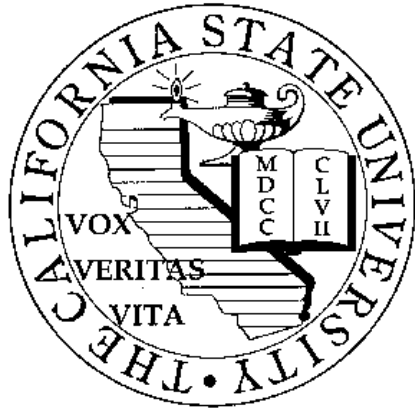


CONFLICT OF INTEREST HANDBOOK



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Conflict of Interest

Handbook

I. Introduction

Conflict of Interest law seeks to minimize the extent to which public employees pursue their own financial interests at the expense of the public interest. The law of conflict of interest sets forth the means by which the collision of public interest with self interest is diminished.

California's principal conflict of interest law is the Political Reform Act of 1974 (Gov't Code § 81000 *et seq.*). This Act and other conflict of interest laws with which California State University employees should be familiar are summarized in this Handbook.

II. Political Reform Act of 1974

The Political Reform Act of 1974 contains a general prohibition against conflicts of interest as well as provisions for the adoption of a conflict of interest code by the California State University. It prevails over any other conflict of interest law to the contrary (Gov't Code section 81013).

A. The General Prohibition

1. What It Is

“No public employee at any level of state or local government shall make, participate in making or in any way attempt to use his [or her] official position to influence a governmental [CSU] decision in which [s/he] knows or has reason to know [s/he] has a financial interest.” (Gov't Code § 87100;) Any person who willfully violates the general prohibition is guilty of a misdemeanor. (Gov't Code § 91000) This general prohibition applies to all CSU employees.

2. Conflicting Personal Financial Interests

A public official has a personal financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on the employee, a member of his or her immediate family, or on any one of the five kinds of economic interests (Gov't Code § 87103).

a. Personal Finances

- (1) A conflicting economic interest exists if “the decision will have a material financial effect, distinguishable from its effect on the

public generally, on the [CSU employee or] a member of his or her immediate family.”

- (2) If a decision will result in the increase or decrease of “personal expenses, income, assets, or liabilities of the [CSU employee] or his or her immediate family,” a conflicting personal economic interest exists (Tit. 2, Cal. Code Regs § 18703.5).
- (3) A decision to appoint or promote a CSU employee’s spouse would constitute a conflicting economic interest.

b. Five Economic Interests

If it is reasonably foreseeable that any of the following will be materially affected by the decision, a conflict may exist:

- (1) Any business entity in which the employee has a direct or indirect investment worth \$2,000 or more, including ownership of stock by the employee or the employee’s spouse or dependent child (an indirect interest).
- (2) Any real property in which the employee has a direct or indirect interest worth \$2,000 or more. One’s home is not included but any other investment property is.
- (3) Any source of income which provides \$500 or more in value promised to, or received by, the employee within 12 months prior to the time when the decision is made.
- (4) Any business entity in which the employee is a director, officer, partner, trustee, employee, or holds any position of management.
- (5) Any donor of, or any intermediary or agent for a donor of, a gift or gifts totaling \$340 or more in value provided to, received by, or promised to the employee within 12 months prior to the time when the decision is made. Gifts of meals or travel or gifts of anything else of value are included in the \$340. (This amount is tied to a consumer price index and is occasionally adjusted.)

3. When Disqualification is Required

If it is foreseeable that the decision an employee is called upon to make, help make, or influence, will affect any of these five kinds of economic interests, the employee likely has a conflict of interest. The Fair Political Practices Commission, the agency assigned to administer and interpret the Political Reform Act, has provided the following eight-step analysis to determine when an employee has a conflict of interest that would

require the employee to be disqualified from being part of the decision-making process:

FPPC's Eight Step Analysis

(1) Is the employee covered by the Act? All CSU employees are public officials subject to the Act. 2 CCR § 18701.

(2) Does the CSU employee make, participate in making, or use or attempt to use his/her official position to influence a government decision? 2 CCR § 18702.

(3) What are the CSU employee's economic interests? 2 CCR § 18703. The five kinds of economic interests are summarized above.

(4) For each of the CSU employee's economic interests, is that interest directly or indirectly involved in the governmental decision which the public official will be making, participating in making, or using or attempting to use his/her official position to influence? 2 CCR § 18704.

(5) What is the applicable materiality standard for each economic interest, based upon the degree of involvement determined in the previous step? 2 CCR § 18705. When an employee's economic interest is directly involved, a material financial effect will usually be deemed to exist. But the rules are complicated and may require a review of the regulations or a call to University Counsel or the FPPC helpline (866-ASK-FPPC).

(6) Is it reasonably foreseeable that the governmental decision will have a material financial effect on each economic interest identified in step 3? If it is not reasonably foreseeable that there will be a material financial effect on any of the CSU employee's economic interests, then there is no conflict of interest under the Act.

(7) Is the reasonably foreseeable financial effect on the CSU employee's economic interests distinguishable from the effect on the public generally? If not, s/he does not have a conflict of interest under the Act. 2 CCR § 18707.

(8) Is the CSU employee's participation in the decision legally required despite the conflict of interest? 2 CCR § 18708. The answer is no for all CSU employees.

If a conflict of interest exists, the employee must publicly announce the financial interest creating the conflict and should disqualify himself or herself from involvement in the decision-making process.

B. CSU Conflict of Interest Code

1. Overview

In addition to the General Prohibition that applies to all CSU employees, the Act also requires CSU to develop its own Conflict of Interest Code which applies to specifically designated CSU employees and requires those employees annually to disclose certain kinds of personal economic interests on a designated form. The purpose of this annual disclosure is to sensitize the designated employees as to their own personal economic interests that may be affected by the decisions they make.

2. Designation

The specifically designated CSU employees to which the CSU Code applies are those who are considered most likely to make, participate in making, or influence decisions that could significantly affect personal economic interests.

3. Disclosure

The CSU Code also assigns a disclosure category or categories to each specifically designated employee position. The disclosure categories identify the kinds of personal economic interests which the position occupant must disclose in a public document. These are thought to be the personal economic interests most likely to be affected by the decisions associated with the designated employee position. The public document, FPPC Form 700, must be filed with the campus filing officer when an employee first occupies a designated position, annually thereafter by April 1, and at the time the employee leaves the designated position. The law provides for a \$10 per day fine for each day the Form 700 is late beyond April 1. The maximum fine is \$100. The Form 700 that is filed is maintained by the filing officer for seven years as a public document open to public inspection. The list of positions and assigned disclosure categories is occasionally amended to reflect the changes in position names and decision-making authority.

4. Disqualification

The same general prohibition disqualification rules apply to CSU employees required to file FPPC Form 700 as to all CSU employees. Hence, the disqualification requirement may arise from conflicts with personal economic interests that need not have been disclosed in FPPC Form 700. It is possible that a CSU employee filing Form 700 may be

confronted with a decision-making responsibility that will have a material effect on a personal economic interest that s/he was not required to disclose in Form 700. When disqualification is mandated, the employee should reveal the nature of the conflict to his or her supervisor and disqualify himself or herself from the decision-making process.

5. Ethics

The CSU Code also contains an ethics section that reflects statutory prohibitions contained in the Act. Government Code §§ 89500 *et seq.*, 2 CCR § 18730. These sections prohibit receipt of honoraria in any amount and gifts over a set amount.

a. Honoraria Prohibition

A CSU employee in a designated position under the CSU Code may not accept an honorarium from any economic interest or source that s/he has been required to disclose on Form 700. An honorarium is defined as payment, either cash or in kind, for a speech given, articles published, participation on a panel, serving as an emcee, or payment for simply attending a conference, meeting, event, meal, or other gathering.

Generally, the economic interests and sources included in the disclosure categories are commercial business entities. Public or nonprofit entities are usually not within a disclosure category assigned to a designated employee. Also, the law does not prohibit payment of honoraria directly to the CSU and does not prohibit giving a speech for free.

There are three major exceptions to the prohibition on the receipt for honoraria from an economic source identified on Form 700. The first is transportation, food, and necessary lodging for giving a speech, participating in a seminar, or serving on a panel in California. The second is payments made as part of one's non CSU, private employment. The third provides that under certain circumstances, an honorarium may be returned, donated, or the source reimbursed without violating the prohibition. (See Title 2, Cal. Code of Regs § 18930 *et seq.*)

b. Prohibition on Accepting Gifts

A CSU employee in a designated position may not accept gifts when the total exceeds \$340 in a calendar year from a source that s/he has been required to disclose on Form 700. (The \$340 amount will be adjusted in future years for changes in the cost of living.) Gifts given directly to the CSU or to a CSU auxiliary or even to another member of the employee's family in circumstances where the

employee is not in control of the gift do not violate this prohibition. But gifts given to the employee, even when the employee gives it to the campus or someone else are includable in calculating the total amount. If the employee, within 30 days of receipt of the gift, returns the gift to the donor, reimburses the donor for the cost of the gift or donates the gift unused to a public entity or to a charitable organization without taking a tax deduction, the employee will not be in violation of this prohibition against taking gifts. 2 CCR § 18940, *et seq.*

c. Enforcement

Violations of the Conflict of Interest Code are punishable by disciplinary action (Gov't Code § 91003.5), civil action (§ 91004 *et seq.*), and criminal prosecution (§ 91000).

III. Contract Conflicts

A. Government Code Section 1090 *et seq.*

An early California statute that also sets out conflict of interest restrictions provides:

... [S]tate ... 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. (Gov't Code § 1090)

This prohibition applies to all CSU officers and employees, including governing board members. It applies to any contract where the officer or employee has any financial interest, including being an officer, employee, agent, attorney, broker, supplier, landlord, or tenant of a contracting party. The California Supreme Court has stated: “[h]owever diverse and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, [§ 1090 is violated].” (People v. Daysher (1934) 2 Cal.2d 141, 146) Officers or employees cannot insulate themselves from this statute by abstaining or disqualifying themselves from the decision-making process.

There are some exceptions from this prohibition. Under Gov't Code §§ 1091 and 1091.5, no conflict exists where the officer or employee has only a remote interest in the contract, if that interest is disclosed to the body or board and noted in its records, and if the body or board then approves the contract by a vote sufficient for that purpose without counting the vote of the officer or employee with the remote interest. Remote interests include, among others, being an officer in a nonprofit corporation, a landlord of the contracting party, an owner who owns less than 3 percent in a for profit corporation and the total annual income from dividends from the corporation

does not exceed 5 percent of total annual income, and that of a nonsalaried member of a nonprofit corporation.

Violation of section 1090 voids the contract and exposes the violator to \$1,000 penalty or imprisonment and permanent disqualification from holding any office in the state (Gov't Code § 1097).

B. Employees with Financial Interests in CSU Contracts:

More recent California statutes set out the following conflict of interest prohibitions:

1. A CSU employee may not engage in any activity for compensation which is sponsored or funded by the CSU through or by a CSU contract. Public Contract Code § 10831 This restriction does not apply to employees with teaching or research responsibilities or those acting within the course and scope of their CSU employment.
2. A CSU employee may not "contract on his or her own individual behalf as an independent contractor with any [CSU] department to provide services or goods." Public Contract Code § 10831 This restriction also does not apply to employees with teaching or research responsibilities.
3. For two years following retirement or separation from CSU employment, no formerly employed person "may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decisionmaking process relevant to the contract while employed in any capacity by any [CSU] department." Public Contract Code § 10832(a)
4. For 12 months following retirement or separation from the CSU, no person may contract with the CSU if he or she was employed by the CSU "in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement ... or separation." Public Contract Code § 10832(b) Excepted from this restriction are contracts for expert witness services and contracts to continue attorney services. This prohibition relates to CSU contracts and not a resumption of CSU employment (*e.g.*, as a retired annuitant), nor does it address contracts with auxiliary organizations.

IV. Common Law Conflicts

Even though a specific conflict of interest may not be defined in statute, California courts have condemned conflicts which they determine are violative of public trust. One court has noted:

A public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated ... to discharge their

responsibilities with integrity and fidelity. ... [T]hey may not exploit or prostitute their official position for their private benefits. When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office and vitiate the trust reposed in them, and the public is injured by being deprived of their loyal and honest services. Terry v. Bender, 143 Cal.App.2d 198, 206 (1956)

An earlier court summarized:

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence ... Noble v. City of Palo Alto, 89 Cal.App. 47, 51 (1928).

Accordingly, the state's Attorney General has concluded:

The general common-law conflict of interest rule ... strictly requires public officers to avoid placing themselves in a position in which personal interest may come into conflict with their duty to the public." (46 Ops.Cal.Atty.Gen. 74, 86 (1965))

Since "[t]he gist of the common law of conflict of interest is to prevent the doing of an official act where the official may have a direct or indirect interest in the outcome" (58 Ops.Cal.Atty.Gen. 345, 355 (1975)), "when a conflict arises between a public officer's official duties and his personal interests, he need only abstain from participation therein and from influencing any other public officer or employee with respect to the particular transaction." (67 Ops.Cal.Atty.Gen. 7, 9 (1984)).

V. Miscellaneous "Conflicts"

Several other specific laws forbid certain forms of private gain from public service.

A. Education Code Section 89006

This statute provides that it is unlawful to utilize nonpublic information received by reason of CSU or CSU auxiliary employment or a CSU or CSU auxiliary contract for personal pecuniary gain not contemplated by the terms of the employment or contract. It applies to all officers, employees, and contractors of CSU, and CSU auxiliaries. Violation of this prohibition is punishable as a misdemeanor (Penal Code § 19.4).

B. Gift of Public Funds

California Constitution, Article 16, Section 6 prohibits making gifts of any public funds. The state must receive commensurate value whenever its

resources are used, including time, equipment, materials, supplies and facilities.

Gov't Code Section 8314 additionally prohibits using state resources for nonstate purposes. Civil penalties are prescribed for violations of this section, but a violation does not occur for “incidental and minimal use of public resources.”

C. Salary as Compensation in Full

The law forbids payment of extra compensation to a public employee after service has been rendered (Cal Const. Art. 4, Sec. 17). Awarding bonuses or other forms of extra compensation once service has been rendered are not authorized. However, identifying incentive awards prior to performing the service is not prohibited. This rule is expressed for state appointive officers in Gov't Code Section 18000 which states that “[t]he salary fixed by law ... is compensation in full for that office and for all services rendered in any official capacity or employment whatsoever”

D. Legislator May Not Also be a CSU Employee
Federal Officer May Not Also be a CSU Officer

The California Constitution forbids California legislators from also being employed by the State (Art. 4, Sec. 13) and forbids a paid federal officer from also being a paid officer of the state except for limited military service (Art. 7, Sec. 7).

E. State Officers May Not Accept Free Passes or Discounts from Transportation Companies

A forfeiture of public office results from the acceptance of a free pass or discount from a transportation company (Cal. Const. Art. 12, Sec. 7). The rule applies only to public officers, not employees, which the California Attorney General defines to include public servants who actually set or make policy. The rule applies to transportation both inside and outside of California irrespective of whether the travel is in connection with personal or public business. The prohibition is not offended by passes or discounts offered to the public or a larger group under a generally authorized or approved plan (e.g., frequent flyer programs, spouses of flight attendants, upgrades for honeymooning couples).

F. State Appointive Officers Code of Ethics

Officers in state government who are appointed may not have “any interest, financial or otherwise, direct or indirect or engage in any business or transaction or professional activity, or incur any obligation of any nature, which is in substantial conflict” with the discharge of the officer’s duties and responsibilities (Gov’t Code Sec. 8920(a)). A substantial conflict exists if the

officer “has reason to believe or expect that he will derive a direct monetary gain or suffer a direct monetary loss ... by reason of his official activity.” (Gov’t Code Sec. 8921). Further, a substantial conflict does not exist if the officer’s “relationship to any potential beneficiary of any situation is one which is defined as a remote interest by Section 1091 or is otherwise not deemed to be a prohibited interest by Section 1091.1 or 1091.5” (Gov’t Code Sec. 8922). These remote interests are briefly summarized on pages 6 and 7.

G. Incompatibility of Public Offices

When a public officer while holding one public office accepts a second public office with duties that potentially overlap and significantly clash with the duties of the first office, the California Courts have said the offices are incompatible resulting in an automatic vacating of the first office. For this rule to apply, there must be the simultaneous holding of public offices, as distinguished from employment, with potentially clashing duties. Duties clash when there is a potential overlap or conflict in the functions or responsibilities or loyalties of the two offices. This occurs when either office exercises a supervisory, auditory, appointive, or removal power over the other or when there is an inconsistency in the functions of the two as might occur in overlapping jurisdictions or divided loyalties. (Chapman v. Rapsey, 16 Cal. 2d 636 (1940); 78 Ops. Cal. Atty. Gen. 316 (1995)).

VI. Conclusion

The California restrictions on conflict of interest are numerous and complex. The information in this Handbook is necessarily presented in summary form. University Counsel are available to respond to specific situations or more detailed questions.