

Memorandum

To : Mr. E. L. Sorensen, Jr.

Date : December 5, 1990

From : Mary C. Armstrong

Subject: Senate Bill 1738 - Analysis 90-3

As part of a comprehensive ethics reform act, Senate Bill 1738 (Ch. 84, Stats. 1990) added section 15626 to the Government Code ("The Quentin L. Kopp Conflict of Interest Act of 1990"). Section 15626 imposes a three-pronged disclosure requirement on Board Members, the public, and Board staff.

First, section 15626 provides that prior to rendering any decision in any adjudicatory proceeding before the Board, each Member who knows or has reason to know that he or she received a contribution or contributions within the preceding 12 months in an aggregate amount of \$250 or more from a party or his or her agent or from any participant or his or her agent, the fact of contribution must be disclosed and the Member is prohibited from participating in the decision or using his position to influence the decision. (If the Deputy Controller is sitting on the Board, a disclosure must be made by the deputy on the Controller's behalf.) A Member knows or has reason to know about a contribution (1) if facts have been brought to the Member's personal attention that he or she has received a contribution which requires disqualification, or (2) if the Board Member has received written notice from the Board staff before the hearing and before any subsequent decision on the matter has occurred that a party has made a contribution.

Second, it provides that a party or a participant (one who is not a party but who actively supports or opposes a particular decision and who has a financial interest in the decision) is required to disclose for the record if there has been a contribution of \$250 or more in the preceding 12 months, by the party or participant, or his or her agent, to any Member of the Board. When a close corporation is a party to, or a participant in, a Board hearing, the majority shareholder is subject to these disclosure requirements. The term "party" also includes an agent, representative, or consultant and the corporation or firm that representative works for.

Third, the staff must inform the Board Member if it is aware that there has been a contribution from a party or participant.

If a Member receives a contribution which would otherwise require disqualification and the contribution is returned with 30 days from the time the Board Member knows of the contribution and the pending proceeding, the Board Member may participate in the proceeding.

The Board Members are required to provide "Board staff" with a copy of all campaign statements at the time the statements are filed.

The notice of contribution from the "Board staff" to the Board Member must be on a form prescribed by rules adopted by the Board. The notice of contribution requires the Board staff to ask of each party, participant, close corporation, or its majority shareholder, and any agent whether a contribution has been made in the 12 months preceding any adjudicatory proceeding or decision. The staff shall also inquire and report on the record: 1) whether any party or participant is a close corporation, or if so, its name or its majority shareholder; and 2) whether any agent is an employee or member of any law, accounting, consulting or other firm or similar entity or corporation, and if so, its name and address and whether a contribution has been made by any such person, firm, corporation, or entity.

The term "Adjudicatory Proceeding Before the Board" is defined in section 15626 as including all matters scheduled for Board hearing -(Franchise, Business and Property) which have appeared as an item on a meeting notice as a contested matter. It also includes "consent agenda" matters if (1) the matter was previously on the calendar as a non-consent item; (2) was removed from the consent calendar for separate discussion and vote, or (3) the item is one about which the Member has previously contacted the staff or a party.

Government Code section 15626 does not apply to public hearings or rules or regulations.

The term "contribution" has the same meaning prescribed in Government Code section 82015 and Fair Political Practices Regulation 18215 and includes contributions in kind, loans, etc.

Section 15626(i)(5) provides that "[t]his section shall not prevent any member of the board from making, or participating in making, a governmental decision to the extent that the member's participation is legally required for the action or decision to be made. However, the fact that a member's vote is needed to break a tie does not make the member's participation legally required."

The term "legally required participation" is defined in FPPC Regulation 18702 as:

"(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

(b) Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she shall:

(1) Disclose as a matter of official public record the existence of the financial interest;

- (2) Describe with particularity the nature of the financial interest before he or she makes or participates in making the decision;
 - (3) State the reason there is no alternative source of decision-making authority
 - (4) Participate in the decision only in an open meeting of the agency, as required by Government Code section 11123 and 54953, or in closed session, as provided in Government Code Sections 11126, 54956.7, 54956.8, 54956.9, 54957 and 54957.6, where participation by the official is legally required for the agency to act.
- (c) This regulation shall be construed narrowly, and shall:
- (1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.
 - (2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification

The bill provides that any person who knowingly or willfully violates this section is guilty of a misdemeanor and can be subject to a fine of \$10,000 or three times the amount the person failed to disclose. No person convicted under this section shall be allowed to be a candidate for any elective office or act as a lobbyist for four years.

Several questions and problem areas have arisen with regard to the implementation of Senate Bill 1738. The first question concerns the effective date of the bill with regard to the reporting requirements. Senate Bill 1738 restricts participation by a Board Member in the decision making process if the Board Member has "received a contribution or contributions in an aggregate amount of two hundred and fifty dollars (\$250) or more within the preceding 12 months..." There is a question whether the "preceding 12 months" provision found in Government Code section 15626(c) includes the 12-month period prior to the effective date of the legislation (i.e., January 1, 1990, through December 31, 1990) or is it limited to the months commencing with the January 1, 1991, effective date of Senate Bill 1738 (Ch. 84, Stats. 1990).

There is strong authority for determining that only those contributions made after the January 1, 1991, effective date of Senate Bill 1738 should be required to be disclosed. In a similar provision administered by the Fair Political Practices Commission (FPPC), Government Code section 84308(c) is very similar to section 15626. It provides:

"Prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars (\$250) * * *

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from a party or from any participant shall disclose that fact on the record of the proceeding..."

Regulation 18438 provides that section 84308 does not apply only to those contributions made or received prior to the effective date of the legislation (January 1, 1983). Historically, a time requirement which is contained within a statute has been treated differently by the courts than the effective date of a given piece of legislation. Although there is a general rule of construction that a statute will not be construed to be retroactive unless the intention to make it so appears from the Act itself, the same rule does not apply to requirements contained within the language of the statute. It is well settled that a statute is not considered retroactive merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment (United States v. Jacobs (1938) 83 L.Ed. 763), or because it draws on facts antecedent to its enactment for its operation. (Burks v. Poppy Construction Company (1962) 57 Cal.2d 463.) Examples of the application of this principle in particular situations may be found in the following California cases: Eichelberger v. City of Berkeley, 46 Cal.2d 182, 189 (Increase in pension); and Gregory v. State of California, 32 Cal.2d 700, 702 (Interest recovered on refund of gift-tax due to passage of statute allowing interest). We note that a similar approach was utilized with respect to the Political Reform Act (PRA) (Gov. Code Sec. 81000 et seq.), which was added by initiative adopted June 4, 1974, and became effective January 7, 1975. The PRA contained similar provisions which required state officers and employees to report contributions or investments which had occurred during the previous 12 months within 30 days of the effective date of the act (see generally Gov. Code Sec. 87200) even through the 12 months were prior to the effective date of the Act. However, a different approach was taken in the late FPPC Regulation 18438.

In summary, it is unclear whether or not the Board Members must report contributions received during the 12-month period preceding the January 1, 1991, effective date of section 15626. Can the Board, by regulation, provide that the prohibitions and requirements of Government Code section 15626 do not apply to contributions made or received prior to January 1, 1991? If the Board does provide by regulation that the provisions of Government Code section 15626 do not apply until January 1, 1991, are campaign contributions which are used to pay campaign debts incurred prior to January 1, 1991, required to be reported under section 15626?

The second problem in interpretation concerns Government Code section 15626(h)(3) which provides, in part, that:

A person actively supports or opposes a particular decision if he or she lobbies in person the members or employees of the board, testifies in person before the board, or otherwise acts to influence the members of the board."

Two questions are raised by this language. First, is the phrase, "or employees of the board" limited to the individual Board Members and their immediate staff, or does it include communications with any employee of the agency? In an agency the size of the Board of Equalization, an interpretation which includes every employee seems unworkable. We note that in a

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mitted to the immediate staff of each of the Board Members and not all employees.

Second, what will be considered to "lobby in person," "testify in person," or "otherwise act to influence?" Will it be sufficient to adopt the same definitions as those contained in FPPC Regulation 18438.4(a), (b) and (c).

The next problem of interpretation is the question of what constitutes unlawful participation by a Board Member under section 15626? Is a request to postpone a matter so that a contribution can be returned or a vote to abstain considered "participation" within the meaning of section 15626? The statute provides that "no member shall make, participate in making, or in any way attempt to use his or her official position to influence..." It would appear that this language precludes any action by an affected Board Member including a vote to abstain or postpone. If the Member cannot act or participate in any way, can his or her presence be counted for purposes of making up a quorum?

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