

Restructuring Marketing Order Advisory Boards to Serve the Public Interest

Marketing order advisory boards, dominated by members of agricultural industries, administer public interest programs that regulate the marketing of many California farm commodities. This article concludes that such representation should continue despite the conflict of interest standards in the Political Reform Act of 1974. It further concludes, however, that representatives of other interests and professions should supplement agriculture's representatives on the advisory boards so that the marketing programs continue to serve the public interest.

Forty years ago, during the Great Depression, intense competition between small farmers endangered the stability of California's food supply and the viability of California's farm businesses.¹ Emulating the federal government,² California issued rules and regulations, designated marketing orders, to control the development, promotion, quality and supply of specific farm commodities.³ The legislature intended marketing orders to serve the public interest in a stable food supply by guaranteeing a reasonable income to producers for their products.⁴ Today, advisory boards composed of the growers and handlers of the regulated products assist the state in implementing each order.⁵

1. J. FOYTIK, AGRICULTURAL MARKETING ORDERS CHARACTERISTICS AND USES IN CALIFORNIA, 1933-1962 (Giannini Foundation Research Report No. 259, 1962).

2. The most important federal marketing law is the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601, 602, 608(a)-608(d), 610, 612, 614, 624, 671-674 (1976).

3. The most important agricultural marketing order in California is the California Marketing Act of 1937. CAL. FOOD & AGRIC. CODE §§ 58601-59293 (West 1968 & Cum. Supp. 1978). Few industries utilize the Agricultural Producers Marketing Law. *Id.* §§ 59501-60015. Several other laws regulate specific commodities. *Id.* §§ 61301-65675 (The California Agriculture Code was renamed the California Food and Agriculture Code by 1972 Cal. Stats. 468).

4. The state policy behind marketing orders is to prevent economic waste, develop efficient and equitable marketing methods, and maintain producer purchasing power. CAL. FOOD & AGRIC. CODE § 58652 (West 1968). "The primary concern of the legislature in enacting this chapter was the maintenance of an adequate food supply essential to the needs of the people of the state." *People v. Asamoto*, 131 Cal. App. 2d 22, 29, 279 P.2d 1010, 1014 (2d Dist. 1955).

5. CAL. FOOD & AGRIC. CODE §§ 58841-58842 (West 1968).

The advisory boards and their marketing orders are now an integral part of California's agriculture.⁶ The Political Reform Act of 1974 (PRA),⁷ however, establishes conflict of interest standards which threaten their continued existence.⁸ The legislative creation of the boards reflects the belief that the public is served when special interests have the power to solve their internal problems. The PRA, on the other hand, aims to eliminate special interest power in the belief that it contravenes the public interest. The debate over the PRA's application to advisory boards, as institutionalized conflicts of interest, raises questions concerning how well the boards serve the public interest.

This article argues that the PRA should not be allowed to paralyze the operation of the advisory boards. The legislature should restructure the boards, however, to ensure that marketing orders will serve the public interest. The article first briefly describes marketing order activities and the role of advisory boards. It then discusses and analyzes the application of the PRA to advisory boards. Finally, the article suggests alternatives to the current marketing order structure and discusses reasons for reducing agriculture's domination of marketing order administration.

I. STATE MARKETING ORDERS

A. *Purposes and Types*

A marketing order empowers state government to impose rules and regulations on an entire agricultural industry to control the marketing of the industry's product.⁹ The state, depending on the type of order, can limit the amount of produce that goes to market.¹⁰ It can then raise money from the industry for the enforcement of those limits. The money raised can also finance state regulated promotion and research

6. As of 1977, there were twenty-eight active marketing orders under the California Agricultural Marketing Act of 1937. CAL. FOOD & AGRIC. CODE §§ 58601-59293 (West 1968 & Cum. Supp. 1978). Commodities with orders included alfalfa seeds, apricots, globe artichokes, avocados, dry beans, brandy, celery, citrus, eggs, dried figs, desert grapefruit, desert grapes, extracted honey, iceberg lettuce, melon, milk, dairy products, cling peaches, clingstone peaches, potatoes, poultry, dried prunes, raisins, rice, strawberries, processing strawberries, fresh market tomatoes, and turkeys. Calif. Dep't of Food and Agriculture, Bureau of Marketing, Tabular Outline of Active Marketing Orders (Jan. 1978) (hereinafter cited as Tabular Outline). See also B.C. FRENCH, N. TAMINI, & C.F. NECKTON, *MARKETING ORDER PROGRAM ALTERNATIVES: USE AND IMPORTANCE IN CALIFORNIA, 1949-1975* (Gianinni Foundation Information Series No. 78-2, May 1978).

7. CAL. GOV'T CODE §§ 81000-91014 West 1976) (initiative measure adopted June 4, 1974). A ruling by a Los Angeles Superior Court that the entire Political Reform Act is unconstitutional is currently under appeal to the California Supreme Court. *Institute of Gov'tal Advocates v. Younger*, No. 78-41 (Cal. Sup. Ct. March 17, 1978).

8. CAL. GOV'T CODE §§ 87100-87312 (West 1976).

9. CAL. FOOD & AGRIC. CODE § 58615 (West 1968).

10. *Id.* §§ 58881-58888.

programs for the industry.¹¹

The California Marketing Act of 1937 invokes the state police power to enforce marketing controls and financial levies on agricultural industries. The rationale for use of this power is that commodity marketing is "affected by the public interest."¹² The inability of farmers to voluntarily control the erratic markets of the 1920's and 1930's prompted this state intrusion into the agricultural sector. Diminished demand and chronic overproduction jeopardized the farm economy and the quality and quantity of the state's food supply.¹³

Marketing orders commonly use three basic techniques to correlate market demand with product supply and to stabilize or increase industry income. These techniques are commodity regulation, product promotion, and research.¹⁴ The needs of a particular agricultural industry determine the type of order for that industry.¹⁵

An industry may use only one of these techniques or may use them in combination.¹⁶ Commodity regulations control the supply and quality of produce sent to market. These controls include surplus diversion¹⁷ and restriction of the rate produce flows to market.¹⁸ Grading standards eliminate low quality produce and accordingly may also serve to reduce supply.¹⁹ Promotion orders are more widely used than commodity regulations.²⁰ Rather than attempting to limit supply, under promotion orders an industry advertises its product and tries to increase public

11. CAL. FOOD & AGRIC. CODE § 58921 (West 1968).

12. *Id.* § 58653. "Affected with the public interest" is often interpreted as meaning essential to the welfare of the general public. Case Note, 25 CALIF. L. REV. 493 (1937).

13. Marketing problems for agriculture included poor quality produce, deceptive packaging, and fluctuating supply and prices. Comment, *A New Look at the California Marketing Act of 1937*, 5 U.C.D. L. REV. 190, 196-97 (1972).

14. FOYTIK, *supra* note 1, at 17. Marketing orders can also have provisions relating to unfair trade practices, production adjustment benefits, quality improvement educational programs, official board brands, trade names, or labels, and eradication of pests and diseases. CAL. FOOD & AGRIC. CODE §§ 58890-58891, 58893-58895 (West 1968 & Cum. Supp. 1978).

15. CAL. FOOD & AGRIC. CODE §§ 58811, 58813 (West 1968).

16. *Id.* § 58881.

17. *Id.* §§ 58881-58888. Surplus diversion involves redirecting a certain percentage of the produce from regular trade channels and into export outlets, secondary outlets, storage, the dump pile, and other non-competitive channels. FOYTIK, *supra* note 1, at 23-25.

18. By spacing commodity shipments to market, an industry tries to avoid alternately inflating and depressing the market so as to improve returns and production as a whole. FOYTIK, *supra* note 1, at 21-22.

19. CAL. FOOD & AGRIC. CODE §§ 58884, 58885, 58888 (West 1968). Quality standards eliminate inferior produce that would cost the same to pack and transport as superior produce, but would be sold at a lower price due to defects. Because the standards may change from year to year, quality standards may begin to resemble other supply controls. FOYTIK, *supra* note 1, at 20-21.

20. CAL. FOOD & AGRIC. CODE § 58889 (West 1968). As of 1978, 17 of the 28 active marketing orders had promotion provisions. Tabular Outline, *supra* note 6.

demand.²¹ Research orders, however, are the most popular type of marketing order.²² An agricultural industry may contract for and finance the study and development of new methods in the production, processing, and distribution of its commodity.²³

B. Administration

Under the Marketing Act of 1937,²⁴ the State Director of Food and Agriculture and members of the affected industry share responsibility for organizing and operating marketing orders. The Director and industries work together to authorize²⁵ and terminate²⁶ the orders. Advisory boards, dominated by industry members,²⁷ administer the marketing orders, subject to the Director's approval.²⁸

This statutory division of responsibility between state and industry, however, does not reflect the actual division of power over marketing order activities. The industry-dominated advisory boards have exclusive power to initiate many order activities, including the appointment of public members to sit on the boards.²⁹ The boards make findings about

21. Industry-wide promotion enables industry members to contribute to advertising campaigns they could not finance individually. Promotion techniques include media advertisements, consumer education, and place of sale displays. FOYTIK, *supra* note 1, at 18-19. The promotions cannot be for a particular brand name, cannot make unwarranted claims, and cannot disparage other commodities. CAL. FOOD & AGRIC. CODE § 58889 (West 1968).

22. CAL. FOOD & AGRIC. CODE § 58892 (West 1968 & Cum. Supp. 1978). As of 1978, 25 of the 28 active marketing orders had research provisions. Tabular Outline, *supra* note 6.

23. FOYTIK, *supra* note 1, at 18. The University of California must carry on this research whenever feasible. CAL. FOOD & AGRIC. CODE § 58892 (West 1968).

24. CAL. FOOD & AGRIC. CODE § 58881 (West 1968).

25. To issue a marketing order, the Director must approve the proposed order after public hearings and the industry members must approve the order. CAL. FOOD & AGRIC. CODE §§ 58742, 58771-58788, 58811-58814 (West 1968). A majority of the producers or handlers, depending on the order's coverage, who produce or handle over half the volume of the commodity must approve the order. For a full description of this weighted voting procedure, *see id.* §§ 58991-59000.

26. The Director may terminate ineffective or inoperative orders. CAL. FOOD & AGRIC. CODE §§ 59081, 59087 (West 1968). The Director may also terminate an order upon request of industry members. *Id.* §§ 59082, 59085.

27. Depending on the type of order, an advisory board's membership may be entirely of producers, handlers, or a combination of both groups. *Id.* §§ 58841-58842. The Director of Food and Agriculture appoints the board members. *Id.* § 58841. The word "members" refers to producers and handlers including processors and distributors, within an agricultural commodity industry.

28. *Id.* § 58846(a).

29. These exclusive initiatory powers include making recommendations to the Director on enforcement of the order, modifying marketing regulations and formulating the budget for necessary expenses. CAL. FOOD & AGRIC. CODE §§ 58846, 58923, 59161, 59171 (West 1968). The Director may appoint a representative who is neither a producer nor a handler on the recommendation of the advisory board. This representative may be a member of the Department of Food and Agriculture or the "public generally."

economic conditions for their particular commodities³⁰ and recommend appropriate actions which the Director may only approve or disapprove.³¹

The advisory boards are also responsible for the expenditure of public funds. They formulate marketing order budgets³² and assist the Director in collecting fees from industry members to finance their orders.³³ While this money comes only from the industries, it is public money because the state collects it under the police power and ultimately authorizes its expenditures.³⁴ These industry assessments are the sole financial support for the marketing orders.³⁵

Advisory board members who represent the affected industries provide expertise and experience for marketing orders at minimal cost.³⁶ They are vitally interested in the orders because of their effect on their industries and their own incomes. Industry representatives are well aware, due to their position, which marketing order activities their industries need.

The agricultural dominance of advisory boards, however, invites conflict between agriculture and the public's interest in an adequate food supply.³⁷ The boards' overwhelming agricultural representation embodies a narrow viewpoint and members may not fully consider effects of and alternatives to current marketing order activities. Only the Director's ultimate authority³⁸ and the individual public members who sit on

CAL. FOOD & AGRIC. CODE § 58843 (West 1968). See also 58 OP. CAL. ATT'Y GEN. 625 (1975) and FOYTIK, *supra* note 1, at 35.

30. FOYTIK, *supra* note 1, at 39.

31. CAL. FOOD & AGRIC. CODE § 58846 (West 1968). The State Director of Food and Agriculture may also authorize the boards to enter contracts, employ personnel, and incur necessary expenses. *Id.* § 58845.

32. The State Director of Food and Agriculture must determine that the budget and assessment rates are proper, equitable, and sufficient to defray marketing order expenses. *Id.* § 58923.

33. *Id.* § 58846(f).

34. "[T]he amounts on hand resulting from marketing order assessments and other monies resulting from the marketing order are public monies continually appropriated under the Food & Agriculture Code to defray the necessary and approved expenses of the marketing order under which the assessments were collected." 58 OP. CAL. ATT'Y GEN. 1, 8 (1975). The assessments are comparable to taxes since they are involuntary pecuniary burdens the legislature imposes for public purposes under its police or taxing power. *In re Frozen Food Co.*, 221 F. Supp. 385, 387 (N.D. Cal. 1963).

35. CAL. FOOD & AGRIC. CODE § 58921 (West 1968).

36. Advisory board members are only compensated for expenses they incur when performing their duties. *Id.* § 58844.

37. *People v. Asamato*, 131 Cal. App. 2d 22, 29, 279 P.2d 1010, 1014 (2d Dist. 1955).

38. The Director must consider consumer interests in approving the marketing order and any limitations set on quantity and quality of the producer marketed. CAL. FOOD & AGRIC. CODE §§ 58813, 58883, 58886 (West 1968). The state government rarely, however, substitutes its judgment for that of the board. FOYTIK, *supra* note 1, at 35. See also Address by W.J. Kuhrt, Chief Deputy Director of the California State Dep't of Agriculture, American Beekeepers Federation (Jan. 24, 1962).

the boards balance the industry-dominated outlook.³⁹

II. APPLICATION OF PRA'S DISQUALIFICATION RULE TO ADVISORY BOARDS

The PRA⁴⁰ is an initiative measure that directs government departments to prepare conflict of interest codes for their agencies. The codes must set conditions under which officials will disqualify themselves from decision-making that affects their financial interests. In order to monitor how financial interests might affect conduct of public officials, the codes require that officials disclose financial interests which their decisions might affect.⁴¹ The Fair Political Practices Commission (FPPC),⁴² which implements and administers the PRA, reviews and approves the codes.⁴³

Since advisory boards are state agencies with decision-making authority,⁴⁴ their members must observe the conflict of interest code of the State Department of Food and Agriculture.⁴⁵ The FPPC approved the code in November, 1977, after a year-long discussion of the extent of disclosure requirements for advisory board members. The disqualification conditions for board members, however, remains a troublesome issue.⁴⁶

39. CAL. FOOD & AGRIC. CODE § 58843 (West 1968). *But see* SIDNEY HOOS, ECONOMIC OBJECTIVES AND OPERATIONS OF CALIFORNIA AGRICULTURAL MARKETING ORDERS 27 (Giannini Foundation Research Report No. 196 1957).

40. CAL. GOV'T CODE §§ 81000-91014 (West 1976).

41. *Id.* § 87300-87312.

42. *Id.* § 83111.

43. *Id.* § 82011.

44. Members of state agencies are public officials. *Id.* § 82048. Advisory boards are state agencies because they are authorized by statute, the voting board members are appointed by an agency official (the State Director of Food and Agriculture), financed by public funds and subject to appropriation in the state budget, and their jurisdiction is greater than one county. CAL. ADMIN. CODE, tit. 2, § 18249 (1976). Advisory boards have decision-making authority because their responsibilities include the power to initiate decisions and because their substantive recommendations are regularly approved by a public official (the State Director of Food and Agriculture) without significant modification. The boards take administrative action that includes proposing and drafting rules and regulations. *Id.* § 18700 (1976). *See* 3 F.P.P.C. OPNS. 11 (Feb. 1, 1977).

45. Letter from V.L. Shahbazian, Chief of Bureau of Marketing of California Department of Food and Agriculture, to the Members or Alternate Members of the Advisory Board, Program Committee or Council Addressed (Nov. 4, 1976).

46. The State Department of Food and Agriculture held the first hearing on the proposed code on November 30, 1976. *Id.* The FPPC and the State Department of Food and Agriculture attempted to minimize the burden of disclosure for advisory board members to the constitutional minimum, the approximate value of any economic interest that an official's decision potentially could affect. *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 670, 522 P.2d 1345, 1350, 114 Cal. Rptr. 345, 350 (1974). The code differentiates disclosure requirements for members of advisory boards engaged solely in promotion from all other advisory boards. All advisory board members must report investments in business entities with advisory board contracts, interests in real property used by the board, and other sources of income or gifts which furnished property or

A. *The FPPC's Interim Compromise*

Public officials must publicly disclose financial interests when there is a potential conflict of interest between their financial interests and the interests of the public they serve.⁴⁷ Disqualification from decisionmaking occurs should a conflict actually exist.⁴⁸ The FPPC holds that a conflict exists when a government decision will foreseeably and materially affect a decision-maker's financial interest differently from its effect on the "public generally."⁴⁹

All marketing order advisory board decisions have a potential effect on financial interests of their members. Their interests are clearly different from the interests of people outside the industry. The text of the PRA, however, expresses no intent to disrupt the boards by prohibiting their members from voting on virtually every decision. The job of reconciling the PRA's conflict of interest provisions with the continued existence of advisory boards belonged to the FPPC as part of its duty to implement and administer the PRA.

The FPPC debated the problem of disqualifying advisory board members as part of an effort to clarify the meaning of conflict of interest.⁵⁰ As noted, conflict occurs when a decision-maker's financial interest differs from the interests of the "public generally." Advisory board

services to the advisory board. All boards, except those budgeted solely for promotion, must also report investments, real property interests, and sources of income connected with the advisory board's commodity. Order Adopting Regulations of the Department of Food and Agriculture Pertaining to Conflict of Interest Code 9-10 (Dec. 20, 1977) (adopted by FPPC, Nov. 17, 1977). This distinction is based on the FPPC's belief that the size of a board member's interest in the board's commodity would not affect a decision on promotion activities, whereas a commodity interest might influence a decision on commodity regulation or even on research. It remains to be seen whether or not these requirements will discourage industry members from serving on advisory boards. The code was adopted on the basis that board members' interests should not conflict with the interests of other industry members. Interview with Delbert Spurlock, Chief of Conflict of Interests Division of the F.P.P.C. in Sacramento, Cal. (Oct. 27, 1977). Marketing orders have been ordered to comply with the conflict of interest code. *Western Growers Assn. v. State Dept. of Food and Agriculture*, No. 272954 (Super Ct., Sacramento County, 1978), *appeal docketed* No. 18017 (3d Dist. Sept. 27, 1978).

47. 8 CAL. J. 316 (1977).

48. "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." CAL. GOV'T CODE § 87100 (West 1976).

49. 1 OPNS. F.P.P.C. 198, 202 (Dec. 4, 1975). The commission derives its interpretation of conflict of interest from the definition of "financial interest" in the PRA. CAL. GOV'T CODE § 83111 (West 1976). The requirement that the effect of a decision on an official's financial interest be "distinguishable from its effects on the public generally" is a practical one. An official's foreseeable, material interest in a decision must be different from the interest of the public in order for the interests to conflict. Memorandum from FPPC Chairperson Daniel Lowenstein to the Commissioners of the FPPC (Dec. 29, 1975) [hereinafter cited as Lowenstein Memorandum].

50. For a detailed discussion of the FPPC's efforts to interpret the conflict of interest

proponents supported a FPPC staff proposal that defined the "public generally" as a "significant segment of the community."⁵¹ This definition originally appeared in the Moscone Act, a conflict of interest law which pre-dates passage of the PRA.⁵² In the case of industry-dominated advisory boards, the "significant segment" would be members of the industries the boards serve.⁵³ Board members would disqualify themselves only when their interests differed from the interests of the other members in their industries. This requirement significantly reduces the possibilities for disqualification of board members since their interests will often be similar to their industries' members' interests.

Consumer groups preferred a definition that would define the "public generally" as everyone in the state. These groups opposed the "significant segment" definition since it would limit the number of occasions on which advisory board members would disqualify themselves. They argued that the FPPC staff proposal would be ineffective to prevent board members from benefitting their industry and themselves at the expense of the purchasing public. The consumers preferred that the legislature reorganize the boards to end industry representation.⁵⁴

The FPPC commissioners realized that their decision could affect the fate of the entire California marketing order system. If industry board members frequently had to disqualify themselves, the orders would cease to function and would eventually terminate. The commission was reluctant to allow this to happen since the legislature had created marketing order advisory boards long before passage of the PRA.⁵⁵ The commissioners felt they could not legislate the effective abolition of ad-

provisions of the PRA, see Comment, *Proposition Nine and Conflicts of Interest: Scrambling to Close the Barn Door*, 7 PAC. L.J. 847 (1976).

51. *Id.* at 878.

52. The Moscone Act provision read:

[Disqualification] . . . shall not apply if the action or decision affects an economic interest of the official as a member of the public or a significant segment of the public or as a member of an industry, profession, or occupation, to no greater extent than any other such member of the public, segment of the public or an industry, profession, or occupation.

CAL. GOV'T CODE § 3625(d) (West Cum. Supp. 1978). The Moscone Act has been declared inoperative due to the PRA. *Id.* §§ 3800-3802.

53. Comment, *supra* note 50, at 878.

54. *Id.* at 879. See also Written comments of Taketsugu Takei, Director of the California Department of Consumer Affairs, to the FPPC (on file at U.C.D. Law Review) [hereinafter cited as Takei comments].

55. It is interesting to note that there had been broad conflict of interest prohibitions in existence long before the PRA. Kaufman & Widiss, *The California Conflict of Interest Laws*, 36 SO. CAL. L. REV. 186 (1963). The most important provision prohibited public officials from having an interest in a contract made by boards of which they were members. CAL. GOV'T CODE § 1090 (West 1966 & Cum. Supp. 1978). Evidently, there was never any outcry that advisory board members might have interests in promotion or research contracts.

visory boards without specific authorization in the PRA or from the legislature. On the other hand, they could not ignore board members' potential conflicts of interests with those of consumers.⁵⁶

The FPPC compromised in February, 1976, by temporarily adopting the proposed staff definition of the "public generally" for industry boards. This definition was to remain in effect until January 1, 1979.⁵⁷ During that period, the legislature could reconsider the structure of the boards and determine how they should be affected by the PRA.⁵⁸ If the legislature so chose, it could amend the enabling statute for the boards to define their public as members of the affected industry. At the end of this interim period the FPPC would make decisions about boards for which the legislature had made no determination.⁵⁹

In passing this compromise regulation, the FPPC issued two invitations. One invited the legislature to decide the marketing order advisory board issue by amending the boards' enabling statute, the Marketing Act of 1937, to declare that the "public generally" for each board is the industry it represents.⁶⁰ The other extended consumer groups a chance to challenge the regulation.⁶¹

Both houses of the California Legislature responded by unanimously adopting the FPPC definition of the "public generally" as an amendment to the Marketing Act of 1937.⁶² The amendment declares that industry representation on advisory boards serves the public interest by furthering interests of the affected industry. Members of the entire industry, therefore, constitute the "public generally" for advisory boards under the PRA.⁶³ This amendment embodies a legislative determination that marketing order advisory boards serve the public interest when

56. Comment, *supra* note 50, at 878-79.

57. CAL. ADMIN. CODE, tit. 2, § 18703(d) (1976).

58. Comment, *supra* note 50, at 879.

59. CAL. ADMIN. CODE, tit. 2, §§ 18703(c)-18703(d) (1976). There are other types of industry boards in California's state government. For example, the Department of Consumer Affairs has many industry-dominated professional licensing and regulatory boards under its authority. CAL. BUS. & PROF. CODE § 101 (West Cum. Supp. 1978). The Department of Consumer Affairs, however, has always supported the addition of "public members" to these boards. Takei comments, *supra* note 54. The addition of "public members" to these boards has been accomplished substantially by the legislature. 1972 Cal. Stats. 5335. The overall impact of disqualification for the industry members on these professional boards, however, is not considered to be as severe as it would be for the marketing order advisory boards. Memorandum from Mike Baker, Counsel to FPPC, to the FPPC (Oct. 20, 1976) [hereinafter cited as Baker Memorandum].

60. CAL. ADMIN. CODE, tit. 2, § 18703(c) (1976).

61. After passage of the regulation, the FPPC chairperson suggested that consumer representatives challenge the new regulation in the courts. Statement of Daniel Lowenstein, Meetings of the Fair Political Practices Commission (March 17, 1976) (transcript at 3).

62. 1975-1976 Session, 2 ASSEMBLY FINAL HISTORY 1753.

63. CAL. FOOD & AGRIC. CODE § 58852 (West Cum. Supp. 1978).

they serve their industries' interests.⁶⁴

Consumer groups challenged the FPPC's regulation by filing suit against the FPPC and the California Milk Producers Advisory Board.⁶⁵ The petitioners asked that the court issue a writ of mandate ordering the FPPC to vacate the "significant segment" regulation and ordering the Milk Producers to comply with the provisions of the PRA under a much broader definition of the "public generally."⁶⁶

The consumers asserted that the voters intended conflict of interest standards to apply to all public officials. Given this intention, the FPPC's regulation unlawfully exempted advisory board members from the full effect of the PRA's requirements.⁶⁷ The FPPC replied that it was obligated, if possible, to reconcile the PRA and Marketing Act of 1937 and had done so through the regulation. The FPPC further argued that the PRA, as modified by the FPPC, would still serve to prevent board members from enriching themselves at the expense of fellow producers or handlers.⁶⁸

The court agreed with the petitioners and issued a writ of mandate

64. The staff reports to the legislative committees considering the amendment indicate that the committees did not reconsider the value of continued industry-wide domination of the advisory boards. ASSEMBLY COMMITTEE ON AGRICULTURE, A.B. 3277 (Comm. Print 1976); SENATE COMMITTEE ON AGRICULTURE AND WATER RESOURCES, A.B. 3277 (Comm. Print 1976).

65. Consumers Union of the United States, Inc. v. California Milk Producers Advisory Bd., No. 705856 (Super Ct., San Francisco County, filed May 5, 1976). Petitioners also prayed that the court enjoin the Milk Advisory Board's activities as an unconstitutional delegation of authority from the legislature. Advisory boards have withstood such attacks in the past. Brock v. Superior Court, 9 Cal. 2d 291, 71 P.2d 209 (1937). Since that time, however, more stringent standards and safeguards have been set down for boards composed of industry members. Bayside Timber Co. v. Board of Supervisors, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1st Dist. 1971). No ruling was made on the delegation of authority issue in this case. This article does not discuss the question of delegating legislative authority to industry dominated boards.

66. Petitioner's Memorandum of Points and Authorities in Support of Peremptory Writ of Mandate, Consumers Union v. California Milk Producers Advisory Bd., No. 705856 (Super. Ct., San Francisco County, filed May 17, 1976).

67. *Id.*

68. Respondent-F.P.P.C. Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, Consumers Union v. California Milk Producers Advisory Bd., No. 705856 (Super. Ct., San Francisco County, filed May 17, 1976). The possibility of advisory board members having interests which might conflict with other industry members is not necessarily remote. Conflicts of interest occur between different groups of industry members before the industries approve marketing orders. Hoos, *supra* note 39, at 27. The interests of large producers and small producers may conflict over the proper scope of commodity regulations. MARKETING TASK FORCE, THE SMALL FARM VIABILITY PROJECT, THE FAMILY FARM IN CALIFORNIA 3-5 (1977). Such conflicts may persist after the approval of an order if one faction gains control of the advisory board. The presence of a cooperative may split an industry between cooperative members and non-members. Large cooperatives frequently dominate marketing orders for their industries and can use them to enhance cooperative power over nonmembers. FEDERAL TRADE COMMISSION, STAFF REPORT ON AGRICULTURAL COOPERATIVES 143-50, 174-76 (1975) [hereinafter cited as FTC].

ordering the FPPC to vacate the regulation.⁶⁹ The FPPC, the California Milk Producers Advisory Board, and the State Department of Food and Agriculture⁷⁰ have appealed the decree,⁷¹ thus staying the writ and keeping the regulation in effect.⁷² In its writ, the court did not rule on the legitimacy of the legislature's amendment to the Marketing Act of 1937 and its effect on the PRA.⁷³

B. *The Inability of the PRA to Disrupt Advisory Boards*

PRA proponents view the Act as part of a new domestic reform movement to open government to the varied demands of all interest groups. The PRA uncovers, regulates, and eliminates biased decision-making with a focus on the influences and temptations of wealth.⁷⁴ Advisory boards seem ideally suited to PRA reforms. A special interest, the agricultural industry dominates the boards. The boards use public funds to administer programs chiefly intended to maintain or increase financial returns to agricultural interests.

An initiative such as the PRA, however, has limitations as a reform instrument. Initiatives, as documents, are submitted directly to the state's electorate and by-pass the political give-and-take in the state's legislative process. This give-and-take often isolates and tries to resolve such troublesome issues as how conflict of interest standards should affect industry-dominated advisory boards.⁷⁵

69. Writ of Mandate, *Consumers Union v. California Milk Producers Advisory Bd.*, No. 705856 (Super. Ct., San Francisco County, issued Apr. 27, 1977).

70. The State Department of Food and Agriculture became a party as a respondent-intervenor. Order Granting Leave to Intervene, *Consumers Union v. California Milk Producers Advisory Bd.*, No. 705856 (Super. Ct., San Francisco County, filed July 13, 1976).

71. *Consumers Union v. California Milk Producers Advisory Board*, No. 705856 (Super. Ct., San Francisco County), *appeal docketed*, No. 42225 (1st Div. 1977).

72. CAL. CODE CIV. PROC. § 916(a) (West Cum. Supp. 1978).

73. CAMPAIGN LAW REPORTER, October 1976, at 11. It is not settled whether the legislature can amend one statute in order to interpret an initiative as it has done in the case of CAL. FOOD & AGRIC. CODE § 58852 (West Cum. Supp. 1978) and the PRA. According to the constitution, only the electorate may amend an initiative measure, CAL. CONST. art. 2, § 10(c), but an initiative may provide for alternate methods of revision besides direct election. The PRA provides for such an alternative through the legislature in CAL. GOV'T CODE § 81012 (West 1976). The PRA states, however, that "if any act of the Legislature conflicts with the provisions of this title, this title shall prevail." CAL. GOV'T CODE § 81013 (West 1976). Whether or not this prohibition extends to amendments to other laws that might be deemed conflicting with the PRA has not been tested. See also *Franchise Tax Bd. v. Cory*, 80 Cal. App. 3d 772, 145 Cal. Rptr. 819 (3d Dist. 1978). 58 OP. CAL. ATT'Y GEN. 772, 776-77 (1975).

74. INSTITUTE OF GOVERNMENTAL AFFAIRS OF THE UNIVERSITY OF CALIFORNIA AT DAVIS, CALIFORNIA'S 1974 POLITICAL REFORM ACT: THE IMPLEMENTATION AND IMPACT OF PROPOSITION NINE: PROCEEDINGS OF A WORKSHOP 13 (May 30, 1975) (remarks of Daniel Lowenstein, Chairperson of FPPC).

75. A recent study suggests that initiatives should always undergo some sort of legislative review before final submission to the voters. Note, *The California Initiative Proc-*

Both the courts and the California Constitution limit the potential of initiatives to disrupt governmental functions. When courts interpret local initiatives, they assume that the drafters of the initiative did not intend to impair or impede essential governmental functions.⁷⁶ Essential governmental functions include budget management and fiscal policy administration.⁷⁷ The state constitution explicitly refuses to allow referendums to deal with "tax levies or appropriations for the usual current expenses of the state."⁷⁸ Courts also apply this constitutional restriction to initiatives.⁷⁹

Advisory boards play an essential for marketing orders role when they assess and later spend monies collected from industry members under the state's taxing power. The boards determine the fees that members will pay to support order activities.⁸⁰ Expenditures for order activi-

ess: A Suggestion for Reform, 48 SO. CAL. L. REV. 922 (1975). Another early study acknowledges that initiatives are deficient as legislative devices because opponents are not heard in their formulation. V. KEY & W. CROUCH, *THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA* 568-69 (1939). The authors acknowledged that initiatives are submitted "without much consideration of their relationship to any general program of legislation," but they discounted the significance of this defect since no branch of government has adequate authority over the entire lawmaking process. *Id.*

76. *Geiger v. Board of Supervisors*, 48 Cal. 2d 832, 839-40, 313 P.2d 545, 549 (1957) (referendum on board's tax levy). *See also* *Campan v. Greiner*, 15 Cal. App. 3d 836, 843, 93 Cal. Rptr. 525, 529 (1st Dist. 1971) (initiative on city's utility tax); *Chase v. Kalber*, 28 Cal. App. 561, 169, 153 P. 397, 400 (3rd Dist. 1915) (initiative on local street improvement); *THE LAW OF POLITICS* (Cal. Cont. Ed. Bar 1977) 364-65. Arguably, the public policy against initiatives which impair or impede essential governmental functions applies only to local measures and not statewide issues. *Cf.* 18 Op. Cal. Att'y Gen. 11, 12 (1951) (opinion concerns public policy against referendums which impair or impede essential governmental functions). The financial paralysis of state marketing programs through disqualification of advisory board members, however, suggests that such a policy is necessary at the statewide level. *See text* accompanying notes 80-82 *infra*.

77. *Geiger v. Board of Supervisors*, 48 Cal. 2d 832, 839-40, 313 P.2d 545, 549 (1957).

78. CAL. CONST. art. 2, § 9(a). The constitutional limitations on referendums are considered sufficient to prevent any statewide menace. 18 OP. CAL. ATT'Y GEN. 11, 12 (1978). This constitutional prohibition includes any measure which restricts the government's ability to provide for tax levies. 61 OP. CAL. ATT'Y GEN. 51, 55 (1978).

79. *Dare v. Lakeport City Council*, 12 Cal. App. 3d 864, 867, 91 Cal. Rptr. 124, 126 (1st Dist. 1970) (applies state constitutional restrictions on referendums to local initiatives). Initiatives concerning local taxation have been invalidated as "backhanded referendums" which impair essential government powers. "This is essentially the other side of the coin from article II, section 9 subdivision (b) [sic] of the California Constitution . . . which prohibit[s] the use of the referendum to interfere with tax levies to support state and local government." 61 OP. CAL. ATT'Y GEN. 51, 54-55 (1978). Since these constitutional restrictions on referendums also apply to statewide referendums, 18 OP. CAL. ATT'Y GEN. 11, 12 (1951), there is no reason why they should not also apply to statewide initiatives.

80. "The advisory board . . . shall recommend to the director . . . the assessment rates which are necessary to provide sufficient funds for the marketing order." CAL. FOOD & AGRIC. CODE § 58923 (West 1968). "The advisory board shall recommend and the director may approve the proportion of such single assessment which may be ex-

ties cannot occur until the boards approve and recommend a budget.⁸¹ It would be unconstitutional for an initiative such as the PRA to paralyze the functioning of ongoing state approved marketing orders by preventing their advisory board members from making tax and appropriation decisions necessary to the continued operation of the orders.⁸²

The purpose of the PRA does not establish an intent to disrupt the advisory boards. Section 81002(d) of the PRA states that officials should disqualify themselves "in appropriate circumstances."⁸³ This phrasing permits less than an unqualified application of the disqualification rule. A legislatively sanctioned conflict of interest, such as advisory boards, could be an inappropriate circumstance in which to bar public officials from decision-making. While the PRA aims to serve the public interest by uncovering and eliminating concealed financial interests, the interests of the board members are no secret.⁸⁴ The legislature has declared, in fact, that when board members vote on marketing order activities that their industries' interests are no different from the public interest.⁸⁵ Members should not be disqualified by the PRA except when they stand to enrich themselves at the cost of fellow industry members. If the PRA were to prevent board members from asserting their self-interest as industry members, it would actually defeat the public interest as the legislature has defined it.⁸⁶ It is sound policy for the legislature to determine whether or not the public interest is congruent with the interests of the

pendent to defray the costs of formulation, issuance, administration, and enforcement of the marketing order" *Id.* § 58927.

81. "The advisory board . . . shall recommend to the director . . . budgets to cover necessary expenses, and budgets to cover the expenses of carrying out sales promotion plans" *Id.* § 58923. "[E]ach marketing order . . . shall be charged the amounts which are computed by the director as required to reasonably provide for services to be rendered to such marketing orders by the department. Such amounts are subject to approval by the advisory board" *Id.* § 58941.

82. Marketing order assessments are public monies comparable to taxes. *In re Farmers Frozen Food Co.*, 221 F. Supp. 385, 387 (N.D. Cal. 1963). *See also* 58 OP. CAL. ATT'Y GEN. 1 (1975). Setting the amount of assessments is a taxation function. *Dare v. Lakeport City Council*, 12 Cal. App. 3d 864, 868-69, 91 Cal. Rptr. 124, 127 (1st Dist. 1970). *See also* *Myers v. City Council of Pismo Beach*, 241 Cal. App. 2d 237, 244, 50 Cal. Rptr. 402, 406 (1966) (initiative could not prevent city council from exercising its discretionary power in a tax matter); 61 OP. CAL. ATT'Y GEN. 51 (1978).

83. CAL. GOV'T CODE § 81002(d) (West 1976).

84. Letter from James G. Youde, Acting Director of the California Department of Food and Agriculture, to Delbert L. Spurlock, Chief of Conflicts of Interest Division of the FPPC, 1-2 (Feb. 15, 1977).

85. Comment, *supra* note 50, at 878. Such a declaration is implicit in the establishment of industry-dominated boards to administer marketing programs "affected by the public interest." *See* CAL. FOOD & AGRIC. CODE § 58653 (West. 1968).

86. The Marketing Act of 1937 serves the public interest in an adequate food supply. *People v. Asamoto*, 131 Cal. App. 2d 22, 29, 279 P.2d 1010, 1014 (2d Dist. 1955). The industry administration of marketing orders through the advisory boards implies a congruence of the industry's interest with the public interest in commodity marketing. Lowenstein Memorandum, *supra* note 49, at 6.

advisory board members. Rather than the PRA eliminating industry members and paralyzing the orders without regard for the public interest they are intended to serve, the legislature can reevaluate and restructure the boards in light of agriculture's and the public's interest today.⁸⁷

The actual campaign to pass the PRA raises doubts that its sponsors intended the initiative to actually paralyze advisory boards. The PRA sponsors did omit the "significant segment" language of the Moscone Act which the FPPC has adopted to insulate the boards for disqualification.⁸⁸ This omission arguably implied an intent to disrupt the boards. The PRA, however, was drafted before the Moscone Act was enacted.⁸⁹ The PRA's drafters simply may have failed to anticipate the dilemma the advisory boards would pose. On the other hand, if the drafters knew of the Moscone Act language, it is surprising that they did not consider the advisory board question more explicitly and thus avoid later controversy. The Official Voter's Pamphlet merely states that the PRA established conflict of interest standards for all state and local public

87. A different argument is that construction of the phrase, the "public generally," permits the FPPC's "significant segment" definition. Courts realize that the "public" cannot be realistically everyone in the state, so they define the "public" as any large and indeterminate group of people which is affected by an entity, event, or object. *See, e.g.,* *Mary Pickford Co. v. Bayly Bros*, 12 Cal. 2d 501, 86 P.2d 102 (1939) (offer to sell securities to a roomful of people was public sale); *Sherman v. Buick*, 32 Cal. 241, 9 Am. Dec. 577 (1867) (access to a road was public); *Askew v. Parker*, 151 Cal. App. 2d 759, 312 P.2d 342 (1957) (general invitation to use swimming pool on any occasion made the pool a public pool). The "public" for advisory boards obviously extends beyond the members of the industries they affect to include the people who purchase and consume the industries' product. If "public" was used alone in the PRA, without a modifier, then surely the board members would have to constantly disqualify themselves since their interests would differ from the interests of many of the people affected by board decisions. In the PRA, however, public is modified by "generally." CAL. GOV'T CODE § 83111 (West 1976). When construing the effect of "generally" in a statute or treaty, courts find that the drafters intended to allow exceptions to a broad application of the words or phrase modified. An exception might be necessary due to a conflicting law or doctrine. *See* *Sims v. Scheussler*, 64 S.E. 99, 102, 5 Ga. App. 850 (1909) (use of "generally" by legislature indicates an intent to provide for exceptions); *Tokaji v. State Bd. of Equalization*, 20 Cal. App. 612, 617-18, 67 P.2d 1082, 1084-85 (1942) (use of "generally" in a treaty indicates intent to allow for contingencies and requires only an approximate application of treaty terms). In the case of the PRA, it is arguable that the legislatively ordained membership of advisory boards is an exception. Rather than a specific and unqualified definition of "public," an approximate application is allowable to harmonize the laws and avert constant disqualification of advisory board members. It would not be inconsistent with the PRA, therefore, to define the "public generally" as only a "significant segment of the community," such as industry members. A problem with this argument, however, is found in the provision of the Marketing Act providing for public members. Such members represent the "public generally," but cannot be producers or handlers of the industry affected by the advisory board. CAL. FOOD & AGRIC. CODE § 58843 (West 1968).

88. CAL. GOV'T CODE § 3625(d) (West Cum. Supp. 1978). *See* note 52 *supra*.

89. *Los Angeles Times*, May 26, 1976, at 5, col. 1.

officials.⁹⁰ Publicity about the PRA centered on its lobbyist and campaign spending provisions. There was misunderstanding and surprise about the actual impact of the extensive conflict of interest rules.⁹¹

State policy, the PRA itself, and the conduct of the campaign indicate that the PRA is not the proper instrument to effectively end the operations of advisory boards. As an initiative, it cannot interfere with the state's taxing power by bringing the boards to a halt. The intent of the PRA permits appropriate exceptions to an unqualified application of its rules. An exception is appropriate because paralysis of the boards may actually be contrary to the public interest in an adequate food supply. The PRA should and can prohibit board members from participating in decisions when their interests conflict with others in the industry. The FPPC definition of the "public generally" as a "significant segment" accomplishes this result without totally preventing the boards from functioning.

III. POSSIBLE CHANGES IN ADVISORY BOARDS DUE TO THE PRA

The FPPC attempted to reconcile industry domination of advisory boards with highly adverse conflict of interest standards by redefining a key regulatory phrase, the "public generally."⁹² The court challenge to this definition, however, forces the legislature and agricultural industries to consider alternatives in case the boards must operate under the consumers' definition of "public."⁹³ In any event, the legislature should reevaluate whether the boards as they now exist truly serve the public interest.⁹⁴

90. OFFICE OF THE SECRETARY OF STATE OF CALIFORNIA, OFFICIAL VOTER'S PAMPHLET 34-37 (June 1974).

91. They [the voters] thought they were controlling lobbyists and campaign contributions-and they were. But few people realized that in passing Proposition Nine [the PRA] they were also enacting the most far-reaching conflict of interest law in the United States, one which will ultimately affect more than 100,000 California public servants.

8 CAL. J. 315 (1977). An example of popular misunderstanding of the PRA provisions is a newspaper editorial endorsing the PRA which referred to the conflict of interest provisions as applying to "elective officials" without mention of its considerable effect on non-elected officials. Los Angeles Times, May 24, 1974, at 6, col. 1.

92. CAL. ADMIN. CODE, tit. 2, § 18703 (1976).

93. The consumers' definition of "public generally" includes everyone in the state. See text accompanying note 54 *supra*.

94. See text accompanying notes 120-156 *infra*. While it is true that the legislature has approved the current structure of advisory boards by enacting the "significant segment" definition for advisory boards, CAL. FOOD & AGRIC. CODE § 58852 (West Cum. Supp. 1978) this article argues that an actual reevaluation of industry domination of the boards is still necessary.

A. Possibilities for Change under the PRA

The legislature may have to consider new membership structures for advisory boards if PRA conflict of interest standards disqualify current members.⁹⁵ Increased numbers of public members might supplement the boards.⁹⁶ Public members would not have to disqualify themselves as often and could vote on many board decisions when agriculture members could not.⁹⁷ This could mean the public members would be making important board decisions without the voting participation of representatives of the affected agricultural industries.⁹⁸

Agricultural industries will resist expanded public membership on the boards.⁹⁹ Such expansion would threaten their control of the boards. In addition, agriculture interests will perceive this expansion as unfair since it is the producers and handlers who support and finance marketing orders.¹⁰⁰ Public members may not agree with the affected industry about marketing order policy, and yet industry members possess specialized expertise and experience that public members may not have.¹⁰¹

A diverse membership, however, could still provide many viewpoints including those that favor industry members. Home economists, academicians, members of the business community with marketing knowledge, and even retired producers or handlers could be members of

95. The PRA does provide that public officials with conflicting financial interests need not disqualify themselves if their participation is legally required for a decision to be made. CAL. GOV'T CODE § 87101 (West 1976). Since many marketing orders require a majority of a quorum to make decisions, FOYTIK, *supra* note 1, at 45, and since the boards are necessary to initiate many activities, *see* text accompanying note 29 *supra*, board members might try to argue that their participation is legally required. The FPPC, however, requires an official using this provision to disclose the conflicting financial interests, state that there is no alternative source of decision-making authority, participate only to the extent legally required, and refrain from influencing other officials about the decision. CAL. ADMIN. CODE, tit. 2, § 18701(b) (1976). The FPPC also declares that this provision should be "construed narrowly." *Id.* It is doubtful that the FPPC would allow advisory boards to exercise *constantly* the legally required participation exception in order to circumvent PRA standards, if the consumer definition of "public generally" prevails, since it is the FPPC's intention to prevent the rule from becoming a wide loophole. *See* Comment, *supra* note 50, at 872-73; 3 F.P.P.C. OPNS. 69 (Aug. 18, 1977); 58 OP. CAL. ATT'Y GEN. 670 (1975). *But see* 59 OP. CAL. ATT'Y GEN. 604 (1976) (public officials with conflicting interests allowed to participate on non-contractual questions, opinion does not apply legally required participation exception to votes on contractual matters).

96. Marketing Act of 1937 currently allows only one "public member" on advisory boards. CAL. FOOD & AGRIC. CODE § 58843 (West 1968).

97. A "public member" is neither a producer nor a handler. *Id.*

98. Baker Memorandum, *supra* note 59.

99. MARKETING ORDERS: HEARING TRANSCRIPT OF THE ASSEMBLY COMMITTEE ON AGRICULTURE 222-24 (September 23-24, 1975) (statements of Jim Eller, California Farm Bureau & Ralph Pinkerton, Avocado Advisory Board).

100. *Id.*

101. Statement of Sidney Hoos, Professor of Agricultural and Resource Economics, Hearings of the Assembly Committee on Agriculture, Concerning Public Members for California Marketing Orders (April 28, 1975).

advisory boards. Industry members could still be expert witnesses and advisors.¹⁰² The industry would maintain its influence through its role in initialing and terminating the orders.¹⁰³ Agriculture could also take part in the nomination process leading to the appointment of the public members.¹⁰⁴ Newer viewpoints, however, will mean closer and possibly less favorable scrutiny of marketing order activities.

Rather than change the membership structure of advisory boards, the legislature might amend the Marketing Act of 1937 to eliminate the boards' decision-making authority. The boards would become solely advisory and therefore not subject to the PRA.¹⁰⁵ This would mean, of course, that advisory boards would substantially relinquish their control over marketing orders.

To produce purely advisory boards, the legislature would have to remove their power to contract¹⁰⁶ and to initiate and compel government decisions through their recommendations to the Director.¹⁰⁷ The Director will have to scrutinize these recommendations closely since regular approval of the recommendations still amounts to board decision-mak-

102. Takei comments, *supra* note 54. Even as advisors, industry representatives must observe FPPC guidelines to avoid being public officials. They must be totally independent of any state agency in terms of their research and conclusions. They can possess no authority over an agency's decision beyond rendering advice and information. CAL. ADMIN. CODE, tit. 2, § 18700(a)(2) (West 1976).

103. CAL. FOOD & AGRIC. CODE §§ 58742, 58771-58788, 58811-58814, 58991-59000 (West 1968 & Cum. Supp. 1978).

104. Currently, the State Director of Food and Agriculture may appoint a public member only upon the recommendation of the advisory board. CAL. FOOD & AGRIC. CODE § 58843 (West 1968). The Director, however, does not necessarily have to choose from the nominees the boards submit. 58 OP. CAL. ATT'Y GEN. 625 (1975).

105. A state board must have decision-making authority in order to bring its members within the coverage of the PRA. CAL. ADMIN. CODE, tit. 2, § 18700(a)(1) (1976). Decision-making authority includes: (1) making a final governmental decision; (2) compelling a government decision or preventing a decision due to exclusive power to initiate or veto a decision; and (3) making substantive recommendations which are regularly approved without significant amendment or modification. *Id.* Governmental decisions include voting on matters, appointing persons, committing agencies to a course of action, entering a contractual arrangement, or determining not to act unless such a determination is because of a conflicting financial interest. *Id.* § 18700(b). Participation in a governmental decision may also make board members subject to disqualification. CAL. GOV'T CODE § 87100 (West 1976). Such participation can include conducting governmentally related negotiations without significant review and attempting to influence a decision by conducting investigations and presenting opinions. CAL. ADMIN. CODE, tit. 2, § 18700(c) (1976). An action is unrelated to a government decision and beyond the reach of the PRA if it is of a purely ministerial, secretarial, manual, or clerical nature. Appearances as a member of the public on matters of personal interest or actions concerning compensation or employment conditions are also unrelated to governmental decisions. *Id.* § 18700(d).

106. The State Director of Food and Agriculture may authorize the boards to enter into contracts. CAL. FOOD & AGRIC. CODE § 58845(a) (West 1968). This power is obviously crucial to agreements with promotion agencies and for research studies.

107. CAL. FOOD & AGRIC. CODE §§ 58846, 58923, 59161, 56171 (West 1968). See text accompanying note 29 *supra*.

ing under the PRA.¹⁰⁸

Another consequence of reduced decision-making would be a more limited role for advisory boards in administering the order. There would be a corresponding increase of Food and Agriculture Department responsibility over the orders. The state would probably view this redistribution of power as burdensome and costly.¹⁰⁹

Faced with alternatives such as the restructuring of board membership or a reduction of board power due to the requirements of the PRA, agriculture and the legislature might consider eliminating advisory boards. The State Director of Food and Agriculture would then have greater responsibility for administering the order. Agricultural industries could rely on other entities such as bargaining organizations and cooperatives to represent their interests. The end of industry-dominated advisory boards, however, will remove a central forum for the entire industry.¹¹⁰ The industry membership would fragmentize and it is unlikely than marketing orders would continue.

Agricultural industries may try to operate a marketing order independent of state law and, therefore, not subject to the PRA. Any such venture involving supply control, such as through surplus diversion, causes marketing orders to lose the immunity they have from antitrust laws.¹¹¹ In addition, there would be no government compulsion behind marketing orders. Independent efforts might, therefore, be as ineffective as the original voluntary associations.¹¹² On the other hand, operations such as promotion and research might attract sufficient industry-wide support since they intrude less on agricultural businesses.¹¹³

108. Even with these reductions in power, the advisory boards will still have decision-making authority if the State Director of Food and Agriculture regularly approves their recommendations without significant substantial change. CAL. ADMIN. CODE, tit. 2, § 18700(a)(1)(C) (1976).

109. Although virtually all funds for the order came from the affected industries, recent experience suggests that the state already finds administrative costs for marketing orders to be too high. Jamison, *Marketing Orders and Public Policy for the Fruit and Vegetable Industries*, 10 FOOD & RESEARCH INST. STUDIES IN AGRICULTURAL ECON., TRADE, DEV. 229, 303-304, 330 n.73 (1971).

110. Unlike the cooperatives and other voluntary groups, marketing orders involve all industry members and can be central sources of information and settings for industry-wide discussion. Their success in this area is especially apparent in promotion and research orders. *Id.* at 310-11. Marketing orders offer firm support for other industry activities such as bargaining. Jacobson, *Marketing Orders: Bargaining Aid or Vehicle*, in BARGAINING IN AGRICULTURE 34, 38 (University of Missouri Extension, H. Breimyer ed. 1971).

111. *Parker v. Brown*, 317 U.S. 341 (1943) (regulation of amount of produce sent to market by marketing order held not to be in violation of antitrust). The Ninth Circuit dismissed for failure to exhaust administrative remedies and FTC appeal of a district court holding that advertising programs were also immune from antitrust liability. *California ex rel. Christensen v. FTC*, 549 F.2d 1321 (1977), *cert. denied*, 434 U.S. 876 (1977).

112. Comment, *supra* note 13.

113. *Id.* at 210-11.

Some agricultural industries currently operating under state marketing orders could operate under federal law to escape the consequences of the PRA.¹¹⁴ Federal marketing orders and agreements allow certain industries to choose between commodity regulations and research.¹¹⁵ Under federal law, industries may also establish and finance their own administrative agency.¹¹⁶ Federal law cannot help all California industries, however. The program cannot apply to the processing of many California fruits and vegetables.¹¹⁷ This would prevent coordination of the marketing of all industry products. Federal law does not currently provide for promotion programs, one of the most popular types of marketing orders for California.¹¹⁸ Federal marketing laws require changes before they could be practical or attractive for many California agricultural industries.¹¹⁹

B. The Public Interest and Marketing Orders

A failure of the PRA to either stop the operation of or force a change in advisory board membership should not foreclose the issue of agriculture's domination of marketing orders.¹²⁰ The PRA embodies a statewide attitude that conflicts of interest in government decision-making are contrary to the public interest. If the legislature or the voters were to scrutinize advisory boards, it would be apparent that board membership represents a narrow perspective. This viewpoint is insufficient to serve the public's interest in an adequate food supply or agriculture's interest in a reasonable income. Advisory boards composed of representatives of other interests such as consumers, labor, economists, and business, would balance agriculture's viewpoints and offer additional analysis and ideas to improve current marketing order activities.

Controlling supply through surplus diversion¹²¹ is an example of a marketing order activity which would benefit from the input of diverse interests. While diversion often achieves an immediate goal of raising prices and increasing producer income by limiting supply, it may have wasteful and costly long-run consequences. Increased income encour-

114. 7 U.S.C. §§ 601-602, 608(a)-608(d), 610, 612, 614, 624, 671-674 (1976).

115. 7 U.S.C. §§ 608(c)(6)-608(c)(7) (1976).

116. 7 U.S.C. §§ 608(c)(7), 610 (1976). Antitrust exemption is found in 7 U.S.C. § 608(b) (1976).

117. 7 U.S.C. § 608(c)(2) (1976).

118. Congress has recently investigated the possibility of adding promotion to the federal order programs. S. Hoos, U.S. Marketing Agreements and Orders: A Retrospective View 11 (1977) [hereinafter cited as Hoos, U.S. Marketing Agreements and Orders].

119. For a full comparison of California and federal marketing orders, see FOYTIK, *supra* note 1, at 5; Comment, *supra* note 13, at 199 n. 54.

120. Initiatives often have the indirect effect of disseminating ideas which eventually become legislation. KEY & CROUCH, *supra* note 75, at 452.

121. CAL. FOOD & AGRIC. CODE §§ 58882-58887 (West 1968).

ages expanded production and attracts new producers. The boards most often then impose stricter supply controls to maintain price levels.¹²² If prices are forced higher than consumer demand justifies, consumers may be discouraged from purchasing the product.¹²³ Once producers have shifted to this high income product, there will not be resources available to produce alternative commodities that consumers may want.¹²⁴ Neither the consumer nor agriculture benefit from this cycle of overproduction and stricter controls. The cycle is often difficult to break, however, since members fear the consequences of lifting controls.¹²⁵ Outside forces or external policy change may be necessary to compel an end to this practice.¹²⁶ A diverse advisory board membership administering marketing orders could provide the compulsion to end this practice and consider new programs.

Marketing orders which restrict the rate at which produce flows to market do not diminish the total supply of a product,¹²⁷ but attempt to spread the supply evenly throughout the entire marketing season.¹²⁸ This approach has proven to be more satisfactory since it can provide a stable supply and prevent fluctuating prices without the long run effects of surplus diversion. The rate-of-flow order has limitations, however, and does not guarantee high returns to producers.¹²⁹ It is difficult to delay shipments of some produce¹³⁰ and unpredictable consumer demand makes rate adjustment difficult.¹³¹ The input of other interests could help to circumvent these limitations and make these programs as effective as possible.¹³²

122. Jamison, *supra* note 109, at 357-61.

123. Comment, *supra* note 13, at 224.

124. FTC, *supra* note 68, at 162.

125. Jamison, *supra* note 109, at 358, 360. The overproduction cycle should be no surprise since marketing order experts have long warned that surplus control should be used sparingly. Hoos, U.S. Marketing Agreements and Orders, *supra* note 118, at 21.

126. Jamison, *supra* note 109, at 362. Disagreement concerning the long-term consequences of supply controls indicates the need for further study. One critic concludes that the long-run gain in prices for controlled commodities did not differ greatly from the gains accruing to uncontrolled commodities. *Id.* at 296-97. The FTC takes issue with this finding and asserts that the overall effect of these controls, in the case of federal orders, has been to enhance the price of controlled commodities. FTC, *supra* note 68, at 168.

127. CAL. FOOD & AGRIC. CODE §§ 58883-58886, 59171-59176 (West 1968).

128. FOYTIK, *supra* note 1, at 21-22.

129. Hoos, U.S. Marketing Agreements and Orders, *supra* note 118, at 5.

130. For example, the lemon industry encountered difficulties with its rate-of-flow approach due to the differing characteristics of lemons in various production districts. Jamison, *supra* note 109, at 354.

131. Hoos, U.S. Marketing Agreements and Orders, *supra* note 118, at 5.

132. Currently, marketing orders cannot control the actual production of food. 54 OP. CAL. ATT'Y GEN. 116 (1971). It has been suggested that production control be allowed. Indications are that most agriculture industry members would not tolerate such regulation. MARKETING ORDERS AND ADVISORY BOARDS: HEARING TRANSCRIPT OF THE ASSEMBLY SELECT COMMITTEE ON AGRICULTURE, FOOD AND NUTRITION 192 (Dec. 5, 1973) (statement of Herman Grabow, California State Grange).

The effect of marketing orders requiring the grading and sorting of low-quality produce¹³³ depends on the attitude of the agricultural industries. Quality control can provide a valuable service if it distinguishes or eliminates less desirable produce. In return, such beneficial controls increase consumer satisfaction with the industries and desire for their products.¹³⁴ On the other hand, quality control may perform a disservice to consumers and to the industries when grading standards are adjusted to actually reduce supply. Consumers will have to pay higher prices for the remaining food. Since these standards often eliminate merely unattractive food, the industries waste nutritious edible produce that could still be sold at reduced prices. While this may mean increased prices for the producers, it does not mean that the overall return to the industries will be greater than it would be if all the various grades of food were sold. The relation between quality control and the market is little understood by advisory boards.¹³⁵ Representatives of other interests could lead to policies that will distribute acceptable produce to consumers without reducing returns below a reasonable level.

Agricultural industries now prefer the more positive approach of raising consumer demand through non-brand promotion, rather than the negative approach of limiting supply.¹³⁶ Ideally, advertising raises demand for a product and increases returns to the producer. The actual effectiveness of promotion in raising demand is uncertain.¹³⁷ A study of the market performance of certain commodities during the last twenty years raises questions that may require a reevaluation of these programs.¹³⁸ Using price as an indicator, this study reveals that promotion has little impact on the consumer demand for a commodity. Other factors such as increased production, consumer income, and competition with other products weigh against the effectiveness of promotion.¹³⁹ Considering the significant number of promotion marketing orders, the need for further study seems obvious. Little research does occur because agriculture has been willing to accept the theoretical validity of advertis-

133. CAL. FOOD & AGRIC. CODE §§ 58884, 58885, 58888 (West 1968).

134. HOOS, U.S. Marketing Agreements and Orders, *supra* note 118, at 6.

135. *Id.* at 6-7.

136. As of 1978, only five marketing orders had provisions for any commodity regulations while seventeen had promotion programs. Tabular Outline, *supra* note 6. Only quality control provisions are currently in effect. French, *supra* note 6, at 38.

137. HOOS, U.S. Marketing Agreements and Orders, *supra* note 118, at 10. See also THOMAS J. GUNN, METHODS OF NON-BRAND ADVERTISING FOR CALIFORNIA PRODUCTS 8 (Dep't of Agricultural Economics, California State University-Fresno, Research Report 2, Oct. 1975).

138. Testimony of Lawrence Shepard, Professor of Agricultural Economics at U.C. Davis, Hearings of the California Dept. of Food and Agriculture, Marketing Order Advertising and Sales Promotion 14-15 (Nov. 20, 1975).

139. *Id.*

ing's value.¹⁴⁰ An increase in representation from outside agriculture on the advisory boards could provide the necessary pressure to pursue further appraisal of promotion programs. Such an appraisal should lead to a meaningful expenditure of marketing order monies for consumers and agriculture.¹⁴¹

Consumers challenge the cost and content of marketing order promotion. The cost complaints appear groundless. The marketing order assessment adds little to producers' production costs and the products' ultimate price.¹⁴² Despite guidelines in the Marketing Act of 1937 to control deceptive and inaccurate promotion,¹⁴³ the Federal Trade Commission and consumer groups have both challenged promotion tactics. The criticisms of their content involve allegations that some promotions have been either misleading or insensitive to certain segments of the population.¹⁴⁴ The criticism of cost and content points to poor communication between agriculture and consumer, another compelling reason for advisory board decision-making that represents more than one viewpoint.

Marketing order research programs use industry fees to study markets, develop new and better production techniques, and study industry problems.¹⁴⁵ Research subjects often have limited objectives because they involve subjects of a specific and immediate nature¹⁴⁶ and because they receive only small amounts of marketing order funds.¹⁴⁷ Technological research includes studies of pest control, new food varieties, and improved farm equipment. Several orders use research programs to evaluate other aspects of the marketing program.¹⁴⁸ The lack of diverse viewpoints on advisory boards can preclude consideration of all alternatives and the long-term effects of such research. This deficiency is especially apparent today as indicated by rising criticism of the environmental effects of pesticides and socioeconomic effects of exten-

140. See Hoos, *supra* note 39, at 20-21 and Jamison, *supra* note 109, at 307. Both authors note that advisory board members principally rely on advertising agencies for advice on the direction and effectiveness of their promotion campaigns. See also GUNN, *supra* note 137, at 2.

141. Suggestions for future promotion programs include increased collaboration with brand advertisers and improved nutritional instruction in schools. Shepard, *supra* note 138, at 15. Another suggestion is to increase the current industry assessments for the financing of such programs. Jamison, *supra* note 109, at 307.

142. Shepard, *supra* note 138, at 3.

143. CAL. FOOD & AGRIC. CODE § 58889 (West 1968).

144. Such promotion tactics include offering retailers free movie projectors for advertising California avocados and milk slogans that generalize about the consuming public's need for milk. MARKETING ORDERS: *Hearing Transcript of the Assembly Committee on Agriculture* 199-207 (Sept. 23-24, 1975).

145. CAL. FOOD & AGRIC. CODE § 58892 (West Cum. Supp. 1978).

146. FOYTIK, *supra* note 1, at 13.

147. Hoos, U.S. Marketing Agreements and Orders, *supra* note 118, at 8.

148. Hoos, *supra* note 39, at 22.

sive mechanization.¹⁴⁹

This analysis reveals defects in marketing order performance. The orders do not always serve the public interest in an adequate food supply or even provide a reasonable income for agriculture. The research programs demonstrate that the public interest may now go beyond an adequate food supply to include environmental and social issues as well.

Marketing order activities affect all segments of society, but for forty years only the agricultural segment has substantially controlled and evaluated their effects. These orders may continue to serve the public interest if they begin to consider and balance other viewpoints against that of the agricultural industries. The orders can provide an efficient means of grading and inspecting produce, disseminating information on nutrition and food preparation, and conducting agricultural research at little state cost.¹⁵⁰ The producers and handlers of produce, however, cannot be expected to know or appreciate all the economic and social ramifications of their activities. The State Director of Food and Agriculture has the duty to protect other interests, in approving or disapproving board recommendations,¹⁵¹ but this official may also share the values of the agricultural industries.

The advisory boards need more than one public member¹⁵² to represent other interests which could contribute to board decisions. An expansion of board membership with public members could include other representatives besides consumer advocates. Enlarging the nonagricultural representation will increase the overall expertise of the boards and facilitate communication between agriculture and other societal interests.¹⁵³ Currently, the boards and the State Director of Food and Agriculture share the power to appoint public members.¹⁵⁴ To ensure the independence of these members, that power should be removed to a

149. W. Kopper, *Social Implications of State Marketing Orders 91-92 (1975)* (unpublished research project at U.C. Davis, Dept. of Applied Behavioral Science). See also Comment, *The Public Purpose Doctrine and University of California Farm Mechanization Research*, this volume; Comment, *Beyond Pesticides: Encouraging the Use of Integrated Pest Management in California*, this volume.

150. Jamison, *supra* note 109, at 359.

151. CAL. FOOD & AGRIC. CODE §§ 58813, 58883, 58886 (West 1968).

152. CAL. FOOD & AGRIC. CODE § 58843 (West 1968).

153. The need for improved communication between agriculture and the public concerning marketing order programs is recognized. See *MARKETING ORDERS AND ADVISORY BOARDS: Hearing Transcript of Assembly Select Committee on Agriculture, Food and Nutrition* 161 (Dec. 5, 1973) (statement of V.L. Shahbazian, Chief of the Bureau of Marketing of the Calif. Dept. of Food and Agriculture). It is interesting to note that consumer groups, even in their arguments before the FPPC, emphasized that they did not want to see industry representation totally eliminated from advisory boards. See Statement of Lisa Spear, California Citizen's Action Group, Meeting of the Fair Political Practices Commission (Nov. 6, 1975) (transcript at 155).

154. CAL. FOOD & AGRIC. CODE § 58843 (West 1968). See also 58 OP. CAL. ATT'Y GEN. 625 (1975).

different authority, such as the Governor, who has the power to appoint public members to other boards.¹⁵⁵ The responsibility to recruit nominees should be the joint responsibility of the State Department of Food and Agriculture, the State Department of Consumer Affairs, and the various agricultural industries.¹⁵⁶

CONCLUSION

The original purpose of marketing order advisory boards was to administer programs to regulate the marketing of specific farm commodities. The boards' memberships, however, consist only of representatives of the affected agricultural industries. The Political Reform Act of 1974 challenges the ability of these representatives to impartially balance their interests against the public's interests in an adequate food supply.

While the PRA's language and scope as an initiative should not allow it to reform drastically the boards by disqualifying their current membership, it does express the public's desire to eliminate conflicts of interest in government decision-making. The questionable performance of marketing orders under industry domination justifies this desire. By failing to represent other segments and interests in society, marketing orders fail to serve fully either the public or the agricultural industries. Marketing orders could, however, provide valuable public services if the input and advice of members of the public and other interested parties supplemented the advisory board decision-making process. Without this expansion of viewpoints, the legislature can no longer justify marketing orders as a legitimate exercise of government's power to protect the public interest.¹⁵⁷

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155. 1972 Cal. Stats. 5355.

156. Besides expanding the advisory boards with public members, there are other approaches to broadening marketing order decision-making. Possibilities include establishing parallel boards with non-agricultural members and requiring social, economic, and environmental impact reports for marketing order activities. Statement of Sidney Hoos, Professor of Agricultural Economics, Hearings of the Assembly Committee on Agriculture, Concerning Public Members of Advisory Boards for California Marketing Orders (April 28, 1975). A legislative committee recently rejected a proposal to make advisory board membership one-fourth consumer representatives. S.B. 1487 (1977-1978 Reg. Sess.) (1978 Session) (Failed in committee. 1977-1978 Session, Pt. 2 SENATE WEEKLY HISTORY 364).

157. As this article went to press, the California Court of Appeals reversed the order of the San Francisco Superior Court vacating the FPPC regulation defining the "public generally" as a "significant segment of the community." *Consumers Union of United States, Inc. v. Cal. Milk Producers Advisory Bd.*, 82 Cal. App. 3d 433, 147 Cal. Rptr. 265 (1st Dist. 1978), hearing denied by California supreme court on Sept. 20, 1978. The court held that the FPPC's definition of the "public generally" was valid since there was no intent in the PRA to nullify industry-dominated boards. The court found rules of statutory construction to be of little help and believed that the PRA drafters had overlooked

the advisory board problem. The opinion does state that if the FPPC's regulation was invalid, the amendment by the legislature, CAL. FOOD & AGRIC. CODE § 58852 (West Cum. Supp. 1978), would also be invalid since it did not meet the requirements for amending the PRA. *See* note 73 *supra*. Interestingly, the court describes the "public interest" as emerging from the "competing interests of various groups", but does not state how industry-dominated boards represent such competing interests. 82 Cal. App. 3d at 448, 147 Cal. Rptr. at 274. The court acknowledges that there are "meritorious arguments that many industry-dominated boards do not adequately serve consumers' interests." *Id.* at 444, 147 Cal. Rptr. at 272.

