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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Silver, Commissioners Baker, Ortiz, Wilson, and Wood

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Prenotice Discussion, Proposed Repeal and Adoption of Regulation 18932.3, Honorarium Ban Exception, Definition of “Predominant Activity.”¹

Date: April 15, 2024

Executive Summary

Under the Act’s honorarium ban, candidates and officials may not accept “any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.” There is a limited exception to this ban for earned income in connection with a bona fide business;² however, the exception does not apply when the “predominant activity” of an individual’s business, trade, or profession is making speeches. Current Regulation 18932.3 provides the standards to determine if making speeches is the “predominant activity” of a business, trade, or profession. It defines “predominate activity” as more than 50 percent of the business’s gross income or hours and sets two time periods for making this determination: 12 months for established businesses and 30 days for new businesses.

Narrowly tailored to address the Commission’s concerns, proposed amendments to Regulation 18932.3 will extend this period for certain long-standing businesses that have an activity cycle outside the current periods of examination. Specifically, the proposed language provides an additional examination period of 36 months to determine whether the “predominant activity” (more than 50 percent of the gross income or hours) of an individual’s business, trade, or profession is making speeches. The 36-month period would apply where the business, trade, or profession involves a proprietary work created by the individual and has been in existence for at least 12 months before the individual became subject to the honorarium ban. Additionally, proposed Regulation 18932.3 reorganizes the current language for clarity, requiring the regulation be repealed and the proposed regulation be adopted. The proposed changes are presented for prenotice discussion and will be presented at a later date for adoption.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² All references to “business” include “business, trade, or profession” unless specifically noted otherwise.

Reason for Proposed Regulatory Action

Staff was directed to propose narrowly tailored changes within the limitations of the honorarium statutes to address situations where an individual's long-standing business, trade, or profession has less traditional hours and income cycle, such as one that involves authoring and promoting books through "book talks," in determining whether the business, trade or profession's predominant activity is making speeches and thus subject to the honorarium ban.

Background

In 1990, the voters enacted the honorarium ban as a part of Proposition 112, a package of reform measures, in a constitutional amendment that prohibited members of the Legislature and elected state officers from receiving any honoraria.³ Upon the passage of Proposition 112, Senate Bill 1738, c. 84 of 1990 became operative and enacted Sections 89501-89503.5, defining and implementing the honorarium ban. These statutes are known as the "Ethics in Government Act of 1990."⁴

At the June 2023 Commission meeting, the Commission discussed the honorarium ban's purpose and history. To review, the honorarium ban's purpose was to address concerns about elected officials receiving "honoraria," defined as payments for making speeches, writing articles, and attending events, as these payments carried the potential for influence and abuse. Prior to the ban, because honoraria payments were in consideration for personal service, they could be paid directly to the official as income and were not subject to contribution or gift limits. The purpose and concerns behind the ban are evidenced by Proposition 112 Ballot Pamphlet statements in support, stating, for example:

It's a problem when elected officials can be paid to give speeches to 3 people at the dinner table. ... It's a problem when 120 legislators in Sacramento get over *\$1.1 million* each year in gifts and honoraria-from the same special interests seeking their votes.⁵

³ The Legislature placed Proposition 112 on the June 5, 1990, ballot by Senate Constitutional Amendment 32, 1989, Resolution Chapter 167. Proposition 112 also imposed restrictions on gifts, lobbying activity, and sources of income and authorized a Citizens Compensation Commission to set salaries for the elected state officers and Members of the Legislature. (Legislative Analyst Analysis of Proposition 112, June 5, 1990, Ballot Pamphlet, page 22.)

⁴ Initially, the Ethics in Government Act applied the honorarium ban to elected state officers, and, to the extent the source was reportable on their Statement of Economic Interests, it applied to state board or commission members and designated state agency employees. Local elected officeholders remained subject to the previous limit on accepting honoraria in excess of \$1,000 from a single source in a calendar year. (SB 1738, c. 84 of 1990.) The Ethics in Government Act was amended in 1994 to add local elected officeholders, elected or appointed special district board members, and designated local government employees to the honorarium ban as it applied to state officers and employees (AB 1542, c. 36 of 1994); and again to include local candidates for office (AB 3126, c. 1105 of 1994). In 1995, it was amended to include candidates for state elective office and reorganized to its present form (SB 701, c. 690 of 1995).

As noted at the June 2023 Commission meeting, the ballot arguments for and against Proposition 112 stated that the honorarium ban would broadly ban officials from being paid for speechmaking as a permissible source of income.⁶ Recognizing the broad application of the ban and its potential consequences, Arguments Against Proposition 112 stated that the “initiative punishes the innocent and the guilty alike” and would eliminate “good candidates” because of the resulting reduction in income.⁷ Additionally noted in the Commission’s discussion, Proposition 112 was placed on the ballot after an FBI three-year sting operation, which involved campaign contributions and honoraria to members of the Legislature and resulted in the conviction of five legislators.⁸

Current Law

The Act prohibits candidates for elective office, elected state and local officers, and any officeholder specified in Section 87200 from accepting any honorarium. (Section 89502.)⁹ “Honorarium” means “any payment made in consideration for any speech given,¹⁰ article published,¹¹ or attendance¹² at any public or private conference, convention, meeting, social event, meal, or like gathering.” (Section 89501(a).) However, known as the “earned income exception,” the term “honorarium” does not include “[e]arned income for services customarily provided in connection with a bona fide business, trade, or profession *unless the sole or predominant activity* of the business, trade, or profession *is making speeches*.” (Section 89502(b)(1), emphasis added.) The Legislature charged the Commission with adopting regulations to implement this subdivision. (*Ibid.*)

⁵ Proposition 112, June 5, 1990, Ballot Pamphlet, Rebuttals to Arguments Against Proposition 112, p. 25.

⁶ For example, the Arguments in support state, “VOTE YES AND VOTE TO ... Prohibit legislators, the Governor and other elected officials from accepting honoraria and speaking fees.”

⁷ *Id.*, Arguments Against Proposition 112, p. 25.

⁸ See also, “Proposition 112-Government Ethics Laws, History of the Political Reform Act,” www.fppc.ca.gov/about-fppc/about-the-political-reform-act.html, as viewed on 3/6/2024.)

⁹ A state board or commission member or a state or local government agency’s designated employee is prohibited from accepting honorarium to the extent the member or employee would be required to report the receipt of income or gifts from that source on their Statement of Economic Interests. (Section 89502(c).) Effectively, this limits the ban for these board or commission members and designated employees to honoraria received from persons within their agency’s jurisdiction.

¹⁰ Regulation 18931.1 defines “speech given” as “a public address, oration, or other form of oral presentation, and includes participation in a panel, seminar, or debate.” It does not include a comedic, dramatic, musical, or other similar artistic performance.

¹¹ Regulation 18931.2 defines an “article published” as a nonfiction written work produced other than in the practice of a bona fide business, trade, or profession and published in a periodical, journal, newspaper, newsletter, magazine, pamphlet, or similar publication. “Article” does not include books, plays or screenplays.

¹² Regulation 18932.3 defines “attendance” as “being present during, making an appearance at, or serving as host or master of ceremonies.”

Regulation 18932.3: Definition of “Predominant Activity.”

Adopted in 1992 as a part of the packet of regulations implementing the Ethics in Government Act of 1990, Regulation 18932.3 provides the standards to determine if “making speeches” is the “predominant activity” of a business, trade, or profession. The regulation states that speechmaking is presumed to be the predominant activity of an individual’s business, trade, or profession if more than 50 percent of hours spent or gross income is related to making speeches, including preparing and delivering speeches.¹³

Two time periods are used to make this determination relative to, and including, the hours and gross income for the speech in question: 12 months for a business trade or profession in existence for one year or more and 30 days for one in existence less than one year. The time periods allow for a rolling examination of a business, trade, or profession’s “predominant activity,” relative to the speech in question. The 30-day period was considered a fair representation of a new business’s true “activity” and minimized the potential abuses of the law. (*Id.*, p. 1.)¹⁴ To avoid abuses, the activity (gross income and hours) related to the speech in question is included in making the determination.

Note that for a payment for personal services (such as making a speech) to qualify as “earned income,” Section 89501(b)(1) requires that the business, trade, or profession is “bona fide” and that the services are “customarily provided” in connection with the business, trade, or profession in addition to speechmaking not being the sole or “predominant activity” of the business, trade, or profession.¹⁵

The following is an example of Regulation 18932.3’s application. Suppose an elected official is a long-time practicing ophthalmologist who has often lectured on surgical procedures as a part of her medical practice. She may continue to receive payments for these lectures while in office, so long as her gross income and hours for making speeches do not comprise *more than 50 percent* of her medical business’s hours or gross income for the 12 months prior to and

¹³ In adopting Regulation 18932.3 in 1992, staff purported to be using the plain dictionary meaning of “predominant” as “most frequent or noticeable” in using “more than 50 percent” as the threshold. (Final Statement of Reasons, Adopt Cal. Code of Regs. Section 18932.3, 1992, p. 2.) The regulation looks to gross income and hours as a fair representation of the “activity” of a business, trade, or profession. (*Ibid.*)

¹⁴ Staff stated in several instances that particular honorarium regulations were crafted with the intent to prevent individuals from “circumventing the honorarium limits” and to “avoid creating loopholes” that can be easily exploited. (See, for example, Final Statement of Reasons, Adopt Cal. Code of Regs. Sections 18931.3, 18932.2, 18932.3, 1992.)

¹⁵ Regulation 18932.1 provides the criteria for a “bona fide business, trade or profession.” It requires a period of business records, or a license or certification issued by a governmental authority for the trade or profession or that the individual be employed as a researcher or member of a college faculty. (Regulation 18932.1(a), (b), and (c).) A business is *not* bona fide if the predominant activity is making speeches. (Regulation 18932.1(d).) Where the profession is “teaching,” Regulation 18932.2 provides that the profession is presumed bona fide under specific criteria. The determination of whether a service is “customarily provided” is on a case-by-case basis. (*Kaneda* Advice Letter, No. A-09-215.)

including the speech in question.¹⁶ However, suppose she curtails her practice after her election but continues giving lectures. In that case, if her lectures make up more than 50 percent of the gross income or hours for the business in the past 12 months, including the speech in question, “making speeches” will be the predominant activity of her business. Any payment would be a prohibited honorarium until the 50 percent threshold is no longer exceeded. The honorarium ban does not prohibit payments for speech-making customarily provided as a part of a business or to promote a bona fide business, so long as making speeches is not the predominant activity of the business.¹⁷

At the June 2023 meeting, the Commission discussed the application of the honorarium ban to an elected official who has an established, long-standing, published author’s business which included earning income promoting the published books.¹⁸ The discussion revealed that an author may spend hours drafting a manuscript, receive a publishing contract with an advance in one year, and then provide “book talks” or promotions in a later year. As a result, while the core of a published author’s business may be writing books - under the 12-month standard in Regulation 18932.3, the predominant activity of the business might only reflect the promotion or “speech-making” cycle of activity. The Commission directed staff to explore an alternative to the honorarium definitions within the confines of the honorarium statutes to permit an individual with an established business, trade, or profession of authoring books to receive payments for speeches promoting their published books. The direction was to permit those with long-standing businesses to continue to earn income without creating an exception that would create opportunities for abuse.

While publishing arrangements vary, general research¹⁹ indicates that individual authors who work with a traditional publishing company may be paid an advance for book sales and then receive royalties on sales - once the book sales exceed the advance amount. It can take 2 to 3 years for a book to be published after an advance is received. An author’s income relates to a particular book project and will vary from year to year. Once published, an author can receive payments anywhere from \$300 to \$10,000 per speaking engagement event, depending on the demand for the author. In addition to book and merchandise sales, speaking events provide valuable publicity for the individual.

¹⁶ Lectures by a currently licensed medical professional that relate to an area of expertise meet the “bona fide” requirement (Regulation 18932.1(c), licensed professional practitioner) and “customarily provided” requirement. (See for example, *Halderman* Advice Letter, No. I-08-073.) However, a general healthcare lecture provided by a medical professional to companies that manufacture medical supplies or pharmaceuticals does not satisfy the “customarily provided” requirement. (*Filante* Advice Letter No. A-92-141.)

¹⁷ Note, under Regulation 18932.1(d), a business with a predominant activity of making speeches is not a “bona fide” business.

¹⁸ This issue was raised in an informal advice letter, *Winuk* Advice Letter, No. I-23-009.

¹⁹ See the following resources, as viewed 3/11/2024: [How Can I Get Published? | Penguin Random House](#)
[How Do Authors Get Paid? A Detailed Guide | Clever Girl Author](#)
[How Do Authors Get Paid? | Word Count Tool](#)
[How Much Do Authors Make? Author Salaries Demystified \(rocketexpansion.com\)](#)

The Commission requested that staff look into whether other business or professional endeavors need to be considered in reviewing the regulations. Staff’s research suggests that other business models that involve a created item, such as a software program, can involve project-related income and hours that do not follow a traditional 12-month cycle.²⁰

Staff recommends that to better capture the “predominant activity” of an established business, trade, or profession involving a proprietary work, where there are project-based hours and gross income, Regulation 18932.3 be amended to allow for a 36-month period to determine the predominant activity in these particular circumstances. Staff recommends limiting this alternative period to those situations involving an established business, trade, or profession in accordance with the Commission’s direction that the narrowly tailored provision apply to “long-standing businesses” and to minimize the potential abuses of the law.

Proposed Repeal & Adopt Regulation 18932.3

Addressing the Commission’s concerns, proposed Regulation 18932.3 adds a 36-month period of examination for determining the “predominant activity” of an individual’s established business, trade, or profession, where the business, trade, or profession involves proprietary work created by the individual. The proposal would accommodate a situation such as that of an established author with a book project-based activity. Additionally, proposed Regulation 18932.3 reorganizes the current language for clarity, requiring that the current regulation be repealed, and the proposed regulation be adopted.

Proposed subdivision (a) states the existing standard: that “more than 50 percent” is the “predominant” threshold, and the “hours and gross income” related to making speeches are the “activities” of the business trade or profession relevant for the determination. The proposed language is intended to clarify and consolidate the existing standard.²¹

Proposed subdivision (b)(1) and (2) provide the existing requirement that the “predominant activity” is determined prior to and including each speechmaking opportunity, and the period(s) for making the determination. Where the business, trade, or profession involves proprietary work created by the individual, proposed subdivision (b)(3) provides a 36-month period, prior to and including the date of the speech, as the period for examination. To minimize the potential for abuse, the 36-month period is applicable only in those instances where the business, trade, or profession has existed for at least 12 months prior to the time the individual became subject to the honorarium ban requirements. Evidence of this existence may be demonstrated by business accounting records, tax returns, or proof of licensure, certification, or employment.

Proposed subdivision (c) defines terms used in the regulation. “Proprietary work” is defined for purposes of the regulation as “a tangible or intangible item made or sold by one having the exclusive right to manufacture and sell” and includes items such as “a published book

²⁰ See, for example, as viewed 3/11/2024: [How To Make Money Selling Software \[9 Options For 2024\] \(gigworker.com\)](https://www.gigworker.com)

²¹ Note: the “presumption” previously included in subdivision (a) is removed to provide clarity and avoid ambiguity in stating the standard.

or licensed computer software.” These are two examples of proprietary work that may involve an initial advance payment for the item upfront and then income or hours making speeches to promote the item in a later period. Additionally, subdivision (c)(2) states that the hours and gross income for the applicable period include any anticipated, promised, or received income and any hours spent or anticipated to be spent for the particular speechmaking opportunity.

Conclusion

Proposed Regulation 18932.3 provides for a 36-month period, prior to and including the date of the speech in question, for determining whether the predominant activity of the business, trade, or profession is making speeches where it involves a proprietary work created by the individual and the business, trade or profession has existed for at least 12 months prior to the time the individual became subject to the honorarium ban requirements. Staff recommends proposed Regulation 18932.3 be adopted. It provides a reasonable interpretation of “predominate activity” for an existing business that receives payments for a proprietary work over a multiyear period that is consistent with the intent of the honorarium ban and the limited earned income exception set forth in Sections 89501 and 89502.

Attachment:

Proposed Regulation 18932.3 for Adoption
Proposed Repeal of Regulation 18932.3