

**MEMORANDUM
OFFICE OF THE GOVERNOR
ARNOLD SCHWARZENEGGER**



Privileged and Confidential

To: Anne Sheehan
Executive Director, Public Employee Post-Employment Benefits Commission

From: Dan Maguire
Deputy Legal Affairs Secretary

Date: March 2, 2007

Re: Applicability of Conflict of Interest Rules to Members of the Public Employee Post-Employment Benefits Commission

This memorandum considers what conflict of interest rules – if any – apply to members of the recently-created Public Employee Post-Employment Benefits Commission (the “Commission”). As explained below, with one exception, I do not believe that California’s conflict of interest rules apply to members of the Commission.

I. Background

The Commission was created by executive order on December 28, 2006. (Executive Order S-25-06.) The Commission has one task: preparing a report for the Governor and Legislature analyzing the financial liabilities facing the State and local governments in providing post-employment benefits to public employees. The Commission’s report will (1) identify unfunded post-employment benefit obligations, (2) analyze various approaches for meeting these obligations, (3) consider the advantages to the State in providing such benefits, and (4) propose a plan or plans to meet these unfunded liabilities. (*Id.* at § 2(a) – 2(d).)

The report is due by January 1, 2008, and Commission will disband 30 days later, unless the Governor issues another executive order extending its life. (Executive Order S-25-06 at §§ 2, 3.) The Commission has no power to do anything but issue a report – it cannot create or enforce any policy, rule, or regulation. Thus, the Commission only has advisory powers.

Shortly after the members of the Commission were appointed, questions were raised about the extent to which members of the Commission must comply with California's conflict of interest laws. This memorandum addresses those questions.

II. The Political Reform Act

The Political Reform Act provides the basic conflict of interest rules for governmental officials in California. (See Gov. Code § 87100 [“[n]o 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”].)

These rules only apply to “public officials,” which, by statute, include “member[s], officer[s], employee[s] or consultant[s] of a state or local government agency.” (Gov. Code, § 82048, subd. (a).) The Political Reform Act itself does not create any exception for members of advisory bodies.

However, the regulations promulgated by the Fair Political Practices Commission do create an exception for members of bodies that lack “decisionmaking authority.” (Cal. Code Regs., tit. 2, § 18701, subd. (a)(1).) “Decisionmaking authority” includes (1) making “a final governmental decision,” (2) compelling or preventing a governmental decision, and (3) making “substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.” (Cal. Code Regs., tit. 2, § 18701, subd. (a)(1)(A)(iii).)

Here, the Commission does not make governmental decisions, nor does it compel or prevent such decisions, so it does not possess either of the first two types of “decisionmaking authority.” But does it fall into the third category, which covers bodies whose recommendations are regularly approved by another agency?

It clearly does not, because the Commission is new and thus does not have the “approval-without-significant-amendment” track record required by the regulation. (Cal. Code Regs., tit. 2, § 18701, subd. (a)(1)(A)(iii).) Nor is it likely to ever acquire such a track record, since it will disband shortly after issuing its report. And of course, given the contentious and complex nature of the subjects to be considered by the Commission, it seems unlikely that its recommendations will be adopted by the Legislature and Governor without substantive amendment. Thus, the members of the Commission do not possess “decisionmaking authority,” and therefore they are not subject to the conflict of interest rules of the Political Reform Act. (See FPPC Opinion Letter No. A-06-118 (2006) [newly-formed advisory boards do not possess decisionmaking authority].)

There is one portion of the Political Reform Act that does apply to advisory bodies like the Commission: the rule that bars a public official from appearing as a paid representative before “his or her state agency.” (Gov. Code., § 87104, subd. (a).) This provision expressly applies to “advisory bodies.” (*Id.* at subd. (b).)

This provision would prevent members of the Commission from appearing as a paid representative (such as a lobbyist), before the Commission, and also likely prevents Commission

members from lobbying the Governor's Office, since the Commission is providing advice to the Governor.

Finally, while it is generally not subject to the Political Reform Act, the Commission will need to file an application with the FPPC confirming the exemption. (Gov. Code, § 18751.) The exemption application should include, among other things, a list of all positions in the Commission, and an explanation of why the Commission is exempt. (*Ibid.*) Please let me know if the Commission would like help from the Governor's Office in preparing its application.

III. The Common Law Prohibition Against Conflicts of Interest

In addition to the Political Reform Act, California likely retains its common law rule against conflicts of interest. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-71.) Under this rule, "[a] public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." (*Id.* at 1170.) Unlike the Political Reform Act, the common law rule against conflicts of interest covers both economic and non-economic interests. (*Id.* at 1171, fn. 18.)

Are members of the Commission "public officers" for purposes of this common law rule? I did not find any case or opinion defining what is a "public officer" for purposes of the common law rule. However, for purposes of the incompatible offices doctrine, "public officer" does *not* include a member of "a governmental body that has only advisory powers." (Gov. Code, § 1099, subd. (b)(d).) And as noted above, members of advisory bodies are generally not considered "public officials" for purposes of the Political Reform Act.

With two analogous laws defining "public official" to exclude members of advisory bodies, it seems appropriate to exclude members of such bodies from the common law rule as well. Thus, since the Commission has only advisory powers, with no authority to make any governmental decision, it seems unlikely that the common law rule against conflicts of interest applies to its members.

IV. Conclusion

Because they only provide advice and do not make decisions, members of the Commission are not subject to the conflict of interest provisions of the Political Reform Act. They are also likely not subject to the common law's rule against conflicts of interest.

