

Consultants in a Conflict of Interest Code

Who is a Consultant? The Political Reform Act (Gov. Code Sections 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." (Gov. Code Section 82048.)

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 participates in making a governmental decision (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.

Consultants are Individuals

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 either "participate in making" governmental decisions or 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. (Memorandum to the Commission dated March 28, 1994.) 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.

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. This applies even if an agency fails to properly designate a consultant in a conflict of interest code because the disqualification provisions of the Political Reform Act operate as soon as an individual becomes a public official. The individual is subject to the Act's gift limits and conflict of interest provisions.

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/or serve 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. (Memorandum to the Commission, March 28, 1994.)

An investment firm provides consulting services to a county employee's retirement association. Pursuant to a contract, employees of the investment firm attend all board meetings and subcommittee meetings where investment issues are discussed. Employees of the investment firm are required to perform other services and provide reports on investment issues as requested by the retirement board or staff. Because the employees of the investment advisor serve on an ongoing basis as staff for the retirement board, and in that capacity participate in the making of all investment decisions, they are considered consultants under the Act. (*Randolph* Advice Letter, No. I-95-045.)

Individual members of a consulting firm who prepare an EIS/EIR report for the Sacramento Regional Transit District's ("RT") Folsom light rail extension are consultants and should be designated in a conflict of interest code. RT hires environmental consultants on an as-needed basis to prepare extensive or technical environmental studies which cannot be completed by its staff. RT hires environmental consultants for each project. The consulting firm will be under contract with RT to provide environmental services for three projects extending over at least three years. The consultant conducts research and makes investigations that require exercise of its expertise and judgment, and prepares the report. The consultant's role also encompasses recommending to RT's board of directors approval of agreements and permits it negotiates and approval of the environmental report. Although the RT board reviews the report and related documents, because of the technical nature of the study, the consultant's conclusions and recommendations are accepted without significant intervening substantive review. In addition, members of the consulting firm have authority to negotiate contracts and recommend RT's approval without significant independent review by RT. (*Patterson* Advice Letter, No. A-97-570.)

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.

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