

Date of Hearing: June 15, 2016

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Shirley Weber, Chair

SB 1011 (Mendoza) – As Amended March 17, 2016

**SENATE VOTE:** 38-0

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

**SUMMARY:** Requires, beginning in 2018, a public officer to recuse himself or herself from voting on a contract made by the officer's governmental entity if the officer's child, parent, or sibling, or the spouse of the child, parent, or sibling, has a financial interest in the contract that is known to the public officer. Specifically, **this bill:**

- 1) Provides, for the purposes of Government Code Section 1090 et seq. (Section 1090), dealing with conflicts of interests in contracts, that a public officer is deemed to have a remote interest in a contract for the purposes of Section 1090 if the officer's child, parent, sibling, or the spouse of the child, parent, or sibling, has a financial interest in the contract and that interest is actually known to the public officer.
- 2) Provides for the provisions of this bill to become operative on January 1, 2018.

**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.
- 8) Makes violations of the PRA subject to administrative, civil, and criminal penalties.

**FISCAL EFFECT:** Unknown. Although the current version of this bill is keyed non-fiscal, the Office of the Legislative Counsel indicates that this bill *should* be keyed as a fiscal bill, as detailed below.

**COMMENTS:**

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

The perception that political agendas coincide with personal financial interests is a common thread of concern amongst the public. Although Public officers are prohibited from entering into state contracts that directly benefit them financially, Public officers may be seen as having biases in their public contract decisions when the specific contract decision directly affects a child, parent, sibling, or the spouse of a child, parent, or sibling.

- 2) **Conflict of Interest Rules:** As detailed above, public officials in California are subject to two main conflict of interest laws that are intended to prevent public officials from using their official positions for personal financial benefit. The PRA generally prohibits a public official from using his or her official position to influence *any* governmental decision, as defined, in which the official has a financial interest. The PRA's conflict of interest rules also prohibit public officials from participating in decisions that have a material financial effect, as specified, on the official's spouse or dependent child. Violations of the PRA's conflict of interest rules are punishable by administrative penalties, and in certain cases, by civil or criminal penalties. Criminal violators of the PRA's conflict of interest rules additionally are prohibited from being a candidate for elective office or from acting as a lobbyist for four years after the conviction.

Section 1090, on the other hand, applies only to contracting decisions. 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. For the purposes of Section 1090, an official or employee also has an interest in the property and income of his or her spouse. Contracts made in violation of Section 1090 are void, and willful violators of Section 1090 are subject to criminal penalties and a lifetime ban on holding public office in the state.

- 3) **Limitations on Section 1090:** 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 entered into by a body or board of which the officer is a member if the officer has only a "remote interest" in the contract and if certain other conditions are met, including requirements that the officer disclose the remote interest to the officer's board or body, and that officer's vote 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 creates 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."

- 4) **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 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. In essence, existing conflict of interest rules are based on an objective standard: namely, those rules apply to situations where a public official's finances may be affected by his or her official actions.

At its essence, this bill seeks to protect against situations in which outside individuals may have—or may appear to have—an *undue influence* over governmental decisions made by

public officials. In contrast to the relatively objective standard that underlies existing conflict of interest rules, the determination about what constitutes *undue influence* is more subjective. This bill deems 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.

For example, providing that a public official has a "financial interest" in a contract based solely on family relationships may not account for 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 was not regularly in contact with the sibling.

On the other hand, this bill may not address situations where individuals other than family members may have a significant influence on public officials. For example, it is possible that the godparent, neighbor, friend, or pastor of a public official could have an undue influence on an official's decision, yet none of those relationships would be regulated by this bill.

Finally, in order for a public official to comply with the provisions of this bill, that official will need to consider the financial interests of various family members when that official is involved in making contracting decisions. Unlike prior related legislation, which is described below, this bill explicitly provides that the financial interest of a relative in a contract must "actually [be] known to the public officer" in order for that officer to be deemed to have a remote interest in the contract under Section 1090. While this language may help protect public officials in situations where they have no way of knowing about the financial interests of their relatives (e.g., in situations where the official is estranged from a relative), this bill nonetheless could force a public official 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.

- 5) **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.

- 6) **Fiscal Bill and Suggested Amendment:** Previous legislation that was similar to this bill, as described below, was keyed fiscal, and was identified as a state-mandated local program. According to the Office of the Legislative Counsel, this bill should be keyed fiscal, and identified as a state-mandated local program; instead, this bill was erroneously keyed as a non-fiscal bill. Committee staff recommends a technical amendment to correct that error.
- 7) **Previous Legislation:** 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.

SB 330 (Mendoza) of 2015 would have provided, beginning in 2017, that an elected officer of a state or local governmental entity was 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, had a financial interest in the contract. SB 330 was approved by this committee on a 5-0 vote, but was held on the Assembly Appropriations Committee's suspense file.

- 8) **Double-Referral:** This bill has been double-referred to the Assembly Local Government Committee.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

None on file.

**Opposition**

None on file.

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