she either (1) "*participates* in the making of a governmental decision as defined in Regulation 18702.2," or (2) "performs the same or substantially all the same duties" for the agency that would otherwise be performed by someone *who is required to file a disclosure*

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[17]Travis Letter, No. A-96-053 [1996 WL 779490] (February 28, 1996), p. 3.

[18]Davidson Advice Letter, No. I-95-111 [1995 WL 911934] (April 17, 1995)

[19]Parry Advice Letter, No. I-95-064 [1995 WL 911913] (April 6, 1995).

[20]*See also,* Karger Advice Letter, No. A-97-253 [1998 WL 113592] (March 4, 1998), p. 3 (Contractors were not "consultants," even though the agency's request for proposal (RFP) and the contractor's response thereto stated that contract personnel would "perform all of the functions normally carried out by staff," where the actual facts demonstrated otherwise, and the contract for advisory services lasted only a "relatively short period of time, i.e., less than one year.")

statement under the agency's conflict-of-interest code.[21]

— When the contractor *either* "participates in the making of a government decision as defined by Regulation 18702.2" . . . .

Regulation 18702.2 provides:

> A public official "participates in making a governmental decision" except as provided in . . . Regulation . . . 18702.4, when, acting within the authority of his or her position, the official:
>
> (a) Negotiates, *without significant substantive review*, with a governmental entity or private person regarding a governmental decision referenced in [paragraph (A) of the Regulation 18701(a)(2)];
>
> (b) Advises or makes recommendations to the decisionmaker either directly or *without significant intervening substantive review*, by:
>
> (1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [paragraph (A) of Regulation 18701(a)(2)]; or
>
> (2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [paragraph (A) of Regulation 18701(a)(2)].

(italics added).

As the italicized language indicates, a key factor in determining whether an individual "participates" is often the absence of any "intervening substantive review" of the contractor's work or recommendations before those go to the agency's decision-maker.[22] The FPPC's

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[21]Cal. Code Regs., tit. 2, § 18701(a)(2)(B).

[22]This is true as well with regular agency employees. If their work is subject to review by their supervisors and they don't make recommendations directly to the decisionmakers, they typically are not included in the agency's conflict-of-interest code. To avoid constitutional privacy concerns, an agency's conflict-of-interest code is developed by each agency so as to be tailored to

Marks Advice Letter, is illustrative of the point.[23] That Letter concerned certain contract physicians. The FPPC concluded that, although many of the physicians served in a staff capacity, there was sufficient "intervening substantive review" of their *participation* in the making of governmental decisions to take them out of paragraph (B). The facts were that individual contract physicians made recommendations on equipment, supplies and services that were then reviewed by a committee of other physicians, with input from the hospital director. If approved, the recommendation was then forwarded by the hospital director to the board of supervisors for a "final decision." Thus, the individual physicians did not make recommendations "directly" to the board of supervisors, and the recommendations were reviewed by other individuals with the experience to make that review "substantive."[24]

> **— *or* the contractor performs all or substantially all the same duties that would otherwise be filled by someone holding a position specified in the agency's conflict-of-interest code.**

The FPPC's Randolph Advice Letter[25] concluded that employees of Wilshire Associates Inc. were "consultants" within the meaning of the Regulation because they:

> . . . prepare and present reports or opinions which require the exercise of judgment on their part (as set forth in [the regulation]) and for the purpose of influencing a governmental decision referenced in subdivision (a)(2)(A) – namely, board decisions to enter into, modify, or renew contracts with investment managers, as well as decisions regarding policies, standards, and guidelines for the agency. [Cite omitted.]
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> These types of services constitute the "participation" in decisions and if the same services were performed by an employee of the agency, the employee would be designated in the conflict of interest code.

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the particular decision-making processes and positions within the agency. (*See* City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259.)

[23]Marks Advice Letter, No. A-98-073 [1998 WL 289886] (May 26, 1998).

[24]The Letter distinguished, however, those contract physicians who serve on committees or subcommittees: "In general, we conclude that members of committees who make final decisions on non-routine matters would be consultants under the Act." (Marks Advice Letter, *supra* note 23 at pp. 5-6.)

[25]*Supra* note 10.

The FPPC's Maze Advice Letter[26] involved a private accounting firm whose employees performed independent audits of municipalities on an annual basis. The FPPC analyzed whether the individuals were "acting in a staff capacity *and* performing substantially the same functions" as an employee covered by the conflict-of-interest code.

> First, the persons must work on more than a single project or a limited range of projects. . . . Second, even if you worked on more than a single project or more than a limited range of projects for an agency, your tasks must also be those of a quasi-staff member and must be substantially the same as one of the individuals whose position at the agency is described in the conflict of interest code.

Maze Advice Letter, supra at 2-3.

In this case, the FPPC concluded that, even though the firm had a multi-year contract with various jurisdictions, "[g]enerally you would not qualify as consultants in performing independent audits of municipalities. . . . [O]ur advice is limited to your independent audit function, we have not been provided facts regarding contracts for general accounting services and advice."[27] A similar result was reached in the FPPC's Lyions Advice Letter,[28] regarding a civil engineering firm hired to assist a city in its general plan revision.

Contracts with Firms: Who Should be Designated to File Disclosure Statements?

First, it should be noted that ". . . a 'consultant' is the natural person providing the services to the [agency], and not the business entity itself."[29] Second, the Act requires filing only by those contract providers who actually fit the definition of "consultant." "For these reasons, the employees of Wilshire who provide services to the KCERA are currently designated in the conflict of interest code and should continue to be designated as consultants and subject to

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[26]*Supra* note 12.

[27]*Id.* at p. 3.

[28]Lyions Advice Letter, No. A-94-353 [1994 WL 912806] (November 18, 1994)

[29]*Id.* at p. 3, fn. 2; *accord,* Conley Advice Letter, No. A-96-182 [1996 WL 779535] (July 15, 1996), at p. 5, fn. 3.

the provisions of the Act."[30] Thus, in the Marks Advice Letter[31] discussed above, some of the contract physicians (those who sat on committees or subcommittees) were found to be "consultants" because they "participate in making governmental decisions." However, other contract physicians were found not to be "consultants" because they did not "participate" within the meaning of the Regulation. To the same effect is the following statement from the Patterson Advice Letter:

> A public official must be a natural person. (See section 82048). We will assume for purposes of this letter that your question pertains to the particular employee or member of the consulting firm who will be performing the work you detail in your letter.[32]

What Needs To Be Disclosed?

Under the Act, disclosure categories are developed for each agency's respective conflict-of-interest code. This structure was created to remedy the earlier constitutional problems of overbreadth and violation of privacy.[33] Disclosure categories are to be crafted to fit the duties and powers of the particular position in question. Since each agency knows best what its employees and "consultants" do, the conflict-of-interest code is developed by the agency.[34] The FPPC has regulations that amplify on the statutory scheme for agencies developing their conflict-of-interest codes.[35]

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[30]Randolph Advice Letter, *supra* note 8, at p. 7.

[31]*Supra* note 23.

[32]Patterson Advice Letter, No. A-97-570 [1998 WL 88205] (February 25, 2998), p. 3.

[33]See, Carmel-by-the-Sea v. Young, supra, and County of Nevada v. MacMillen (1974) 11 Cal.3d 662); *cf.* Hays v. Wood (1979) 25 Cal.3d 772 (upholding the Act's narrowly tailored requirements.)

[34]Gov. Code, § 87301; *see also*, Burgess Advice Letter, No. A-95-336 [1995 WL 907875] (November 8, 1995) at p. 2 ("The designation of employees under an agency's conflict-of-interest code is left to the discretion of each individual agency and its respective code-reviewing body. (Sections 87300-87310.)") For all state agencies, except itself, the FPPC is the code reviewing body. (Gov. Code, §82011, subd. (a), (d).)

[35]Cal. Code Regs., tit. 2, §§18730-18733.

With respect to "consultants" in particular, the Marks Advice Letter is instructive:

> With respect to consultants, the Commission has advised that a consultant position should be designated in the code but that disclosure may be limited on a case-by-case basis at the discretion of the agency's executive director (or analogous position). Specifically, the Commission has advised that the following language be added to an agency's conflict of interest code:
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> "Consultants shall be included in the list of designated employees and shall disclose pursuant to the broadest disclosure category in the code subject to the following limitation: the (executive director or executive officer) may determine in writing that a particular consultant, although a 'designated position,' is hired to perform a range of duties that is limited in scope and thus not required to fully comply with the disclosure requirements described in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The (executive director's or executive officer's) determination is a matter of public record and shall be retained for public inspection in the same manner and location as this conflict of interest code."
>
> Accordingly, the county may employ a limited disclosure procedure for consultant physicians. Because the determination as to the extent of disclosure for any particular consultant is left to the discretion of the agency, we will not comment as to whether . . . your request would be appropriate for any or all of the physicians.[36]

Thus, each agency is initially responsible for the determination of which of its contract service providers are "consultants" under any of the prongs of the test. Then, the agency must determine, as to those "consultants," whether "the broadest disclosure" (e.g., all investments, sources of income and gifts, and interests in real estate) is appropriate. If that level of disclosure is inappropriate, because the range of decisions being made or participated in by the consultant is narrow, then the ". . . disclosure may be limited on a case-by-case basis." However, the Act requires that a conflict-of-interest code must ". . . provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed and prevented. . . ."[37]

The conflict-of-interest code, including the description and assignment of disclosure categories, must also ". . . provide to each affected person a clear and specific statement of his

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[36]Marks Advice Letter, *supra* note 24, at pp. 7-8.

[37]Gov. Code, §87302, subd. (a), §87309, subd. (a).

[or her] duties under the Code . . . [and] adequately differentiate between designated employees with different powers and responsibilities."[38] The agency must make this determination and notify the "consultant" of his or her obligation to file disclosure statements and of the scope of disclosure required, i.e., the disclosure categories assigned, so that the "consultant" may comply with his or her obligations under the Act.

We trust this memorandum has proved helpful to you in analyzing the various issues relating to who is, or is not, a "consultant" under the Act. As previously stated, specific fact-based questions should be addressed to the FPPC.

Enclosure: Consultants In A Conflict of Interest Code

[38]Gov. Code, §87309, subd. (b) and (c).

CONSULTANTS
IN A
CONFLICT OF INTEREST CODE

WHO IS A CONSULTANT?

The Political Reform Act (Gov. Code Section 81000-91015) provides that "no 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." (Section 87100.) In addition, the Act requires every public official to disclose those economic interests that could foreseeably be affected by the exercise of his or her duties. (Sections 87200-87313.)

The term "public official', includes consultants: "'Public official at any level of state or local government' means a member, officer, employee, or consultant of a state or local government agency." (2 Cal. Code of Regs. Section 18701(a).)

Regulation 18701(a)(2) defines "consultant" as an individual who, pursuant to a contract with a state or local government agency:

(A) Makes a governmental decision whether to:

- (i) Approve a rate, rule, or regulation;
- (ii) Adopt or enforce a law;
- (iii) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
- (iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract which requires agency approval;
- (v) Grant agency approval to a contract which requires agency approval and in which the agency is a party or to the specifications for such a contract;
- (vi) Grant agency approval to a plan, design, report, study, or similar item;
- (vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof;

-OR-

(B) Serves in a staff capacity with the agency and in that capacity performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code.

CONSULTANTS

CONSULTANTS ARE INDIVIDUAL

It is not the business or firm providing services to your agency that is considered the consultant. The *individual(s)* working for the firm who provide the services are considered the consultants. These individuals must file statements of economic interests based on their *personal* financial interests and are subject to disqualification and other laws affecting public officials.

SERVING IN A STAFF CAPACITY

The regulation includes only those individuals who are performing substantially all the same tasks that normally would be performed by staff members of a governmental entity. In most cases, individuals who work on just one project or a limited range of projects for an agency are not considered to be working in a "staff capacity." The length of the individual's service to the agency is relevant. For example, suppose an individual contracted with a city to study noise at a specified intersection. If the individual took the noise measurements in one day, and issued a report to the planning commission before its next meeting, the individual normally would not be serving in a staff capacity. If, however, a firm's contract provided that it would provide all plan checking services for a city for five years, it is much more likely that individuals performing these services would be in a quasi-staff capacity. In addition, the tasks of the quasi-staff member over this period of time must be substantially the same as a position that is, *or should be,* specified in the agency's conflict of interest code. (Memorandum to the Commission dated March 28, 1994, regarding Regulation 18700, pp. 3-4.) *(Kalland* Advice Letter, No. I-96-078.)

An individual *who makes a governmental decision* listed above or serves in *staff capacity* with the agency is considered a public official who must file a statement of economic interests. The individual is subject to the Act's gift limits and conflict of interest provisions.

EXAMPLES

The California Coastal Commission hired an engineering firm to review a hydrological study involving wetlands restoration. Employees of the firm would not be considered consultants under the Act, because they are not making governmental decisions and are only providing services on a sporadic basis for one project. If over time, the firm provides consulting services to the Coastal Commission on a regular basis, or performs substantially the same duties as would otherwise be performed by an individual designated in the Commission's conflict of interest code, employees of the firm would be considered consultants. *(Parry* Advice Letter, No. I-95-064.)

CONSULTANTS

EXAMPLES

An attorney hired to perform ongoing legal services for an agency would usually be considered a consultant. Attorneys generally have broad powers to affect decisions which could foreseeably and materially affect their financial interests. These powers include the authority to represent and bind the agency to a course of action in litigation and contract matters. Attorneys often make governmental decisions listed in Regulation. 18701(a)(2)(A) and/observe in a staff capacity with the agency. However, an attorney hired to work on one discrete litigation matter, who was not making any governmental decisions listed above, would not be considered to be working in a "staff capacity" and, therefore, would not be a consultant.

The Milton Marks Commission on California State Government hired a research firm to conduct a study on gaming in California. The firm's responsibilities were to create and coordinate advisory committee meetings, create a public hearing, and produce an in-depth report about the Commission's findings; they did not make any governmental decision, nor did they provide advice or make recommendations. Although members of the firm "performed all the duties normally carried out by staff," their duties did not include those listed above which would qualify them as consultants. (*Karger and Scher* Advice Letter, No. A-97-253.)

CalPERS entered into a limited partnership with a real estate development firm to implement an investment program for residential subdivisions. The firm is the general partner and runs the business. Although this is a single project, it requires regular work over an extended period of time; the work is the sort that staff would normally provide. Therefore, the firm's employees are consultants and must report their economic interests. (*Thomas* Advice Letter, No. I-98-185.)

CONSULTANTS

LISTING CONSULTANTS IN A CONFLICT OF INTEREST CODE

The Commission realizes that not all consultants participate in making decisions on behalf of public agencies. Rather than amend your code each time you retain a consultant who is in a decision-making capacity, you may use a specialized disclosure category which provides that the disclosure required of consultants shall be determined on a case-by-case basis by the chief executive officer. The chief executive officer may make a determination as to what disclosure, if any, is required by any particular consultant.

This consultant disclosure category should be part of the code. You should add the position "consultant" as a designated position in the appendix of the code with a footnote as shown in the following example:

Consultant*

> **Consultants shall be included in the list of designated employees and shall disclose pursuant to the broadest disclosure category in the code subject to the following limitation:*
>
> *The (executive director or executive officer) may determine in writing that a particular consultant, although a "designated position," is hired to perform a range of duties that is limited in scope and thus is not required to comply fully with the disclosure requirements described in this section. Such determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The (executive director's or executive officer's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code.*

This fact sheet highlights provisions of the Act concerning consultants. You should not rely on the fact sheet alone to ensure compliance with the Act. If you have any questions, consult the Act and regulations or contact the Fair Political Practices Commission at (916) 322-5660.