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Complying With California Conflict of Interest Laws

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THE CHARTER LAW FIRM

YM&C Firm Overview

- Partners have over 100 years of collective experience working with charter schools
- 28 attorneys working with charter schools throughout the state in all areas of charter school law (e.g., employment/labor, creation and compliance of nonprofit organizations, litigation, audit issues, facilities leasing/purchasing, special education, student suspension/expulsion, etc.)
- Represent most of California's charter schools
- Conduct workshops for charter schools in all areas of legal compliance

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Goals for Session

1. This is a primer; non-exhaustive overview.
2. Charter petition, bylaws, Memorandum of Understanding with your authorizer(s), and school policies might obligate you even more stringent rules and higher standards than minimum requirements set by statute.
3. Limit disruptions and prevent civil or criminal liability for Board members in most common conflict of interest scenarios.

- Disclaimers**
 - Real problems are fact specific & complex. Consult legal counsel.
 - You should only speak to legal counsel about compliance issues to ensure the attorney-client privilege applies. Emails to staff are discoverable.
 - Only highlighting most common compliance issues.
 - Federal conflict of interest law is not covered in this presentation.

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Why You Should Care About Conflict Law Compliance



- Potential criminal penalties
- Potential fines
- Potential charter revocation
- Loss of good reputation
- Potential loss of Foundation support and funding



Understanding Conflict of Interest Laws



Conflicts of Interest



Principle

"public officials should perform their duties in an impartial manner, free from bias caused by their own financial interests..."

General Rule

- Public officials are disqualified from participating in decisions in which they may have a financial interest.



Conflicts of Interest



Broad Definition

- A *conflict of interest* arises when an individual who has a private financial interest in the outcome of a corporate contract or a public decision, participates in the decision-making process or influences or attempts to influence others making the contract or decision.
- In short, a conflict of interest is a clash between an individual's duty to his or her office and his or her personal interests.

7



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Conflicts of Interest



- Trend has been toward more legislation and investigations related to conflicts of interest.
- Landscape is shifting toward strict compliance and avoiding the appearance of impropriety.
- Many new charter schools are avoiding having either their employees or owners and employees of their vendors and landlords on their boards.

8



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Hoops to Jump Through



What happens if a Board member or employee has a conflict of interest in a decision (such as a proposed transaction or contract)?

1. Disclose the interest.
 - Employees disclose in writing to supervisor
 - CEO and Board members disclose to Board and ensure it is noted in the minutes
2. Abstain from any vote or discussion before or during the meeting and do not participate in the matter (leave the room).
3. Determine whether the remaining members of the Charter School Board can enter into the transaction or contract. Must be able to jump through six hoops that we will talk about today. Consult with attorneys because minor facts of each case can change legal advice.

9



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Hoops to Jump Through

Conflict of Interest Code & Policy
 Government Code Section 1090
 Political Reform Act
 Corporations Code
 Regulations
 Common Law

10
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COI Code & Policy

Hoop #1

Conflict of Interest Code and Policy

11
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COI Code & Policy

Conflict of Interest Code

- States who must file Form 700 and what must be disclosed
- Establishes standard when a designated board member or employee has a financial interest in a potential transaction or contract (cannot be less stringent than legal minimum)
- LAUSD requires a “bridge policy” that is aligned with LAUSD’s Conflict of Interest Code for LAUSD approved charter schools.
- If not in LAUSD, stand alone conflict code must be adopted by charter school and then approved by county board of supervisors or FPPC.

Conflict of Interest Policy

- Establishes process for disclosing potential conflicts and determining whether a conflict exists
- Required for LAUSD approved schools. This policy is not required but is a best practice outside of LAUSD.

12
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Statement of Economic Interest (Form 700)

Who must file Form 700?

- Must be filed by positions designated in Conflict of Interest Code

What must be disclosed?

- Requires disclosure of reportable interests (includes interests of spouse & dependent children)

When filed?

- Assuming or reappointment to office or position (within 30 days)
- Once annually (by April 1st)
- Leaving office or position (within 30 days)

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Statement of Economic Interest (Form 700)

How?

- Obtained online at www.fppc.ca.gov
- Be sure to download each time you need to file to ensure you are using the most current form.
- Signed under penalty of perjury
- Original/inked signature required (not fax/e-mail) unless authorized to file electronically
- Some filing officers require filing electronically (LA County, Santa Clara County, Ventura County, Orange County, and other agencies approved by FPPC)
- Becomes public record

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Statement of Economic Interest (Form 700)

Penalties for failure to file

- Criminal charges by Attorney General or District Attorney for deliberate failure to file
- Civil action by FPPC or private citizen

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Government Code § 1090 

Hoop #2

Government Code Section 1090

 16
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Government Code § 1090 

Elements

1. Public official (officer, board member, or employee)
2. Making a public contract (for sale or purchase)
3. A financial interest

If board member has financial interest, the rest of the board is prohibited from entering into the contract; *even if it is with the best vendor at the best price and the interested board member abstains.*

 17
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Government Code § 1090 

Making a Public Contract

- Under Section 1090, the term “made” is not used in the narrow technical sense, but is defined in the broadest sense to encompass actions including preliminary discussions, negotiations, compromises, reasoning, planning, and solicitation for bids and applications. *Millbrae Association for Residential Survival v. City of Millbrae*, (1968) 262 Cal.App.2d 222.
- Broadly construed by courts to include many of the preliminary steps in the contracting process, such as rendering advice to public officers responsible for entering into the contract.

 18
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Government Code § 1090



What is a financial interest under Section 1090?

- Section 1090 does not define financial interest. However, there are several "remote interest" and "non-interest" exceptions.
 - If "remote interest", then interested party must disclose and recuse. The Board can proceed without participation of the person with the remote interest so long as the school can jump through the rest of the legal hoops.
 - If "non-interest", then we recommend that the interested party disclose and recuse due to the potential appearance of impropriety. The Board can proceed without participation of the person with the remote interest so long as the school can jump through the rest of the legal hoops.

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Government Code § 1090



- Remote interest examples:
 - Employee of contracting party with 10 or more other employees; employee employed for at least 3 years prior to accepting office; employee owns less than 3 percent stock in contracting party & not involved in bid
 - A person owning less than 3 percent of the shares in the contracting party
- Non-interest examples:
 - A recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.
- Consult with legal counsel to see if these, or other exceptions apply.

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Government Code § 1090



Debatable whether applicable to charter schools

Section 1090 provides, in part, "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interest in any contract made by them in their official capacity or by any body or board of which they are members...."

- Legislative attempts to make Section 1090 apply expressly to charters schools have been vetoed.
- Lassen County District Attorney asked for Attorney General Opinion on whether Section 1090 applies to charter schools now (without any new law being signed by Governor).
- Orange County DA prosecuting former charter school board member

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Government Code § 1090



Check Your Governance Documents to See if Your School Committed to Compliance

- Charter
- Bylaws
- MOUs with authorizer
- If unclear, best practice is to comply with Government Code 1090 et seq. to avoid potential prosecution and lengthy investigation caused by any appearance of impropriety.

22

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Political Reform Act



Hoop #3

Political Reform Act

23

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Political Reform Act



Elements

1. Public officials (officers, board members, employees)
2. Participating in or attempting to influence a governmental decision
3. Public official has qualifying financial interest (e.g., (a) investment in business entity \$2k; (b) real property investment \$2k; (c) income of \$500 or more; (d) business position in entity; (e) gift of \$460 or more) **Includes spouse and children*
4. Financial interest is material
 - direct involvement = material
 - indirect involvement → see thresholds under regulations

24

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Political Reform Act



Difference between PRA and Section 1090

- PRA: Disclosure and recusal avoids a violation. Assuming the Board still consists of a quorum, it may then proceed to take action without the involvement of the interested Board members.
- Section 1090: If board member has a financial interest, disclosure and recusal does NOT avoid a violation. The Board cannot enter into the contract unless it is a "remote" or "non-interest" as defined by law.

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Corporations Code § 5233



Hoop #4

Corporations Code Section 5233

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Corporations Code § 5233



Self-Dealing Transactions

- Applies to directors (i.e. board members) only
- In practice, board must synthesize requirements of PRA, Section 1090 (if applicable), and Corporations Code.
- Compliance with Corporations Code satisfies Political Reform Act because requirements are higher. However, compliance with Corporations Code will not satisfy Government Code Section 1090.

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Corporations Code § 5233



Self-Dealing Transactions

Director must not have material financial interest in any contract or transaction unless:

- Fully disclosed/noted in the minutes;
- Transaction approved by directors without interested director's involvement (leaves room);
- Charter school could not obtain a better agreement with reasonable effort; and
- Transaction is in the best interest of charter school and is fair and reasonable at the time.

Recommended to make findings in resolution form.



28

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Regulations



Hoop #5

Regulations



29

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Regulations



- For charter schools accepting lease reimbursement funds from the State of California, special conflict of interest rules apply. See Title 4, California Code of Regulations Section 10170.14.



30

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Common Law



Hoop #6

Common Law on Conflicts of Interest

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Common Law



Doctrine of Incompatible Offices

- Public official
- Holding two public offices simultaneously
- Offices are incompatible with each other (creating divided loyalties); overlapping jurisdictions

Prohibition Against Conflicts of Interest

- Public official
- Engaging in transaction or influencing decision
- Creating an appearance of impropriety (financial interest not necessarily required)

E.g., board member voting on child's expulsion.

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Penalties



Political Reform Act

- Administrative sanctions (e.g., fines per violation, cease and desist orders, orders to file reports);
- Civil penalties (e.g., injunctions, damages and attorneys' fees)
- Criminal charges

Government Code Section 1090

- Criminal penalties (e.g., fine of up to \$1000 per violation or imprisonment in state prison)
- Permanent disqualification from holding office in California
- Any contract made is void.

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Penalties



Charter Schools Act

- Potential charter revocation

Corporations Code

- Civil lawsuit against interested director

Common law

- Removal from office, if incompatible offices

Penal Code Section 70

- Criminal penalties (e.g., imprisonment up to 1 year) for asking for or receiving a bribe.

YM&C 34

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QUESTIONS AND RESPONSES

THANKS FOR ATTENDING TODAY!

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