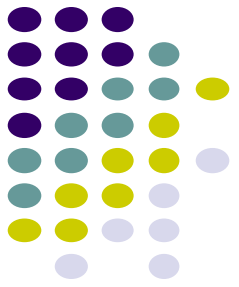
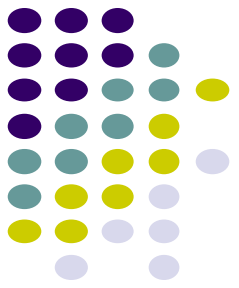


Fair Political Practices Commission



Conflicts of Interests Under the Political Reform Act of 1974 and Government Code Section 1090

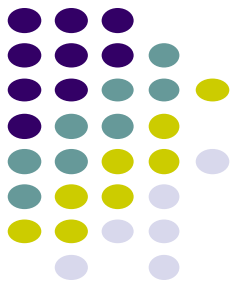
Metropolitan Water District of Southern California
Board of Directors Meeting
January 11, 2022



Fair Political Practices Commission

Purpose

- This training provides a quick overview of conflicts of interests under the Political Reform Act of 1974 and Government Code Section 1090.
- The goal of this training is to help you spot issues so you can assist in ensuring compliance with these laws.
- If a prospective issue or question regarding the application of these laws arises, please contact the FPFC for informal assistance or formal written advice.

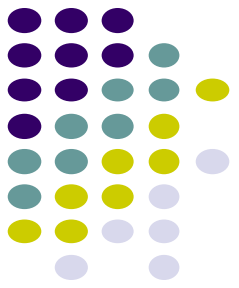


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Background on the FPPC

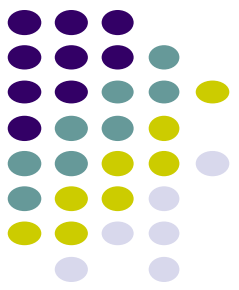
- In 1974, California voters approved Proposition 9, enacting the Political Reform Act and establishing the FPPC. The Act governs:
 - Campaign financing.
 - Lobbying.
 - Government ethics.
 - Conflicts of interests.
- The FPPC was granted limited jurisdiction over Section 1090 in 2014.

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FPPC Resources

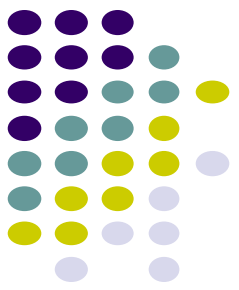
- Advice, information, and training on conflicts of interests under the Act and Section 1090.
- Commission opinions, formal advice letters, and informal assistance by email or telephone.
- Additional resources on the FPPC's website:
<http://www.fppc.ca.gov/learn.html>



Fair Political Practices Commission

Conflicts of Interests Under the Political Reform Act

- **Basic Rule:** The Act prohibits a public official from making, participating in making, or attempting to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's financial interests, distinguishable from the decision's effect on the public generally.
- **“Public Official”** defined as “every member, officer, employee or consultant of a state or local government agency.” (Section 82048(a).)
- **Basic Rule Applies to Official's “Immediate Family”:** Under the Act's conflict of interest provisions, an official always has an interest in the official's personal finances and those of immediate family members. (Section 87103.) “Immediate Family” is defined as the spouse and dependent children. (Section 82029.)

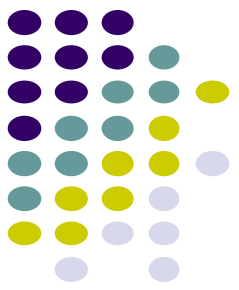


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Conflicts of Interests Under the Act (Cont.)

- **The financial effect to be analyzed is the decision's effect on the official's financial interest at issue.** It is important to keep in mind that a decision may have a disqualifying effect on an official's financial interest without having any financial effect on the official. For example, a decision may have a disqualifying financial effect on an official's financial interest in a source of income or gifts despite the decision not having any effect on the official.
- **Whether the Decision actually ends up benefiting the official's financial interest is irrelevant.** An official must recuse from the decision if it is reasonably foreseeable that the decision could have a material financial effect on the financial interest. The Act's conflict of interest provisions protect against the potential of a disqualifying conflict.
- **When in Doubt, Sit it Out.** Whether a decision may have a disqualifying financial effect is not always intuitive. Whether a decision's financial effect is "reasonably foreseeable" and "material" is determined pursuant to Commission Regulations. If at all in doubt about disqualification, you should confer with the MWDSC Ethics Office or the FPPC as soon as possible, or you should recuse pursuant to Regulation 18707 out of an abundance of caution.

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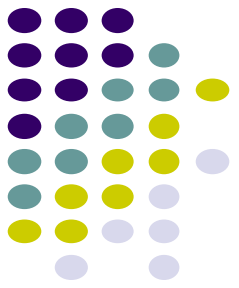


Financial Interests

An official's financial interests that may give rise to a disqualifying conflict of interests under the Act are identified in Section 87103:

- **Business:** An interest in a business valued at \$2,000 or in which the official holds a management position or is an employee.
- **Real Property:** An interest in real property valued at \$2,000 or more.
- **Source of Income:** An interest in a source of income totaling \$500 or more in the 12 months prior to the decision.
- **Source of Gifts:** An interest in a source of a gift or gifts totaling \$520 or more in the 12 months prior to the decision.
- **Personal Finances:** An interest in the official's personal finances and those of immediate family members.

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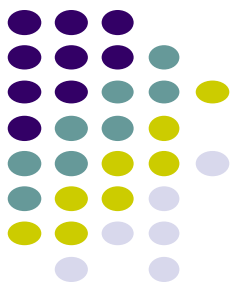


Example: Identifying Financial Interests

A District Board Member will soon consider whether to approve a project to construct a water treatment plant within the District's jurisdiction. The Board Member's owned residence is located 487 feet from the proposed project site. The Board Member manages and owns an architecture and engineering firm that provided substantial services to the project applicant on an unrelated project within the last year. The Board Member also owns \$20,000 in stock in the international corporation that will serve as the general contractor for the project if approved.

What are the Board Member's financial interests with respect to decisions relating to the proposed water treatment project?

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Identifying Financial Interests (Cont.)

With respect to decisions relating to the project, the Board Member would have the following interests:

- A **Business Interest** in the Board Member's firm under both because of the Board Member's ownership interest in that firm. (See Section 87103(a) and (d).)
- A **Business Interest** in the proposed general contractor for the project due to the Board Member's ownership of \$20,000 of stock in that business. (See Section 87103(d).)
- A **Real Property Interest** in the Board Member's owned residence, assuming the Board Member's interest in the residence is worth \$2,000 or more. (See Section 87103(b).)
- **Source of Income Interests** in the Board Member's firm, clients of that firm, or proposed general contractor if the Councilmember has received more than \$500 in income from that source within the 12 months prior to the decision at issue. (See Section 87103(c).)
- An **Interest in the Board Member's Personal Finances** including those of immediate family members. (See Section 87103.)

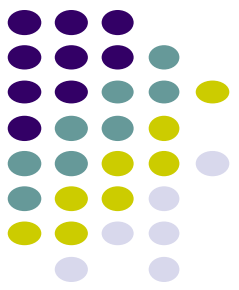


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Reasonably Foreseeable?

The rules for whether a decision's financial effect on an official's financial interest is "reasonably foreseeable" are set forth in Regulation 18701. Under that regulation, the effect is "reasonably foreseeable" if:

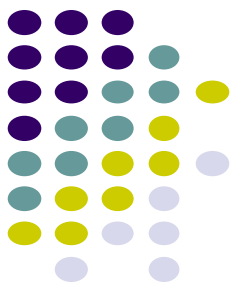
- The official's financial interest is "explicitly involved" in the decision; or
- The decision's effect on the official's financial interest can be recognized as a realistic possibility and more than hypothetical or theoretical. The effect does not have to be likely to be considered reasonably foreseeable.
- Consult Regulation 18701(b) for factors to consider in assessing whether a decision's financial effect is reasonably foreseeable.



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Example: Foreseeability Analysis

- Returning to our previously discussed hypothetical regarding decisions relating to the water treatment project application and the District Board Member's various financial interests related to those decisions.
- Now that we have identified the Board Member's interests at issue, we next analyze whether those decisions would have a disqualifying effect on each of those interests. We begin that analysis by determining if the decisions' effect on each interest is reasonably foreseeable under Regulation 18701.
- The Board Member's interest in the general contractor is "explicitly involved" in decisions relating to the project because it is a "named party" with respect to those decisions.
- The Board Member's other interests are not explicitly involved. However, there is a realistic possibility—more than hypothetical or theoretical—that those decisions could have a disqualifying effect on each of those other interests and, therefore, those potential effects are reasonably foreseeable.

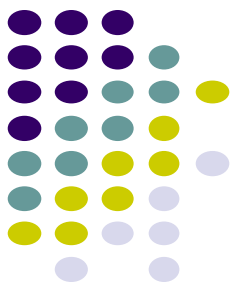


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Material Financial Effect?

- Materiality standards for each type of financial interest are provided in Regulations 18702.1 to 18702.5.
- To determine if a decision's reasonably foreseeable financial effect is material, and therefore requires the official's disqualification, apply the appropriate materiality standards.
- If the decision's reasonably foreseeable financial effect on the financial interest is material under an applicable standard, the official is disqualified, unless an exception applies.

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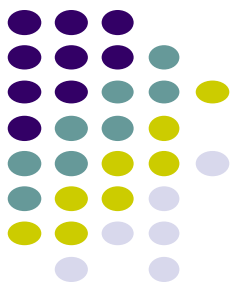


Example Materiality Analysis

Having determined it is reasonably foreseeable that decisions related to the proposed water treatment project may have a disqualifying financial effect on the Board Member's various interests at issue, we next apply the appropriate materiality standards to each of those interests:

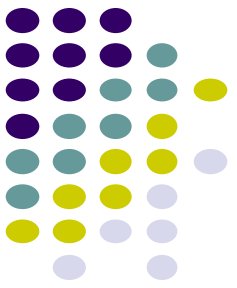
- Apply materiality standards of Regulation 18702.1 to the effect on the Board Member's business interests in the general contractor and his architecture and engineering firm.
- Apply the materiality standard of Regulation 18702.2(a)(7), the "500 Foot Rule," to the effect on the Board Member's residence located within 500 feet of the project.
- Apply materiality standard of 18702.3 to the effect on the Board Member's respective source of income interests in his firm and certain clients of that firm.
- Apply materiality standard of 18702.5 to the effect on the Councilmember's personal finances or those of immediate family. However, this standard does not apply when the decision also affects a business or real property interest of the official.

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Other Considerations

- Does the “Public Generally Exception” (see Regulation 18703) or another exception apply?
- If the decision at issue is complex, could it be “segmented” into component decisions (see Regulation 18706) to allow the official to participate in some components?
- If a quorum cannot be formed due to disqualification, are any disqualified officials “legally required to participate” under Regulation 18705?



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Disqualification Requirements

If an official is disqualified from taking part in a decision, the official must recuse from the decision as directed in Regulation 18707. The key elements to a proper recusal by an official who is a member of an agency's governing body:

- Public identification of the official's financial interest at issue immediately prior to consideration of the decision.
- The official must recuse and leave the room after the public identification and must refrain from any participation in the decision.
- Important to strictly comply with these requirements in order to ensure proper recusal from a decision.

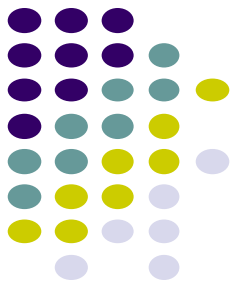


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When in Doubt, Reach Out

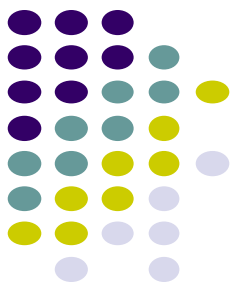
- Resources on FPPC's website. <http://www.fppc.ca.gov/learn.html>.
- Email informal assistance. advice@fppc.ca.gov.
- Telephone informal assistance is available for simple issues. 866-ASK-FPPC (1-866-275-3772).
- For more information, visit: <http://www.fppc.ca.gov/advice/get-advice.html>.

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Types of Advice: Informal Assistance

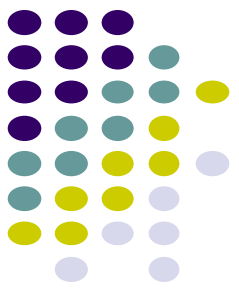
- Email advice - quick, in writing, not available for some complicated questions: advice@fppc.ca.gov.
- Telephone advice is available for simple issues. 866-ASK-FPPC (1-866-275-3772).
- See <http://www.fppc.ca.gov/advice/get-advice.html> for more information.
- Informal assistance not available for Section 1090. (See Section 1097.1(c).)



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Types of Advice: Formal Written Advice

- Formal written advice is provided to officials with duties under the Act and Section 1090 upon request (Sections 83114(b) and 1097.1(c)(2)), and can provide immunity from an administrative enforcement action.
- Regulation 18329(a) and Section 1097.1(c)(2) govern the Commission's provision of formal written advice.
- 21 working day response time for PRA, not applicable to Section 1090.
- Issued by Legal Division without formal Commission action.
- Only type of advice offered with respect to Section 1090. FPPC is required to forward requests for advice involving Section 1090 to the Attorney General's office and the local district attorney. (Section 1097.1(c)(3).)



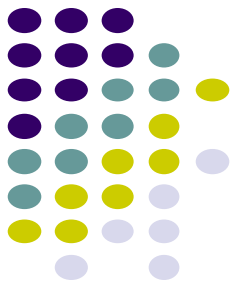
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Formal Written Advice Request Requirements

- Must be from the official or the official's authorized representative and must concern the official's duties.
- Must provide all relevant facts and ensure their accuracy.
- Must not concern past conduct or be the subject of an enforcement action. Must concern prospective action.
- Must present a specific question, may not be overly broad or hypothetical.

See FPFC website for additional guidance on submitting a formal written advice request. There are special instructions for a request involving Section 1090 and a private contractor or consultant.

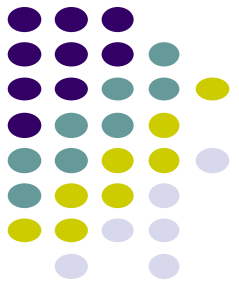
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Limitations on FPPC's Authority to Provide Advice Regarding Section 1090

- **No Informal Assistance:** The FPPC only provides formal written advice regarding Section 1090. Requests regarding Section 1090 must be sent by the FPPC to the local DA and the AG prior to providing advice, and the FPPC must share any comments in response with the requestor.
- **No Past Conduct:** Requested advice must be prospective and cannot relate to past conduct.

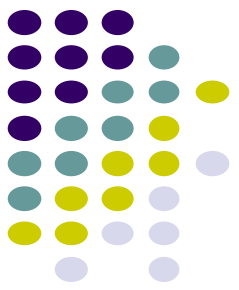
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Section 1090

Section 1090 provides in pertinent part:

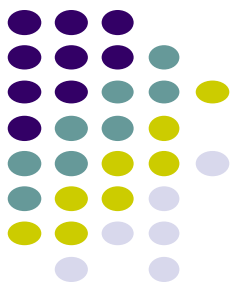
“Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”



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Section 1090 Basics

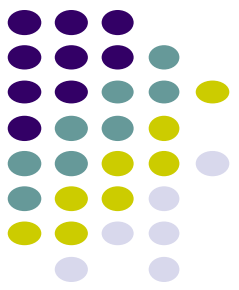
- **Basic Rule:** If an officer or employee has a financial interest in a public contract, Section 1090 generally prohibits that individual from making or participating in the making of the contract. When the officer is a member of the agency's governing body, Section 1090 applies even more broadly prohibiting the agency from entering the contract even if the officer does not take part in the decisions.
- **Public Policy:** Contracts in violation of Section 1090 are contrary to the public policy of California.
- **Long Established:** Section 1090 codified the common law prohibition against "self-dealing" in public contracting, and the statute can be traced back to an act passed in 1851.



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Section 1090 Basics (Cont.)

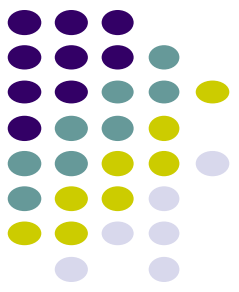
- **Contract in Violation is Void:** A public contract made in violation of Section 1090 is void, regardless of whether the contract is fair and equitable.
- **Subject to Disgorgement:** Profits from a contract made in violation of Section 1090 are subject to forfeiture.
- **Prohibition Applies to Entire Governing Body:** When a member of a governing body is financially interested in a public contract, the entire governing body is prohibited from entering into the contract. The interested member's disclosure of the prohibited interest and recusal from decisions related to the contract are insufficient to cure a violation of Section 1090.



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Section 1090 Basics (Cont.)

- **Other considerations in favor of a contract that violates Section 1090 do not validate the violation.** In the seminal case *Thomson v. Call*, the California Supreme Court clearly stated that if there is a prohibited financial interest in the public contract at issue under Section 1090, it does not matter that the contract:
 - Is “fair, just and equitable” to the agency; or
 - Would be more advantageous to the agency than its alternatives.
- **Spouse’s Financial Interests:** An officer subject to Section 1090 has an interest in the community and separate property income of the officer’s spouse.

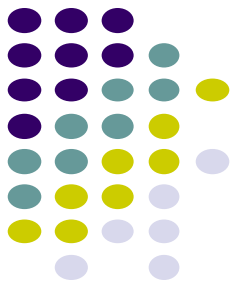


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Section 1090 Analysis

- A six-step analysis is used to determine whether the prohibition of Section 1090 applies:
 - (1) Is the official subject to Section 1090?
 - (2) Does the decision involve a public contract?
 - (3) Is the official making or participating in the making of the contract?
 - (4) Does the official have a financial interest in the contract?
 - (5) Does a statutory exception apply?
 - (6) Does the Rule of Necessity apply?
- If any issue arises in conducting this analysis, you should seek advice from the MWDSC Ethics Office or the FPPC.

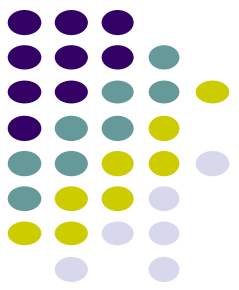
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Example Section 1090 Analysis

A District's Board will soon consider whether to approve a contract with ACME HVAC to update the air circulation and ventilation systems in District buildings. Staff has selected ACME HVAC from among several bidders for the contract because its proposal is clearly the best value for the District. However, a District Board Member has an ownership interest in ACME HVAC.

- The District Board Member is subject to Section 1090.
- A public contract, the proposed contract between the District and ACME HVAC, is involved in the decisions at issue.
- The Board Member is financially interested in the proposed contract because the Board Member has an ownership interest in ACME HVAC.

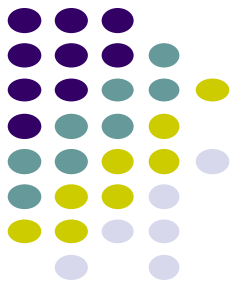


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Example Section 1090 Analysis (Cont.)

- **Section 1090 Applies:** Because the Board Member is financially interested in the proposed contract between the District and ACME HVAC, Section 1090 prohibits the Board Member from making or participating in making in the proposed contract.
- **District Prohibited from Entering Contract:** Section 1090 would also prohibit the Board from entering into the proposed contract with ACME HVAC. When one Board Member is financially interested in a contract, the prohibition is imputed to the entire Board, unless an exception applies.
- **No Indication an Exception Applies:** A governing body may enter into a contract despite one or more of its members being interested in that contract if either a statutory exception or the “rule of necessity” applies. We will review these exceptions in further detail later in the presentation. There is no indication that any of these exceptions apply with respect to the proposed contract with ACME HVAC.

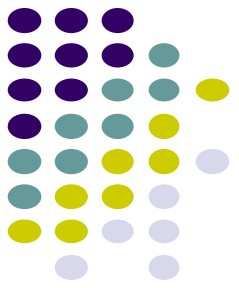
Therefore, Section 1090 prohibits the District from entering into the proposed contract.



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Broadly Applied to Guard Against Self-Dealing

- **Broadly Interpreted:** Section 1090 is broadly interpreted “to ensure that the public has the official’s absolute loyalty and undivided allegiance.”
- **Appearance of Impropriety Sufficient:** Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.”



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“Officer or Employee”

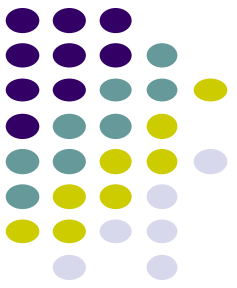
- **Subject to Section 1090:** Section 1090 applies to virtually all state and local officers, employees, and members of governing bodies, whether elected or appointed.
- **Broad Interpretation:** For purposes of Section 1090, the term “officers and employees” has been interpreted broadly to include some contractors.
- **Examples Include:** County Supervisor, City Councilmember, County Administrator, City Manager, County Counsel, City Attorney, and some advisory board members, consultants, and independent contractors.



Fair Political Practices Commission

“Financial Interest”

- For purposes of Section 1090, the phrase “financially interested” broadly encompasses anything that would tie a public official’s fortunes to the existence of a public contract.
- An official is deemed to have a financial interest in a contract if the official may profit from it in any way.
- A financial interest may be direct or indirect, or may involve financial losses, the possibility of losses, or the prospect of financial gains.

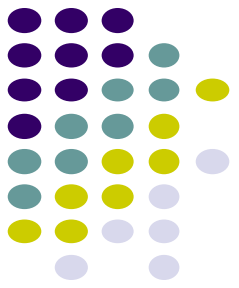


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Statutory Exceptions

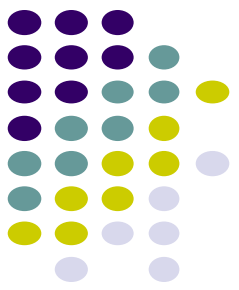
- **Noninterests:** Section 1091.5 sets forth “noninterest” exceptions to Section 1090’s prohibition, or financial interests so minimal that the official is deemed not to have a financial interest in the contract. If an official merely has a noninterest in a contract, Section 1090 does not prohibit that official from participating in the making of that contract.
- **Remote Interests:** Section 1091 provides “remote interest” exceptions to Section 1090’s prohibition. If a remote interest applies, the contract may be made if (1) the officer discloses the remote interest, (2) the interest is noted in the official record, and (3) the officer completely abstains from participating in the making of the contract.

Fair Political Practices Commission



Limited Rule of Necessity

- A limited “rule of necessity” applies where public policy concerns require the public contract at issue, ensuring that essential government functions are performed despite a conflict of interest.
- If the Rule applies, the agency may enter into a public contract that Section 1090 otherwise would prohibit.
- The Rule only applies in two narrow situations:
 - Procurement of essential supplies or services when no other option is available.
 - To carry out essential duties of the office when the official or governing body is the only one authorized to act.

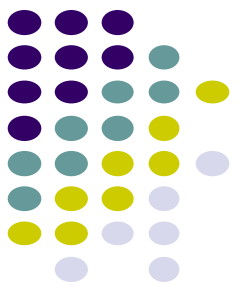


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Penalties for a Violation of Section 1090

- **Civil Penalties:** An official found to have violated Section 1090 is subject to multiple types of civil penalties.
- **Administrative Penalties:** The FPPC also may impose administrative penalties for a violation of Section 1090.
- **Criminal Penalties if Conduct Willful:** If the conduct at issue was willful, the official is also subject to criminal penalties, including imprisonment and permanent disqualification from holding public office.

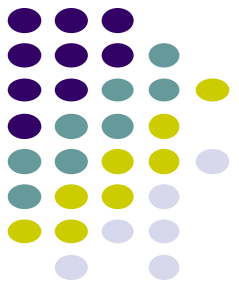
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Section 1090 Resources

- Educational resources regarding Section 1090 are available on the FPPC's website:
<https://fppc.ca.gov/learn/section-1090.html>
- The FPPC's website also provides guidance on submitting a request for formal written advice regarding Section 1090:
<https://www.fppc.ca.gov/advice/formal-advice.html>
- If an issue arises under Section 1090, we encourage you to seek formal written advice. More information may be found here:
<http://www.fppc.ca.gov/advice/get-advice.html>.
- The Attorney General's Guide to Conflicts of Interest Guide (2010) provides further insights:
<https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/coi.pdf>

Fair Political Practices Commission



Thank you for your time and consideration!

For more information on Section 1090 please see:

The FPPC's "Quick Guide to Section 1090"

<https://fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/section-1090/Section%201090%20-%20Quick%20Guide%20-%20Oct%202020.pdf>

The FPPC's "Overview of Section 1090 and FPPC Advice"

<https://fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/section-1090/Section%201090%20-%20Overview%20-%20Oct%202020.pdf>