



## California High-Speed Rail

### BRIEFING: DECEMBER 10, 2019 BOARD MEETING AGENDA ITEM #3

**TO:** Chairman Mendoca and Board Members

**FROM:** Alicia Fowler, Chief Counsel

**DATE:** December 10, 2019

**RE:** Approval and Adoption of the Authority's Conflict of Interest Code

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#### Summary

Under the Political Reform Act (Act), all public agencies are required to adopt a conflict-of-interest code. Agencies are required to review their conflict of interest code at least every other year – state agencies in odd-numbered years and local agencies in even-numbered years (Section 87306(b) of the Government Code).

The Authority's code was last updated in 2015. In 2017, the Authority determined the Code in 2015 continued to reflect the structure of the organization and did not require an amendment. This year, an update is necessary due to the abundant number of added, deleted, or renamed employee positions at the Authority, both on the private and public-sector side.

The Authority provided notice beginning October 11, 2019 that pursuant to the authority vested in it by Section 87306 of the Government Code it proposed amending its Code. Notice and a copy of the proposed Code was provided via email to all staff, posted on the Authority's intranet and in the California Regulatory Notice Register published by the Office of Administrative Law.

This action requests that the Board approve and adopt the attached updated Conflict of Interest Code for the Authority.

#### Background

The code adopted by each agency designates employee or consultant positions that require Statements of Economic Interests (Form 700) filings. It also assigns disclosure categories specifying the types of interests to be reported. The Form 700 is a public document intended to alert public officials and members of the public to the types of financial interests that may create conflicts of interests.

It is essential and legally required under the Act that an agency's conflict of interest code reflect the current structure of the organization and properly identify officials who would be filing a Form 700. To ensure the codes remain current and accurate, each agency is required to review its conflict of

interest code at least every other year – state agencies in odd-numbered years and local agencies in even-numbered years (Section 87306(b) of the Government Code).

The Authority's Board of Directors are not included in the list of positions because the Board Members are required to file Form 700s pursuant to Government Code Section 87200 which is the most comprehensive type of conflict of interest reporting under the Act and is more stringent than the reporting requirement for the Authority staff and consultants covered under this conflict of interest code. As the Board is not subject to the Authority's Code, Board Members are not being asked to affect, amend, or limit their own disclosure requirements through any amendments to the Code.

The Authority's Code must contain the following three components:

### **1. Terms of the code**

The terms of the code comprise the main body of a code and include such provisions as the manner to report financial interests, the disqualification procedures, etc. The FPPC recommends that agencies incorporate FPPC Regulation 18730 by reference because the type of information required to be in the main body of the code is quite complex and Regulation 18730 contains all these provisions. The FPPC will amend the regulation to include legislative and regulatory changes that affect the main body of the code; therefore, this component of an agency's code is automatically in compliance with the Act.

### **2. Designated positions**

The code must specifically list positions that make or participate in making decisions that may foreseeably have a material effect on any financial interest, as set forth in subdivision (a) of Section 87302 of the Government Code. Typically, positions that involve voting on matters, negotiating contracts, or making recommendations on purchases without substantive review must be included in codes.

For the Authority, some of the designated positions are filled by consultants. The Authority, in conjunction with staff at the FPPC, reviewed the organizational charts and duties of key personnel of major contracts including, but not limited to, the Program Delivery Office, Regional Consultant contracts and Project and Construction Manager contracts for inclusion within the Code. As per FPPC guidelines, the following criteria are used in assessing whether a position should be designated:

*A person "makes a governmental decision" when the individual, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) Therefore, such positions should be designated in the agency's conflict-of-interest code.*

*A person "participates in a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the individual negotiates, advises, or makes recommendations to the decision-maker regarding the governmental decision. (Regulation 18702.2.) If a superior relies on an individual's professional judgment, then the individual is participating in making a*

*governmental decision. In other words, if the individual influences the final decision by supporting a position or suggesting a course of action, he/she is participating in the decision even if he/she is not making the final decision. Therefore, the individual's position must be designated in the conflict-of-interest code.*

Designated positions are also required to complete the state's Ethics training and submit documentation to the Authority's Form 700 Filing Officer verifying compliance. The certification is required to be renewed every two years.

### **3. Disclosure Categories**

A primary purpose of the code is to require disclosure of those types of investments, interests in real property, sources of income and business positions that designated positions may affect in their decision-making. For example, the manager of an agency should be assigned full disclosure (all investments, interests in real property, sources of income and business positions) because the manager makes decisions that affect a wide range of interests. Alternatively, a purchasing agent whose decision-making is limited to the purchase of office supplies should only be assigned disclosure of investments, sources of income and business positions in entities that provide office supplies, equipment or merchandise of the type used by the agency.

#### **Prior Board Action**

HSRA #15-06 – Approval and Adoption of the Conflict of Interest Code, February 10, 2015.

#### **Discussion**

The California High-Speed Rail Authority (Authority) has been engaged in a process with the Fair Political Practices Commission (FPPC) to amend its existing Code to update and expand the list of Authority State staff and consultants who are required to file Form 700's. Persons who are required to file Form 700s hold positions that require that individual to make or participate in a government decision for the Authority.

The Authority's process to amend the Code included the following:

- Relevant Authority staff attended a FPPC training pertaining to amending conflict of interest codes.
- Authority staff updated the current Code by removing, adding, or renaming positions to make it consistent with the Authority's current organizational structure by identifying positions that make, or participate in the making of, governmental decisions. Such governmental decisions fit the following criteria:
  - Approve a rate, rule, or regulation;
  - Adopt or enforce a law;
  - Issue, deny, suspend or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
  - Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract which requires agency approval;
  - Grant agency approval to a contract which requires agency approval and to which the agency is a party, or to the specifications for such a contract;
  - Grant agency approval to a plan, design, report, study or similar item;

- Adopt or grant agency approval or policies, standards, or guidelines for the agency, or for any subdivision thereof; or
  - Serve in a staff capacity that otherwise would be performed by an individual holding a position specified in the agency's COI code under Government Code Section 87302.
- Renaming and structuring Program Management to Program Delivery Office and its branches.
  - Re-categorizing and adding disclosure categories to reflect the various range of duties within the organization.

### *Notice of Intention to Amend and Comment Period*

The Authority provided notice beginning October 11, 2019 that pursuant to the authority vested in it by Section 87306 of the Government Code it proposed amending its Code. Notice and a copy of the proposed Code was provided via email to all staff, posted on the Authority's intranet and in the California Regulatory Notice Register published by the Office of Administrative Law.

The purpose of these amendments was to implement the requirements of Sections 87300 through 87302, and Section 87306 of the Government Code. Interested parties were invited to submit comments to the listed contact person available through email, by phone or by mail.

The comment period ended on Monday, November 25, 2019. As stated in the published notice, any interested person or the person's representative could have submitted a request for a public hearing by Monday, November 11, 2019. No requests were submitted for a hearing.

As part of the process, the Authority was required to, and did make the following findings that the proposed amendments:

1. Impose no mandate on local agencies or school districts.
2. Impose no costs or savings on any state agency.
3. Impose no costs on any local agency or school district that are required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.
4. Will not result in any nondiscretionary costs or savings to local agencies.
5. Will not result in any costs or savings in federal funding to the state.
6. Will not have any potential cost impact on private persons, businesses or small businesses.

Additionally, the Authority determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the amendments are proposed or would be as effective as and less burdensome to affected persons that proposed amendments.

### *Individual Comments Received*

The Authority received four (4) comments via email. Authority staff acknowledged the responses and, where requested, provided additional information. The full text of the comments received is attached for reference.

In response to Comment 1 regarding which organizational chart was used to amend the conflict of interest code, Authority staff utilized the version from October 9, 2019, however continued to cross-reference the most current version to ensure no substantial changes have been made. Authority staff

also recognized misidentified terms (i.e. sections, rather than branches) and made the appropriate changes.

Comment 2 pertains to how modifications get enacted. The Act allows permissible changes to a draft, which has been made available to the public for comment, can be adopted or amended without further notice if: (A) the changes is non-substantial or solely grammatical, (B) the agency is not an agency subject to the Administrative Procedure Act and the change is similar to the original proposed code or amendment and employees affected had adequate notice that the change was within the scope of original proposal, or (C) the agency is a state subject to the Administrative Procedure Act and the change is sufficiently related to the original proposed code or amendment and the full text of the changed code or amendment has been available to the public for at least 15 days prior to the date agency adopts the code or amendment. Furthermore, if the modification is a removal of a position, the modification would be deemed as non-substantial. If the modification is to add a position, the Authority is required to document either by completing a Form 804 (State positions) or Form 805 (new consultants) for the newly added position(s). Additionally, the Authority is required to revisit the Code bi-annually and incorporate the modifications in the next amendment to reflect the current structure of the organization.

In response to Comment 3 pertaining to receiving an updated code for review, Authority staff sent out a reminder on November 6, 2019, regarding the "Notice of Intention to Amend" and included a red-lined version of any changes made from the commencement of the public comment period through the reminder notice date.

Comment 4 addresses absent position titles and project sections and the inclusion of sections not part of the project alignment (i.e. Altamont). Authority staff revisited the proposed code released to all-staff on October 11, 2019 and found that the organizational chart did not reflect certain work titles, rather they reflected State classifications (i.e. Principal Transportation Engineer may have a working title as Deputy Director of Strategic Delivery). Authority staff has included the Deputy Director of Strategic Delivery working title for consistency and assurance and appropriately removed or added project sections as needed. Comment 4 also recommends listing Project Managers (PM) and Assistant Project Managers (APM) under different Program Delivery Office branches, rather than by project section. PMs and APMs are listed under the Strategic Delivery branch on the organizational chart, therefore, will remain under the Strategic Delivery branch and by project section.

### *Next Steps*

There are two steps remaining in the process. The Board is required to adopt the proposed Code for the agency and then the Code will be submitted to the FPPC, the Authority's code reviewing body (Section 87303) for final review.

### **Legal Approval**

The Code meets the requirements of the Political Reform Act (Government Code Section 81000, et. seq.) and 2 California Code of Regulations, Section 18730 and any amendments duly adopted by the FPPC. The Authority's attorneys met with the FPPC to ensure the amendments met all requirements.

### **Budget and Fiscal Impact**

The adoption of revisions to the Conflict of Interest Code, by itself, does not have a budget or fiscal impact.

REVIEWER INFORMATION	SIGNATURE
Reviewer Name and Title: Brian Annis Chief Financial Officer	Signature verifying budget analysis: Original Signed December 3, 2019
Reviewer Name and Title: Alicia Fowler Chief Counsel	Signature verifying legal analysis: Original Signed December 3, 2019

### **Recommendation**

Staff recommends the Board approve and adopt the attached Conflict of Interest Code for the Authority.

### **Attachments**

- Draft Resolution #HSRA 19-12 Adoption of the Authority’s Code
- California High-Speed Rail Authority Conflict of Interest Code, as proposed to be adopted
- Comments Received During the Comment Period
- California High-Speed Rail Authority Conflict of Interest Code, Resolution #HSRA 15-06 Approval and Adoption of the Conflict of Interest Code of 2015