

Fair Political Practices Commission
MEMORANDUM

To: Chairman Johnson, Commissioners Garrett, Hodson, Montgomery, and Rotunda

From: Scott Hallabrin, General Counsel

Subject: Adoption of Proposed Regulation 18229.1 and Repeal and Readoption of Proposed Regulation 18944 – “Dependent Children” and Gifts to Family Members of a Candidate or Public Official

Date: November 24, 2009

Proposed Action and Staff Recommendation: Adopt proposed Regulation 18229.1 and repeal and readopt proposed Regulation 18944. (Attachments 1, 2 and 3.)

Summary of the Proposed Regulations

Proposed Regulation 18229.1 defines the term “dependent child” for purposes of the Act. As explained below, it retains the Commission staff’s longstanding definition of that term.

Proposed Regulation 18944 is a rewrite of the Commission’s guidelines for when a gift to a family member of an official constitutes a gift to the official. The rewrite does three primary things: (1) Expands the regulation to cover gifts to college-aged children who meet certain criteria; (2) More specifically defines when a gift to a family member confers a “personal benefit,” and therefore a gift, on the official; and (3) Creates a presumption that gifts to family members from certain persons who appear before an official confer a “personal benefit” on the official.

Reason for the Proposed Regulations

The impetus for these proposed regulations was a request for written advice from a local official that raised the question of whether acceptance of a donation of college tuition to her 18-year-old son constituted a gift to the official and her court commissioner husband under the Political Reform Act (the “Act”).¹ After discussing this matter at its meeting on October 8, 2009, the Commission directed staff to present regulations on this issue at the December 2009 Commission meeting.

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 18110 through 18997 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.

Background

The Commission has never formally defined the term “dependent children” by regulation. Instead, for years, the staff has informally advised that the term “dependent children” or “dependent child” only includes those children who are under 18 and whom the official can claim as dependents for federal income tax purposes. However, as expressed at the October 8, 2009 Commission meeting, staff has been concerned for some time that this definition is too narrow because it does not cover, for example, college-aged children of officials who are 18 or over, still live in the official’s home, and for whom the officials are paying college tuition and other living expenses. As a consequence, under existing Regulation 18944,² when a gift is made to an official’s child who is at least 18 years old, there is no gift to the official regardless of the benefit the official receives from the gift. This issue leads to the larger question of which gifts to family members of a public official should be regulated under the Act. In staff’s view, current Regulation 18944, besides its problematic reliance on the current definition of “dependent child,” inadequately captures those gifts that may have, or appear to have, an influence on the governmental actions of public officials.

The Proposed Regulations

Proposed Regulation 18229.1. This regulation defines the term “dependent child” or “dependent children” for purposes of the Act and Commission regulations. It maintains the longstanding definition applied by Commission staff, covering “a child (including an adoptive child or stepchild) of a public official who is under 18 years old and whom the official is entitled to claim as a dependent on his or her federal tax return.” This definition responds to concerns expressed at the October meeting that broadening the definition to include children who are 18 and older may force an official to disclose financial information on, or be responsible for conflicts of interests relating to, assets held by their adult children to which the officials have no legal right to know or access.

Proposed Regulation 18944. Because this regulation has been reorganized and modified, staff proposes repeal of the existing version of the regulation and readoption of a new version. As mentioned, existing Regulation 18944 addresses when a gift to a family member of a public official or candidate is a gift to that official or candidate for purposes of the Act. The proposed new Regulation 18944 attempts to focus on gifts provided to an official’s family member that provide a clear or presumed benefit to the official.

The guiding principles in approaching this issue are not only in the Act’s definition of “gift” in Section 82028 but also in the purposes of the Act.

Section 82028 essentially provides that a gift is any payment “that confers a *personal benefit* on the recipient” (Section 82028(a); emphasis added.) Thus, for a gift to an official’s family member to be considered a gift to the official under the Act, the family member’s gift must confer a “personal benefit” on the official. Neither the Act, nor Commission regulations or advice, have defined the term “personal benefit.” A narrow reading of that term would suggest

² Regulation 18944 only applies to gifts made to members of an official’s “immediate family.” Section 82029 defines “immediate family” as an official’s “spouse and dependent children.”

that the official does not receive a gift unless he or she directly receives some material benefit. While this generally seems to be a reasonable limiting principle in assessing whether a gift is regulated under the Act, the principle is not so rigid that it excludes those gifts given to an official (or family member) over which the official exercises control, or gifts made to an official's family member by persons who have business before the official and have no apparent motive other than to attempt to gain the favor of the official. When someone provides an official or his or her family member with a gift (such as tickets) and the official is permitted to distribute the gift as he or she pleases, the official receives a personal benefit by personally selecting who can make use of the gift for a purely personal purpose that is unrelated to his or her governmental duties or activities as a candidate. When someone who has business before the official makes a gift to the official's spouse or child, absent additional information, the circumstances suggest the donor intends, through the close family member, to at least indirectly, and perhaps directly, benefit and thus influence the official. In both cases, although the benefit is not necessarily material for the official, it is nevertheless sufficiently personal to merit regulation within the purposes of the Act. One of the Act's primary purposes, as specifically evidenced by its financial disclosure provisions (Sections 87200 – 87313), conflict-of-interest prohibitions (Section 87100 – 87105), and gift limits (Section 89503), is to disclose the assets of, and sources of income (including gifts) to, public officials that may be materially affected by their official actions and to disqualify them from taking official action affecting these interests (see Section 81002(c)). Gifts such as these, at a minimum, provide an appearance of improper influence if the official votes on a matter assisting that donor.

On this basis, the staff believes that it is appropriate to include within the definition of "gift" those gifts made to an official's family member that not only materially benefit the official but also those controlled by the official or given to the family member under circumstances where it appears they were intended to at least indirectly benefit the official and influence his or her governmental decisions. We discuss the pertinent parts of the regulation below.

(1) **Subdivision (b).** Subdivision (b)(2) defines which family members are within the scope of the regulation. Besides the official's spouse,³ the regulation also covers not only a "dependent child" as defined in proposed Regulation 18229.1, but also a child who is aged 18 through 23, is a student, makes his or her principal residence with the official or candidate, and does not provide over one-half of his or her own support. This captures gifts made to an official's child who is 18 or older but who is still dependent on the official for support.

(2) **Subdivision (d).** This subdivision deals with the complicated issue of when a separate gift to a member of an official's family is a gift to the official. It creates two categories of gifts. One, in subdivision (d)(1), involves gifts that confer a clear personal benefit on the official, and describes three categories of gifts meeting this standard. The other, in subdivision (d)(2), involves gifts that confer a presumed personal benefit on the official.

Gifts conferring a clear personal benefit (subdivision (d)(1)):

Subdivision (d)(1)(A) - Gifts given to the family member that confer a financial benefit on the official. This is intended to capture gifts providing a clear financial benefit to the official,

³ Under the Act, the term "spouse" includes a registered domestic partner. (Regulation 18229.)

including those that fulfill a commitment, obligation, or expense of the type normally paid by a family for the ordinary care and support of one of its members. For example, this would include a payment for things such as housing, food, or health costs, or even a television, automobile, or college tuition. It excludes, however, occasional meals, lodging and transportation as well as other payments or gifts for items not part of the ordinary care and support of a family member.

Subdivision (d)(1)(B) – Gifts used by the official. This is self-explanatory.

Subdivision (d)(1)(C) – Gifts over which the official exercises discretion and control. This applies to a gift over which an official gains control even if he or she ultimately does not personally use the gift. It also clarifies that this applies to family gifts solicited by an official. For example, if an official solicits, receives and uses tickets to a sporting or entertainment event for herself, her spouse and her two minor children, all four tickets are a gift to the official. Likewise, if she instead gives all four tickets to her staff to use, all four tickets are still a gift to her because she has exercised control over the tickets.

Gifts conferring a presumed personal benefit on the official (Subdivision (d)(2): These are gifts made to family members by persons (defined in subdivision (d)(2)(A) and (B)) who appear in front of the official and, because of who the donor is, the gifts are presumed to provide a personal benefit to the official. However, the only officials affected by these provisions are state or local officials who are required to file statements of economic interests under Section 87200 (such as elected officers, high-ranking local officials, and members of other selected bodies, including the Fair Political Practices Commission). For example, if a lobbyist employer invites a legislator and her spouse to attend a conference and pays for the spouse to play a round of golf, there would be no clear personal benefit to the legislator under subdivision (d)(1). However, under subdivision (d)(2), because the donor is a person who has business before the Legislature and the legislator is a filer under Section 87200, the value of the spouse's round of golf would still be a presumed gift to the legislator, which, as explained below, could only be rebutted as described in subdivision (d)(3) of the regulation.

Exceptions (Subdivision (d)(3): This subdivision provides exceptions to the general rules attributing a family member's gift to the official. Under this subdivision, the official can generally rebut the fact of a gift by showing there was an independent social, working or similar type of relationship between the donor and family member and the donor had no intent to benefit the official. However, this exception does not apply when the gift provides a clear benefit to the official (as described in subdivision (d)(1)) and the donor is a person who appears before the official.

(3) **Subdivision (e).** This provision provides that something provided to an official's family member that is otherwise exempt from being a gift under the Act or other Commission regulations is likewise not a gift subject to this regulation.

Attachments: (1) Regulation 18229.1
(2) Repeal of Current Regulation 18944
(3) New Proposed Regulation 18944