

Admin.

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## First Supplement to Memorandum 2011-11

### Open Government Laws

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Memorandum 2011-11 identifies and briefly summarizes various “open government” statutes applicable to the Commission. This supplement briefly discusses another statute relating to governmental conflicts of interest, Government Code Section 1090.

Except as otherwise indicated, all statutory references in this supplement are to sections of the Government Code.

#### OVERVIEW

Section 1090 prohibits officers or employees of the state and other governmental entities from being “financially interested” in any contract that is either (1) made by the officer or employee in their official capacity, or (2) made by any body or board of which they are members.

Commissioners are officers of the state for purposes of Section 1090. See *People v. Elliott*, 115 Cal. App. 2d 410, 415; 252 P.2d 661 (1953).

It is rare that a Commissioner would be called upon to personally enter into a contract, in his or her official capacity as a Commissioner. However, the Commission as a body enters into various contracts through its staff, mostly for routine supplies and equipment. By virtue of membership on the Commission, a Commissioner’s financial interest in such contracts could theoretically implicate Section 1090. See *Thomson v. Call*, 38 Cal. 3d 633, 649-50, 699 P.2d 316, 214 Cal. Rptr. 139 (1985); *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 211-212, 137 Cal. Rptr. 118 (1977).

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Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

## NATURE OF FINANCIAL INTEREST

The term “financial interest” as used in Section 1090 has been defined by a court as a “contingent possibility of monetary or proprietary benefits” to the officer or employee based on the contract. *People v. Honig*, 48 Cal. App. 4th 289, 333, 55 Cal. Rptr. 2d 555 (1996)). Alternatively, as this same court explained, “an official has a financial interest in a contract if he might profit from it.” *Id.*

The term “financial interest” also includes an indirect benefit that a member might receive from a contract. An indirect benefit might arise if a Commissioner’s law firm represents a person who contracts with the Commission (see 78 Ops. Cal. Atty. Gen. 230 (1995), or if a Commissioner’s spouse has a financial relationship to a person who contracts with the Commission. (see *Nielsen v. Richards*, 75 Cal. App. 680 (1925); 75 Ops. Cal. Atty. Gen. 20 (1992)).

However, the law does recognize two important limitations on the scope of an officer’s financial interest in a contract.

### **Minimal Financial Interest**

There is an exception to Section 1090 for “minimal” financial interests, as specified. See Section 1091.5.

The minimal interests that are likely most relevant to Commissioners include the following:

- An officer’s interest in a client of the officer’s law firm is minimal and therefore exempt from Section 1090, if (1) the officer has less than a 10% ownership interest in the firm, and (2) the officer has not and will not receive any direct compensation as a result of the contract. See Section 1091.5(a)(10).
- An officer’s ownership interest in a for-profit corporation is minimal and therefore exempt from Section 1090, if (1) the officer owns less than three percent of the stock of the corporation, and (2) the officer does not derive more than five percent of the officer’s annual income from the corporation. See Section 1091.5(a)(1).
- An officer’s reimbursement for actual and necessary expenses incurred in the performance of official duties is minimal and therefore exempt from Section 1090. See Section 1091.5(a)(2).

## **Remote Financial Interest**

The law also provides an exemption from Section 1090 for a “remote” financial interest, provided that all of the following conditions are satisfied:

- (1) The interest is in a contract made by a body or board of which an officer is a member (as contrasted with a contract made directly by the officer).
- (2) The interest is disclosed to the body or board.
- (3) The interest is noted in the official records of the body or board.
- (4) The officer does not influence or attempt to influence another member of the body or board to enter into the contract.

Section 1091(a), (c). In other words, the exemption for remote interests only applies if the interest is disclosed and the officer does not participate in making the contract, as specified above.

The “remote” interests that are likely most relevant to Commissioners include the following:

- An officer’s interest in a client of the officer’s law firm is remote, regardless of the officer’s ownership share in the firm, if the officer has not and will not receive direct compensation as a result of the contract. See Section 1091(b)(6).
- An officer’s ownership interest in a for-profit corporation is remote, regardless of the amount of income derived by the officer from the corporation, if the officer’s share of stock is less than three percent of the stock of the corporation and was derived from the officer’s employment with that corporation. See Section 1091(b)(14).

## **Severe Penalties for Violation**

The penalties for violation of Section 1090 are severe.

A willful violation is punishable by a fine or imprisonment in state prison, and permanent disqualification from the holding of any state office. Section 1097. The term “willful” has been defined to mean that the officer or employee knows of “a reasonable likelihood that the contract may result in a personal financial benefit” to the officer or employee. *People v. Honig*, 48 Cal. App. 4th 289, 338, 55 Cal. Rptr. 2d 555 (1996).

A *non*-willful violation of the section voids the contract at issue, and may result in civil consequences to the interested officer or employee, depending on the circumstances presented. *Thomson v. Call*, 38 Cal. 3d 633, 699 P.2d 316, 214 Cal. Rptr. 139 (1985).

Respectfully submitted,

Steve Cohen  
Staff Counsel