

Date of Hearing: July 15, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Sebastian Ridley-Thomas, Chair

SB 330 (Mendoza) – As Amended July 7, 2015

**SENATE VOTE:** 40-0

**SUBJECT:** Public officers: contracts: financial interest.

**SUMMARY:** Provides, beginning in 2017, that an elected officer of a state or local governmental entity is deemed to have a remote interest in a contract made by the governmental entity if the officer's spouse, child, parent, or sibling, or the spouse of the child, parent, or sibling, has a financial interest in the contract. Specifically, **this bill:**

- 1) Provides, for the purposes of Government Code Section 1090 (Section 1090), dealing with conflicts of interests in contracts, that a public officer who is an elected member of any state or local body, board, or commission, is deemed to have a remote interest in a contract for the purposes of Section 1090 if the officer's spouse, child, parent, sibling, or the spouse of the child, parent, or sibling, has a financial interest in the contract made by the public officer in his or her official capacity, or by any body, board, or commission of which the public officer is a member.
- 2) Provides for the provisions of this bill to become operative on January 1, 2017.

**EXISTING LAW:**

- 1) 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. Prohibits an individual from aiding or abetting a violation of Section 1090.
- 2) Provides that an officer shall not be deemed to be interested in a contract pursuant to Section 1090 if the officer has only a remote interest in the contract, as defined, if the fact of the interest is disclosed by the officer to the board or body of which the officer is a member and that interest is noted in its official records, and the body or board authorizes, approves, or ratifies the contract without counting the vote of the officer or member with the remote interest. Provides that the term "remote interest" includes, among other interests, a parent's interest in the earnings of his or her minor child for personal services.
- 3) Enumerates various financial interests for which an officer or employee is deemed not to be interested in a contract pursuant to Section 1090.
- 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, as specified. Provides that the willful failure of an officer to disclose a remote interest in a contract does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

- 5) Provides that a person who willfully violates Section 1090, or who willfully aids or abets a violation of 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. Gives the Fair Political Practices Commission (FPPC) the authority to commence an administrative or civil enforcement action for a violation of Section 1090 and related laws.
- 6) Authorizes a person subject to Section 1090 to request the FPPC to issue an opinion or advice with respect to that person's duties under Section 1090 and related laws. Permits the FPPC to issue such an opinion or advice, subject to certain conditions.
- 7) Prohibits a public official, pursuant to the Political Reform Act (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 a public official has a financial interest in a decision if the decision will have a material financial effect, as specified, on the official's spouse or dependent child.

**FISCAL EFFECT:** Unknown

**COMMENTS:**

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

The public perception that political decisions are wrongly influenced by personal financial interests is pervasive. Public officers may be seen as having biases in their public contract decisions when a specific contract decision may affect their spouse, child, parent, sibling, or the spouse of a child, parent, or sibling.

Governmental conflict of interest laws across our nation extend beyond the individual to include the individual's family, family unit, household (regardless of relationship), and others. For example, Arizona prohibits government officials from acting on matters involving their family (Arizona Revised Statutes § 38-503). In Washington D.C., public officials are prohibited from acting on matters involving a member of the official's household (DC ST § 1-1106.01). Kentucky and Alabama prohibit a public officeholder from acting on matters where they or their family member may have a financial interest (ALA CODE § 36-25-1 and Kentucky Revised Statutes, § 6.731).

In California, we have conflict of interest policies in our public universities. For example, at the University of California, Berkeley, the conflict of interest policy regarding purchasing decision-making extends to siblings, parents and in-laws (BUSINESS AND FINANCE BULLETIN G-39, Policy Regarding Employee-

Vendor Relationships (August 19, 1982)).

Conflict of interest policies also extend to the private sector. Best Buy, for example, prohibits individuals representing the company from acting on matters where they or their spouse, child, parent, sibling, or the spouse of their child, parent, or sibling have an interest (Best Buy Conflict of Interest Policy). Hewlett Packard requires its representatives to recuse themselves from acting on company matters relating to their family or friends (Hewlett Packard, Our Standards of Business Conduct, Page 11)....

California is at the forefront in defining the potential consequences of a violation of conflict of interest policies. However, in light of allegations involving our state in the last several years, it is time to expand and strengthen our definition of a conflict of interest.

- 2) **Government Code 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. Additionally, contracts that are made in violation Section 1090 can be voided by any party to the contract except the officer interested in the contract. For the purposes of Section 1090, a public official is generally considered to have a financial interest in a contract if that official's spouse has a financial interest in the contract. The prohibitions against public officers being financially interested in contracts that are contained in Section 1090 date back to the second session of the California Legislature (Chapter 136, Statutes of 1851). A public official can be subject to felony penalties for a violation of Section 1090 even if the official did not intend to secure any personal benefit, did not intend to violate Section 1090, and did not know that his or her conduct was unlawful.

Various provisions of state law provide exceptions to, or limitations on, Section 1090. 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 14 different specified conditions. Additionally, 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, including requirements that the officer who has the remote interest must disclose the remote interest to the officer's board or body, and that officer's vote must not count in determining whether to award the contract. While the willful failure of an officer to disclose a remote interest in a contract would subject that officer to the penalties outlined above, the contract itself cannot be canceled due to the violation unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

This bill would create a new "remote interest" under Section 1090, establishing a situation under which the financial interests of an elected official's relatives could create a remote interest for the official. Most previously-established remote interests were designed to

*narrow* the reach of Section 1090, by taking interests that were found by legal opinions to be financial interests under Section 1090, and redefining those interests as "remote interests." This bill, on the other hand, seeks to *expand* the scope of Section 1090 through the creation of a new remote interest. Unlike most previous legislative efforts to create new remote interests under Section 1090, this bill makes interests that are not currently covered by Section 1090 subject to that law by defining those interests as "remote interests."

- 3) **Breaking New Ground:** California's existing conflict of interest laws are designed to prevent public officials from using their governmental positions to enrich themselves financially. As a result, those laws regulate situations where a public official's actions may have a direct financial impact on the public official. Because actions that affect the financial interests of a public official's spouse or dependent child may have a corresponding impact on the official, existing conflict of interest laws generally recognize that the financial interests of an official's spouse or dependent child can create a conflict of interest for the official.

This bill, however, would break new ground by extending the conflict of interest provisions of Section 1090 to situations where a governmental decision does not have the potential for having a financial impact on an elected official. Instead, this bill would deem a public official's ties by blood or marriage with siblings, children, parents, and the spouses of those relatives to be sufficiently important as to prohibit the official from participating in a contracting decision. Such a change from the traditional understanding of a financial interest raises policy issues that the committee should carefully consider.

First, providing that a public official has a "financial interest" in a contract based solely on family relationships ignores situations where an official does not have close ties to a family member who has a financial interest in a contract that the official's governmental body is considering. Under the provisions of this bill, for instance, a public official could be deemed to be financially interested in a contracting decision if the estranged sibling of that public official worked for the company that was awarded the contract, even if the official had no contact with the sibling. In fact, such a policy could even be used by an unscrupulous company to force the disqualification of an unfriendly public official in a contract decision involving that company.

Second, as currently in effect, Section 1090 primarily is concerned with avoiding situations where a public official's loyalties may be called into question because the official may be financially affected by a decision. Prohibiting a public official from using his or her position in this manner when it could result in a personal financial benefit provides a relatively clear-cut philosophical underpinning for a conflict-of-interest law. On the other hand, attempting to protect against undue influence of a public official is a more nebulous undertaking, and it will be difficult to craft a policy that appropriately deals with the potential for undue influence while avoiding the regulation of situations where no such potential exists.

For example, this bill could require the disqualification of a public official in a contracting decision if the spouse of that official's sibling has a financial interest in a contract, in an attempt to prevent undue influence. By the same logic, couldn't a godparent, cousin, or neighbor of the official also have undue influence? On the other hand, as noted above, this bill may require the disqualification of a public official even where no potential for undue

influence exists—where the official is estranged from a sibling or parent, for example.

Finally, in order for a public official to be sure that he or she is complying with the provisions of this bill, that official necessarily will need to have information about—and be familiar with—the financial interests of various family members. Given the list of family members that could trigger the provisions of this bill, an official easily could be required to consider the financial interests of a dozen family members or more in order to determine whether the official is able to participate in awarding a contract. Further complicating that task, the public official would have no way to verify the financial interests of all family members. If a public official participated in the making of a contract, only to realize subsequently that a family member had a financial interest in that contract, could the public official face criminal charges as a result?

- 4) **Common Law Doctrine against Conflicts of Interest:** Notwithstanding the difficulty of creating a clear conflict-of-interest rule that protects against the potential for undue influence, as discussed above, the common law doctrine against conflicts of interest may nonetheless deal with the problem that the author raises.

In a January 2009 opinion by the Office of the Attorney General (No. 07-807), the common law doctrine against conflicts of interest was suggested as a potential source of authority in a situation where both the PRA and Section 1090 were found to be inapplicable to a redevelopment agency board member whose independent adult son sought a commercial loan from the board.

According to that opinion, "[t]he common law doctrine 'prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties,'" and it notes that while the PRA and Section 1090 focus "on actual or potential financial conflicts, the common law prohibition extends to noneconomic interests as well." The opinion noted that even though the conflict of interest rules in the PRA and Section 1090 did not apply in that situation, "...it is difficult to imagine that the agency member has no private or personal interest in whether her son's business transactions are successful or not. At the least, an appearance of impropriety or conflict would arise by the member's participation in the negotiations and voting upon an agreement that, if executed, would presumably redound to her son's benefit."

For that reason, the opinion concluded that "...the agency board member's status as the private contracting party's parent ... places her in a position where there may be at least a temptation to act for personal or private reasons rather than with 'disinterested skill, zeal, and diligence' in the public interest, thereby presenting a potential conflict.... Under these circumstances, we believe that the only way to be sure of avoiding the common law prohibition is for the board member to abstain from any official action with regard to the proposed loan agreement and make no attempt to influence the discussions, negotiations, or vote concerning that agreement."

To the extent that the common law doctrine against conflicts of interest applies to situations like those raised by the author, this bill may be unnecessary.

- 5) **Technical Issue:** The most recent amendments to this bill modify an existing "remote interest" under Section 1090 in an attempt to require elected public officers to recuse themselves from contracting decisions in which certain specified family members have a financial interest. However, the existing remote interest applies to *all* public officers, while the modified remote interest proposed by this bill applies only to public officers who are *elected* members of state or local bodies, boards, and commissions. As a result, for public officers who are *not* elected to their bodies, boards, and commissions, this bill would eliminate an existing provision of law that provides that the interest of a parent in the earnings of his or her minor child for personal services is a remote interest. This change does not seem to be consistent with the author's stated intent of this bill.

If it is the committee's desire to approve this bill, the committee and the author may wish to consider an amendment to resolve this issue. However, as indicated below (see the comment titled "Double-Referral"), due to impending committee deadlines, committee staff recommends against amending this bill in committee today.

- 6) **Related Legislation:** SB 704 (T. Gaines), which is also being heard in this committee today, would establish a new "remote interest" exception to Section 1090 for certain individuals who are serving as appointed members of unelected boards or commissions, among other provisions.
- 7) **Previous Legislation:** AB 1090 (Fong), Chapter 650, Statutes of 2013, authorized the FPPC to bring civil and administrative enforcement actions for violations of Section 1090 and required the FPPC to provide opinions and advice with respect to Section 1090.

SB 952 (Torres), Chapter 453, Statutes of 2014, prohibited an individual from aiding or abetting a violation of Section 1090 and related laws.

AB 785 (Mendoza) of the 2011-12 Legislative Session would have provided that a public official has a financial interest in a governmental contracting decision if an immediate family member of the public official, as defined, lobbies the agency of the official on that decision or is a high ranking official in a business entity on which it is reasonably foreseeable that the decision would have a material financial effect. AB 785 was approved by this committee on a 6-0 vote, but failed passage in the Assembly Local Government Committee on a 0-6 vote.

- 8) **Double-Referral:** After this bill was referred to this committee, the Assembly Rules Committee instructed that this bill should be referred to the Assembly Local Government Committee upon approval by this committee. Accordingly, any motion to approve this bill should provide for the bill to be re-referred to the Assembly Local Government Committee.

Due to impending committee deadlines, if this bill is approved in this committee today, it is scheduled to be heard in the Assembly Local Government Committee this afternoon. However, if this bill is amended in committee today, it will not be able to be heard in the Assembly Local Government Committee before this week's deadline for policy committees to hear and report bills. In light of this fact, if it is the committee's desire to approve this bill with amendments, committee staff recommends that this bill be passed out of committee with

the author's commitment to take those amendments subsequent to passage by this committee.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

City of Norwalk (prior version)

Orange County Employees Association (prior version)

**Opposition**

None on file.

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