

Date of Hearing: April 23, 2013

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Paul Fong, Chair

AB 1090 (Fong) – As Amended: April 10, 2013

SUBJECT: Public officers: conflicts of interest: contracts.

SUMMARY: Authorizes the Fair Political Practices Commission (FPPC) to bring civil and administrative enforcement actions for violations of Government Code Section 1090 (Section 1090), dealing with conflicts of interest in contracts, and requires the FPPC to provide opinions and advice with respect to Section 1090. Specifically, this bill:

- 1) Makes violations of Section 1090 subject to civil and administrative enforcement proceedings, in addition to criminal prosecutions. Permits the FPPC to bring a civil or administrative action against any member of the Legislature, state, county, district, judicial district, or city officer or employee who is financially interested in any contract made by that person in his or her official capacity, or by any body or board of which that person is a member.
- 2) Prohibits the FPPC from commencing an administrative or civil action against a person for a violation of Section 1090 except upon written authorization from the district attorney of the county in which the violation occurred.
- 3) Prohibits the FPPC from bringing a civil action against a person for a violation of Section 1090 if the Attorney General (AG) or a district attorney is pursuing a criminal action against that person for the same alleged violation.
- 4) Provides that if two or more persons are responsible for a violation of Section 1090, they are jointly and severally liable.
- 5) Permits a person who is subject to Section 1090, or his or her authorized representative, to request an opinion or advice from the FPPC with respect to his or her duties under Section 1090. Provides that the FPPC's authority to issue opinions or advice pursuant to these provisions is concurrent with the authority of the AG to issue opinions and advice.
- 6) Permits the FPPC to adopt regulations for the purposes of this bill.
- 7) Requires the FPPC to investigate possible violations of Section 1090 upon receipt of a sworn complaint from a person. Permits the FPPC to investigate possible violations of Section 1090 on its own initiative. Requires such investigations to be conducted pursuant to procedures that govern FPPC investigations for potential violations of the Political Reform Act of 1974 (PRA).
- 8) Provides that the FPPC must obtain written authorization from the AG and the district attorney of the county in which an alleged violation occurred before it can provide immunity from prosecution for testimony compelled by the FPPC over a person's objection.

- 9) Prohibits the FPPC from commencing an administrative action against a person for a violation of Section 1090 if the FPPC has commenced a civil action against that person for the same violation. Prohibits the FPPC from commencing a civil action against a person for a violation of Section 1090 if the FPPC has commenced an administrative action against that person for the same violation.
- 10) Provides that a civil violation of Section 1090 shall be punishable by a fine payable to the FPPC for deposit in the General Fund (GF) in an amount not to exceed three times the value of the financial benefit received by the person.
- 11) Provides that if the FPPC determines that a violation of Section 1090 has occurred through an administrative enforcement process, the FPPC shall issue an order requiring the violator to cease and desist violation of Section 1090, pay a monetary penalty of up to \$5,000 to the FPPC for deposit in the GF, or both.
- 12) Requires the FPPC to follow the procedures that apply to administrative actions brought for violations of the PRA when bringing an administrative action for a violation of Section 1090 pursuant to the provisions of this bill.
- 13) Permits the FPPC to obtain a judgment in superior court for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties imposed pursuant to this bill. Provides that the procedures for obtaining such a judgment for collecting unpaid penalties or fees for a violation of the PRA shall apply to any action by the FPPC to obtain a judgment for unpaid penalties or fees for a violation of Section 1090.
- 14) Permits the FPPC to apply to the clerk of the superior court for a judgment to collect penalties imposed by an FPPC enforcement order for a violation of Section 1090, in lieu of filing a small claims or civil case with the court to collect those penalties, pursuant to the following:
 - a) Provides that if the time for judicial review of a final FPPC order or decision for a violation of Section 1090 has lapsed, or if all means of judicial review of the order or decision have been exhausted, the FPPC may apply to the clerk of the court for a judgment to collect the penalties imposed by the order or decision, or the order as modified in accordance with a decision on judicial review.
 - b) Requires the application to the clerk of the court to include a certified copy of the order or decision, or the order as modified in accordance with a decision on judicial review, and proof of service of the order or decision. Provides that the application constitutes a sufficient showing to warrant issuance of the judgment to collect the penalties. Requires the clerk of the court to issue the judgment immediately.
 - c) Provides that an application to the clerk of the court for a judgment to collect penalties imposed by an FPPC enforcement order shall be made to the clerk of the superior court in the county where the monetary penalties, fees, or civil penalties were imposed by the FPPC.

- d) Provides that a judgment entered pursuant to these provisions has the same force and effect as a judgment in civil action.
- e) Provides that the remedy provided in this bill is in addition to those available under existing law.

EXISTING LAW:

- 1) Creates the FPPC, and makes it responsible for the impartial, effective administration and implementation of the PRA.
- 2) Prohibits members of the Legislature and state, county, district, judicial district, and city officers or employees, pursuant to Section 1090, from being financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Prohibits state, county, district, judicial district, and city officers or employees from being purchasers at any sale made by them in their official capacity, or from being vendors at any purchase made by them in their official capacity.
- 3) Provides that a person who willfully violates Section 1090 is punishable by a fine of not more than \$1,000 or by imprisonment in the state prison, and is forever disqualified from holding any office in the state.
- 4) Provides that a contract made in violation of Section 1090 may be voided by any party to the contract, except for the officer who had an interest in the contract in violation of Section 1090.
- 5) Prohibits a public official, pursuant to the PRA, from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the official knows or has reason to know that he or she has a financial interest. Provides that designated employees and specified public officials that realize an economic benefit as a result of a violation of this provision are liable in a civil action brought by the civil prosecutor for an amount of up to three times the value of the benefit.
- 6) Provides that violations of the PRA are subject to criminal, civil, and administrative penalties.
- 7) Makes the AG responsible for enforcing the criminal provisions of the PRA with respect to state agencies, lobbyists, and state elections. Provides that the district attorney of any county in which a violation occurs has concurrent powers and responsibilities with the AG.
- 8) Provides that the FPPC is the civil prosecutor for violations of the PRA with respect to the state or any state agency, except itself.
- 9) Permits the FPPC to bring an administrative action alleging a violation of the PRA, subject to certain conditions and procedural requirements. Provides that when the FPPC determines in the course of an administrative proceeding that a violation has occurred, the FPPC shall issue an order that may require the violator to do any of the following:

- a) Cease and desist violation of the PRA;
- b) File any reports, statements, or other documents or information required by the PRA; and,
- c) Pay a monetary penalty of up to \$5,000 per violation to the GF of the state.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) Purpose of the Bill: According to the author:

In 1974, California voters passed Proposition 9, a measure that enacted comprehensive conflict of interest laws designed to ensure that public officials would perform their duties in an impartial manner, among other provisions. That measure, commonly known as the Political Reform Act, also created the FPPC, and made it primarily responsible for enforcing those conflict of interest laws. Under the PRA, a public official generally is prohibited from making or participating in the making of any governmental decision in which the official knows or has reason to know that he or she has a financial interest.

The conflict of interest laws in the PRA apply broadly to all types of governmental decisions. There is a separate conflict of interest law, however, that applies only to contracting decisions. Government Code Section 1090 generally prohibits a public official or employee from making a contract in his or her official capacity in which he or she has a financial interest. In addition, a public body or board is prohibited from making a contract in which any member of the body or board has a financial interest, even if that member does not participate in the making of the contract. Unlike the conflict of interest rules contained in the PRA, however, the FPPC does not have a role in enforcing Government Code Section 1090. Instead, enforcement actions may be brought only by the Attorney General or by the district attorney in the county in which the violation occurred. Furthermore, unlike the PRA, which can be enforced through criminal, civil, or administrative actions, Government Code Section 1090 can be enforced only through criminal prosecutions.

Because contracting decisions fall within the broader conflict of interest rules contained in the PRA, however, the FPPC nonetheless can and does bring enforcement actions under the PRA for conflicts of interest that arise in the context of contracting decisions.

The existence of multiple conflict of interest laws that are enforced by multiple entities create unnecessary confusion for public officials and hamper efforts to effectively enforce the state's strict conflict of interest rules.

AB 1090 improves enforcement of the state's conflict of interest laws by allowing the FPPC to bring civil or administrative enforcement actions in response to violations of the Government Code Section 1090 contracting laws, and gives

public officials an additional tool in helping to avoid conflicts of interest by allowing the FPPC to issue advice regarding a public official's obligations under Government Code 1090.

- 2) Overview of Section 1090: Section 1090 generally prohibits a public official or employee from making a contract in his or her official capacity in which he or she has a financial interest. In addition, a public body or board is prohibited from making a contract in which any member of the body or board has a financial interest, even if that member does not participate in the making of the contract. Violation of this provision is punishable by a fine of up to \$1,000 or imprisonment in the state prison, and any violator is forever disqualified from holding any office in the state. The prohibitions against public officers being financially interested in contracts that are contained Section 1090 date back to the second session of the California Legislature (Chapter 136, Statutes of 1851).

Various provisions of state law provide exceptions to, or limitations on, Section 1090. Among other provisions, state law provides that an officer shall not be deemed to be financially interested in a contract if the officer has only a "remote interest" in the contract and if certain other conditions are met. Similarly, another section of state law provides that an officer or employee is not deemed to be interested in a contract if his or her financial interest meets one of a number of different enumerated conditions.

Given the complexity of Section 1090, and the various exceptions to and limitations on that section, it can be extremely difficult for a public board or body to determine whether or not a member of that board or body has an impermissible financial interest in a contract made by the board or body. The AG and county district attorneys have enforcement authority over Section 1090, but neither the AG nor the county district attorneys typically give legal opinions on the application of that section. Public officials may be able to receive an opinion from the legal counsel to the board or body of which they are a member, but such an opinion does not provide the same legal protection to the public official.

- 3) Conflict of Interest Rules in the Political Reform Act: In addition to the conflict of interest laws found within Section 1090 that apply to contracting decisions made by governmental entities, the PRA also has separate conflict of interest laws that apply more broadly to all governmental actions. Generally, these provisions prohibit a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the official knows or has reason to know that he or she has a financial interest, as defined. Any public official who knowingly or willfully violates these conflict of interest rules can be charged criminally. Civil and administrative enforcement actions may also be brought against an individual for a violation of these conflict of interest rules. The FPPC has sole authority to bring an administrative enforcement action under the PRA, and the FPPC also has the authority to bring civil enforcement actions under certain circumstances.

This bill sets up similar processes for the FPPC to bring civil and administrative enforcement actions for violations of Section 1090. Generally, an administrative enforcement action brought by the FPPC pursuant to this bill would be subject to the same procedural and due process requirements that apply to administrative enforcement actions that the FPPC brings under the PRA. Additionally, the penalties available for violations would be the same as

those that are available for violations of the PRA, the statute of limitations for bringing an enforcement action would be the same as for violations of the PRA, and the procedure for collecting unpaid penalties would be the same as under the PRA. However, enforcement actions brought under this bill would be subject to a few restrictions that are not applicable to actions under the PRA.

First, this bill prohibits the FPPC from bringing an administrative or civil action against a person for violation of Section 1090 except upon written authorization from the district attorney of the county in which the violation occurred. This requirement does not generally apply when the FPPC brings enforcement actions under the PRA (although there are certain circumstances in which the FPPC must get written authorization from a district attorney to bring a civil action for a violation of the PRA that occurred within the jurisdiction of that district attorney). This requirement for the FPPC to get written authorization is designed to ensure that this bill does not hinder criminal enforcement actions for violations of Section 1090.

Second, this bill requires the FPPC to get written authorization from the AG and from a district attorney prior to granting immunity to a witness as part of an investigation with respect to possible violations of Section 1090, a requirement that does not apply with respect to investigations for possible violations of the PRA. Instead, the PRA simply requires the FPPC to notify the AG at least 30 days in advance of granting immunity. Again, the requirement for the FPPC to get written authorization is designed to ensure that this bill does not hinder criminal enforcement actions for violations of Section 1090.

Finally, this bill prohibits the FPPC from bringing a civil action for an alleged violation of Section 1090 if it has commenced an administrative action against a person for that same alleged violation, and similarly prohibits the FPPC from commencing an administrative action for an alleged violation of Section 1090 if it has already brought a civil action for the same alleged violation. The PRA does prohibit a civil action from being filed with regard to any person for any violations after the FPPC has issued an administrative order against that person for the same violation, but it does not explicitly prohibit the FPPC from commencing an administrative action against a person if a civil action has already been brought against that person for the same conduct. Nonetheless, according to information from the FPPC, as a matter of practice, the FPPC does not pursue administrative and civil enforcement actions for a single violation of the PRA at the same time, though it is possible that the FPPC could bring a civil enforcement action under the PRA, and ultimately agree to resolve that action through an administrative stipulation with a fine.

- 4) Section 1090 vs. Political Reform Act Conflict of Interest Laws: Notwithstanding the fact that Section 1090 and the PRA's conflict of interest laws are enforced and interpreted by different entities, California courts nonetheless have recognized that the two conflict of interest laws are very similar, and have sought to harmonize the legal interpretations of the two laws to the extent possible (see, e.g., Lexin v. Superior Court (2010) 47 Cal.4th 1050, People v. Honig (1996) 48 Cal.App.4th 289). In fact, the California Supreme Court has relied upon regulations adopted by the FPPC under the PRA to assist the court in interpreting the provisions of Section 1090, notwithstanding the fact that the FPPC does not enforce Section 1090 (see Lexin, supra).

Given the similarity between these two laws, authorizing the FPPC to provide opinions and advice regarding Section 1090, and to bring civil and administrative enforcement actions for violations of Section 1090, may result in greater consistency in the enforcement of these conflict of interest laws and may make it easier for public officials acting in good faith to comply with the conflict of interest laws.

- 5) Bipartisan Commission on the Political Reform Act of 1974: The Bipartisan Commission on the Political Reform Act (McPherson Commission) was created in 1998, pursuant to SB 1737 (McPherson), Chapter 1080, Statutes of 1998, to reassess the provisions of the PRA in order to determine what its effects have been and whether changes would provide for a more efficient and effective implementation. The McPherson Commission consisted of 14 members appointed by various elected officials and the FPPC. The McPherson Commission issued its final report in 2000, which included 35 specific recommendations regarding amendments to the PRA as well as its administration and enforcement. One of the recommendations of the McPherson Commission was that all state conflict of interest statutes, including Section 1090, should be consolidated into a single code or body of law to be interpreted and enforced consistently by a single state agency. In making this recommendation, the commission found that "the existence of multiple conflict of interest provisions sprinkled throughout various Codes creates unnecessary confusion in the minds of public officials who strive to obey the law but who often have no idea what Code to review or whom to ask for advice."

Although this bill would not consolidate Section 1090 into a single code or body of law, it would make the FPPC responsible for enforcement of Section 1090, in addition to the conflict of interest rules in the PRA, and it would provide public officials with a single state entity (the FPPC) that can provide opinions and advice on most of the state conflict of interest statutes.

- 6) Arguments in Support: The sponsor of this bill, the FPPC, writes:

The [FPPC] has a unique expertise in advising upon, investigating, and prosecuting civil ethics violations, such as conflicts of interest, under the [PRA]. In fact, the prohibitions set forth in Section 1090 are quite similar to the conflict-of-interest prohibitions contained in the [PRA]....Under the [PRA], conflicts of interest are subject to criminal, civil or administrative prosecution. This results in accounting for the full range of conduct that can be a violation of the [PRA], even if the conduct does not meet the intent requirements for criminal prosecution. Section 1090 does not currently have a similar range of penalties, even though it is very similar to the [PRA's] conflicts-of-interest provisions. This bill would bring conformity to both prohibitions. Moreover, the [FPPC] is well-suited to assist the Attorney General and district attorneys by having civil and administrative enforcement authority over Section 1090 conflicts.

Additionally, often times, when [FPPC] staff is advising or investigating public officials, a potential 1090 issue is spotted in the fact pattern. However, because Section 1090 falls outside the [PRA], [FPPC] staff is forced to simply refer the individual or the matter to either the Attorney General or district attorney. Individuals are often unable to obtain timely advice regarding Section 1090

issues. Authorizing the [FPPC] to formally and informally advise officials on Section 1090 matters would bring much needed clarity to this area of the law and enable public officials to more effectively carry out their public duties. Further, authorizing the [FPPC] to bring civil or administrative actions under Section 1090 would result in more enforcement and, ultimately, more compliance with Section 1090, thus ensuring public officials conduct the public's business free from improper personal financial interests.

- 7) Arguments in Opposition: In opposition to this bill, the Association of California Water Agencies writes:

We believe that Government Code section 1090 currently provides for strong safeguards against financial abuse by government officials and public employees when entering into contracts on behalf of a public agency. Adding the threat of administrative and civil fines to the current threat of jail time seems unnecessary. If a local government official or employee is going to willfully violate the law, the prospect of going to jail is likely much more of a deterrent than an [administrative] fine. If the law is violated in error, without the intent to gain a financial benefit, currently the District Attorney (DA) can make a determination on whether the case should be pursued. Often the DA will not pursue a case because it is clear that the person did not intend to violate the law. We believe that AB 1090 would merely add opportunities for government officials and public employees to be fined which is much easier to accomplish than pursuing a criminal case.

- 8) Previous Legislation: AB 1558 (Wolk) of 2005, and AB 3003 (Hayashi) of 2008, both would have authorized a pilot project under which the FPPC would have been able to provide written opinions on Section 1090. AB 1558 was held on the Senate Appropriations Committee's suspense file, while AB 3003 was held on the Assembly Appropriations Committee's suspense file.
- 9) Related Legislation: AB 552 (Fong), which is also being heard in this committee today, would establish an expedited process for the FPPC to apply to the clerk of the court for a judgment to collect penalties imposed by an FPPC enforcement order. This bill contains similar provisions with respect to FPPC enforcement orders issued pursuant to this bill for a violation of Section 1090.
- 10) Political Reform Act of 1974: California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

Fair Political Practices Commission (sponsor)
California Common Cause

Opposition

Association of California Water Agencies

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