



COUNCIL AGENDA: 02-28-12  
ITEM: 2.11

# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Dennis Hawkins, CMC  
City Clerk

**SUBJECT:** SEE BELOW

**DATE:** 2-15-12

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**SUBJECT: AMENDMENT OF FAIR POLITICAL PRACTICES COMMISSION  
REGULATION 18705.5**

## RECOMMENDATION

As recommended by the Rules and Open Government Committee on February 15, 2012 and outlined in the attached memo previously submitted to the Rules and Open Government Committee, support the amendment of the Fair Political Practices Commission Regulation 18705.



## Memorandum

**TO:** RULES AND OPEN  
GOVERNMENT COMMITTEE

**FROM:** Richard Doyle,  
City Attorney

**SUBJECT:** Amendment of Fair Political  
Practices Commission  
Regulation 18705.5

**DATE:** February 9, 2012

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Fair Political Practices Commission Regulation 18705.5 deems a decision to appoint an official to a local agency which pays at least \$250 in a 12-month period a conflict of interest for the official if he or she is voting on the decision to appoint himself or herself. See the Attachment 1 for the full text of Regulation 18705.5.

This means that if the City Council takes action to appoint a member of the Council to an agency which pays at least \$250 in a 12-month period, that Councilmember must recuse himself or herself from participating in the decision to appoint himself or herself.

The Cities of Anaheim, Dana Point, Irvine, La Palma, Newport Beach, San Clemente, Villa Park and Yorba Linda ("the Requesting Cities") have asked the Fair Political Practices Commission ("FPPC") to amend the regulation. See Attachment 2 for a copy of the letter from counsel for the Requesting Cities to the FPPC.

The FPPC will consider the matter and testimony at its meeting on March 15, 2012. Counsel for the Requesting Cities has asked the San José City Council to formally support their request for amendment.

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LISA HERRICK  
Sr. Deputy City Attorney

**Attachment 1**

**§ 18705.5. Materiality Standard: Economic Interest in Personal Finances.**

(a) A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least \$250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.

(b) The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family is the only person in the job classification or position.

**Attachment 2**

December 19, 2011

**VIA FACSIMILE (916) 322-0886 AND  
OVERNIGHT DELIVERY**

Fair Political Practices Commission  
Zachery P. Morazzini, General Counsel  
Attn: John Wallace  
428 J Street, Suite 620  
Sacramento, CA 95812

Re: Petition to Amend Regulation 18705.5

Dear Mr. Wallace:

This law firm represents the following public agencies that have authorized this petition to be sent to the California Fair Political Practices Commission ("Commission") relating to certain provisions of the Political Reform Act<sup>1</sup> (the "Act"): the City of Anaheim; the City of Dana Point; the City of Irvine; the City of La Palma; the City of Newport Beach; the City of San Clemente; the City of Villa Park; and the City of Yorba Linda ("Clients"). Our Clients have several council members who are appointed by a vote of each respective city council to serve on the governing boards of legally-established joint powers authorities, special districts or other similar agencies that remunerate the appointed councilmember \$250 or more in a 12-month period ("Appointed Paid Boards").

This letter petitions the Commission to amend Regulation 18705.5. This request is made pursuant to Section 11340.6.<sup>2</sup> Our clients specifically request that this petition for amendment be placed on the Commission's March 2012 meeting agenda. I attach to this petition our firm's previous letter to the Commission outlining our position relating to the issues raised by the amendments adopted by the Commission in 2005 relating to Regulation 18705.5 ("November Letter") (Exhibit A) and our proposed amendment (Exhibit B).

<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> The Commission is subject to the provisions of the Administrative Procedures Act as it existed in 1974, when the Political Reform Act was adopted. In 1974, the Government Code section corresponding to current Section 11340.6 was Section 11426. The old and new sections are substantially similar.

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### Background

In 2005, as set forth in our November Letter, the Commission considered amendments to Regulation 18705.5 that inserted the term "appoint" in the regulation. As we have previously outlined, the practical implications of the amendments in 2005 to Regulation 18705.5 are far reaching. Subsequently, in your reply letter to our firm dated December 6, 2011 ("General Counsel December Letter"), you advised us that the Commission, in 1985, based upon amendments made by the Legislature to Section 87103, adopted Regulation 18702.1 to include the following language found in subdivision(c)(2):

*The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency. This subsection does not apply to decisions to hire, fire, promote, demote, or discipline an official's spouse which is different from salaries paid to other employees of the spouse's agency in the same job classification or position.* (Emphasis in original).

As set forth in the General Counsel December Letter, this language was included by the Commission as a way to interpret the new revisions made by the Legislature, in 1985, via AB 670 (Klehs), which amended Section 87103 to add the following new phrase:

*An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following: (Emphasis in original and footnote omitted].*

This is commonly referred to as the "personal financial effects" (PFE) rule.

In the General Counsel December Letter, you further stated as follows:

The record is clear that as of 1985 the Commission decided the new amendment to Section 87103 applied even to government income and *explicitly* stated so in the 1985 regulation in the second sentence of (c)(2) -- the "exception to the exception" as it were (hereafter the "hire-fire" rule). It appears from your letters that you focused exclusively on Section 82030 and its relationship to Regulation 18705.5, and that you may not have been aware that the

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Commission had to also consider the 1985 amendment to Section 87103 and sought to harmonize the two acts of the legislature.

The Commission at the time made a reasonable policy interpretation of the new statutory language and had the advantage of contemporaneous knowledge of the legislative history that is hard to reconstruct after the fact. (Emphasis in original and footnote omitted.)

The essence of the position expressed in the General Counsel December Letter is that the Commission believes the 1985 legislative amendments to Section 87103 necessitated the creation of the so-called "hire-fire" rule that excluded such decisions from the exception of "government income" found in Section 82030(b)(2). It appears, further, that you do not cite any information in the Legislative Counsel's Digest relating to AB 670 that would suggest the Legislature intended to create an "exception to the exception" for purposes of Section 82030(b)(2). Presumably, if the Legislature had so intended, it would have, in parallel to adopting amendments to Section 87103, amended Section 82030(b)(2), the Act's definition of "income."

Further, as we explained in our November Letter, the Commission's previous advice letters (specifically *Gutierrez Advice Letter*, A-00-15) suggest that the Commission had subsequently (in 2000) rejected the application of the "personal financial effects" rule in a fashion that effectively would swallow up or undermine the "government salary exception" to the Act's definition of "income" found in Section 82030(b)(2). Subsequent to our November Letter, we have discovered additional information indicating that the Commission, at times, has sought to "make it clear that personal financial effects will not in the future be employed in a 'reanalysis' of effects secondary to an impact on government salary" and "that the Commission should announce that personal financial effects may *not* be used to nullify the government salary exception." (Emphasis in original.) (See, Fair Political Practices Commission Memorandum – February 17, 2000: "Adoption of Regulations Developed in Conflicts Projects E, F, and G (Phase 2): Personal Financial Effect Rule; Government Salary Exception; and Materiality Standards For Governmental Entities Which are Sources of Income.")

Accordingly, it appears that to the extent that the original 1985 regulation applied the "hire-fire" rule to the spouse and not the immediate family or to the official himself, and the 2005 amendments of Regulation 18705.5 expanded the "hire-fire" rule to create an "appoint-hire-fire" rule that applied not only to the official's spouse or immediate family, but to the official in the context of appointments to Appointed Paid Boards, the Commission should develop a comprehensive and reasonable policy approach that would consider the practical application of these rules to the daily governance issues facing municipalities in California.

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### Petition For Amendment

Attached as Exhibit B to this letter is our Clients' proposed amendment to Regulation 18705.5 as currently adopted. The proposed amendment adds subsection (c) to address the issues identified in our November Letter, including the ability of a public official to participate, without limitation, including voting, in a decision as to whether the public official can be appointed to serve on Appointed Paid Boards.

### Reasons For Request

While we intend to provide a more detailed explanation as to the need for the proposed amendment to Regulation 18705.5 in advance of the Commission's March 2012 meeting (assuming this request is placed on that meeting agenda), below is a summary of the key reasons for this request:

1. The current Regulation is contrary to the Act's express language as set forth in Section 82030(b)(2), as outlined in our November Letter.
2. The Commission's stated policy purposes for amending Regulation 18705.5 in 2005 related to concerns arising from appointments of a public official's *spouse* versus concerns relating to participation in decisions to appoint oneself to an Appointed Paid Board.
3. Arguably, while the Commission's efforts to "harmonize the two acts of the Legislature" should be commended in 1985, a vigorous analysis must be undertaken to evaluate whether the express language of the Act found in Section 82030(b)(2), as adopted in 1974 by the voters, can be swallowed up and undermined by the Commission's subsequently adopted regulation in 1985 relating to a different statute as amended by the Legislature (*i.e.*, Section 87103).
4. The concerns that were addressed by the 1985 amendments to Section 87103 and the subsequent language proposed at the time by the Commission contained a specific limitation to the PFE rule: the treatment of a spouse by the official that was somehow different than the treatment of other employees in the same classification in the same agency. The aim of this specific language (arguably) even in 1985 was to stop certain abuses, such as those outlined in the Commission's 2005 Staff memorandum (*e.g.*, where a public official made a decision to increase his spouse's salary when she was the only person in that classification, or where a mayor appointed his spouse to an unsalaried position), versus impacting the very public process for making appointments to Appointed Paid Boards.

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5. To the extent that the PFE rule, the expansion of the "hire-fire" rule to appointments, and the Act's specific statutory language found in Section 82030(b)(2) are in conflict, the regulated community should be provided the opportunity to address this conflict with the Commission, as requested in this petition.

6. Any policy decision that results in the expansion of the "hire-fire" rule by the application of the PFS rule to appointments to Appointed Paid Boards should be done after careful consideration of the practical governance issues arising from such a rule, as outlined in our November Letter.

7. The proposed amended Regulation 18705.5 would make it clear that it is limited in application to appointments of public officials to Appointed Paid Boards versus any decision of the public official as it relates to his or her immediate family or the official himself in those situations unrelated to appointment (e.g., the public official is an employee of the agency).

#### Authority For Commission To Take Action Requested

The Commission has clear authority to take the action requested. Section 83112 permits the Commission to "adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title."

On behalf of our Clients, I respectfully request that this petition to amend Regulation 18705.5 be granted and that the matter be set for hearing in accordance with the Administrative Procedures Act and the Commission's regulations.

#### Additional Request

In addition, as set forth in the attached copy of the letter to the Enforcement Division (Exhibit C), we are respectfully requesting that the Enforcement Division immediately (1) rescind any warning letters sent to our clients and not post any such letters on the Commission's website; and (2) take no further action, including, but not limited to, proceeding with any administrative prosecution of the matters such as conducting any further investigations into the allegations, pending the outcome of our petition contained herein including the possible hearing before the Commission.

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Thank you for your consideration regarding this matter.

If you have any questions relating to this letter, please contact me at (650) 320-1515.

RUTAN & TUCKER, LLP

Ash Pirayou

AP:jl

Attachments

cc: City of Anaheim  
City of Dana Point  
City of Irvine  
City of La Palma  
City of Newport Beach  
City of San Clemente  
City of Villa Park  
City of Yorba Linda  
Philip D. Kohn, Rutan & Tucker, LLP  
John Ramirez, Rutan & Tucker, LLP