

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



November 4, 2011

**BY E-MAIL AND
REGULAR MAIL**

Mr. William Lenkeit
Commission Counsel
California Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Re: Notice to Adopt Amendments to Gift Regulations 18940 through 18950.4.

Dear Mr. Lenkeit,

We are writing to comment on the Fair Political Practices Commission ("FPPC") staff's proposed amendments to the Gift Regulations, Regulations 18940 through 18950.4. We are commenting on behalf of the California Public Utilities Commission (CPUC) staff. We want to thank the FPPC staff for all of their hard work in proposing amendments to the FPPC's gift regulations and for giving us the time to provide substantial input during this process. This effort has been a considerable undertaking and we appreciate their efforts. We have a few further suggestions we would like to make.

Effective Date of Proposed Regulations

We noticed there is no effective date stated in these proposed regulations. We recommend that any new regulations adopted this year apply to any report filed on or after January 1, 2012. Thus, for example, any new regulations adopted this year would then apply to the Annual Form 700 filings for 2011 that are filed in 2012. By making all new regulations that are adopted this year effective for all of the annual reporting covering 2011, there would be consistency in reporting and the FPPC would avoid confusion for officials with regard to which regulations to apply when filing their 2011 Form 700.

Regulation 18940.1. General Definitions.

Proposed Regulation 18940.1(f) provides in part:

Payments made by third parties may require disclosure under other provisions of the Act, for example as an activity expense, income, travel payments, or payments to agencies. Unless the payment is made as a result of a contractual arrangement between the agency and a third party, or as a result of a regulatory requirement imposed on a third party, or under the provisions of Regulation 18944, or reported as a gift under Section 89506 or

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otherwise, a payment that does not provide a personal benefit under this paragraph is income to the official.

There appear to be exceptions to "income" in the Act and regulations which are not mentioned in the last sentence of subsection (f), as currently drafted. For example, Section 82030 contains exceptions to income, such as salary from a government agency. Also, payments listed in proposed Regulation 18942 are not income. This sentence needs to be modified to reflect the fact that there are additional exceptions to "income". Therefore, the FPPC should either include a comprehensive list of exceptions to income in subsection (f) or alternatively, include wording that would cover any exception to income in the Act or regulations and subsequently list these exceptions in a manual clarifying the gift regulations.

Therefore, we recommend the last sentence of Regulation 18940.1(f) be modified to read:

Unless the payment is: (i) made as a result of a contractual arrangement between the agency and a third party or as a result of a regulatory requirement imposed on a third party, or under the provisions of Regulation 18944; or (ii) exempt from the definition of income under Section 82030, or any other provisions of the Act or regulations; or (iii) reported as a gift under Section 89506 or otherwise, a payment that does not provide a personal benefit under this paragraph is income to the official.

(redlined to show changes from the proposed Regulation 18940.1 as recently revised on October 31, 2011)

We are also unclear as to what kind of "travel payments" this section is referring to since travel payments are generally either income or gifts, and the quoted language above deals with situations where travel payments are not gifts. We do not understand, therefore, what is intended by the words "travel payments". If this reference to "travel payments" is a reference to how that term is used in some particular section of the Act or regulations, a cross reference should be inserted.

In addition, there is a minor typographical error in proposed Regulation 18940.1(f). The fourth sentence should read:

(f) . . . Except as provided herein, a payment confers a personal benefit, even if the payment otherwise facilitates the business of the official's government agency, to the extent that the payment is unnecessary, extravagant, or lavish under the circumstances, or includes benefits other than free or discounted admission to an event, items of nominal value provided at the event, or a payment for ordinary transportation, lodging, or food." (redlined to show changes from the proposed Regulation 18940.1 as recently revised on October 31, 2011)

§ 18942. Exceptions to Gift and Exceptions to Gift Limits.

The payments listed in proposed Regulation 18942(a) are neither gifts nor income. We believe the title of this proposed regulation should clearly state that this section also covers exceptions to income. We recommend the title of Regulation § 18942 be modified to read:

"§ 18942. Exceptions to Gift, ~~and~~ Exceptions to Gift Limits; and Exceptions to Income"

(redlined to show changes from the proposed Regulation 18942 as recently revised on October 31, 2011)

We also notice that the word "engaged" may be used improperly in a few places in proposed Regulation 18942 (a)(16)(E)(ii) and (iii) and (a)(17).

First, we think that the word "engage" should not be used to refer to how an official becomes involved in a proceeding or government decision. We believe a government official "participates" in a proceeding or governmental decision rather than "engages" in such matters. Moreover, the proposed regulation refers to a "person" other than the "official" as engaging in a business, etc. It is confusing to use "engage" to refer to both a government official's participation in a governmental proceeding or decision and also for the business or similar activities of a person who is not acting as a government official.

We recommend proposed Regulation § 18942 (a)(16)(E)(iii) and (a)(17) be modified to read:

(iii) A person, or an agent of a person, involved in a licensing or enforcement proceeding before a regulatory agency that employs the official and in which the official may reasonably foreseeably engageparticipate, or has engagedparticipated, within 12 months of the time the gift is made.

(17) Any payment, that would otherwise meet the definition of gift, where the payment is made by an individual not identified above, who is not a lobbyist, where it is clear that the gift was made because of an existing personal or business relationship and there is no evidence whatsoever at the time the gift is made that the official engagesparticipates in the type of governmental decisions that may have a reasonably foreseeable material financial effect on the individual who would otherwise be the source of the gift.
(redlined to show changes from the proposed Regulation 18942 as recently revised on October 31, 2011)

We also added a clarifying edit to Proposed Regulation 18942(a)(16)(E)(iii) which will make it consistent with language used elsewhere.

Secondly, there appears to be a problem with the use of the word "engage" and "engaged" towards the end of the first sentence in proposed Regulation § 18942 (a)(16)(E)(ii). As currently written, it appears to say that the "person" (not the official) may foreseeably "engage" or have "engaged" in a type of governmental decision, or a license, permit, or other entitlement. We do not think that this proposed regulation intends to refer to non-officials "engaging" in a

governmental decision or license, etc. At the moment we do not have any suggested language to solve this issue.

§ 18943. Gift to Official Through Family Member.

Proposed Regulation 18943(c) provides in part:

"(c) Absent an exception under Regulation 18942, a payment provided to or for the use of a family member is a gift to the official [OPTION 1] under either of the following conditions: [OPTION 2] if both the following apply:

(1) There is no established working, social, or similar relationship between the donor and the family member that would suggest an association between the donor and the family member suitable or appropriate for making the type of payment provided to the family member.

(2) There is evidence to suggest the donor had a purpose to influence the official. Evidence to suggest the donor had a purpose to influence the official exists in any of the following circumstances:

(A) The payment is made to a family member of a state agency official by a donor who is a lobbyist, lobbying firm, lobbyist employer, or other person required to file reports under Chapter 6 (commencing with Section 86100) of the Act and who is or should be registered to lobby the official's agency.

(B) The payment is made to a family member of a state or local government agency official by a donor, or the donor's agent, if the donor is involved in an action or decision before the official's agency in which the official will foreseeably participate, or an action in which he or she has participated within the last 12 months.

(C) The payment is made to a family member by a person who has a contract with the official's agency or by a person who engages in a business that regularly seeks contracts with or comes before the agency for the purpose of receiving a license, permit, or other entitlement and the official may reasonably foreseeably make or participate in a governmental decision, as defined in the Act's conflict of interest regulations (Regulation 18702 et seq.), related to the person, or has participated in any decision related to the person within 12 months of the time the gift is made. For purposes of this subparagraph, a person who "has a contract with the official's agency" or who "engages in a business that regularly seeks contracts with or comes before the agency" does not include any individual who has less than a ten percent interest in the business contracting with or appearing before the agency."

We support Option 2. We believe that applying paragraph (1) alone to establish that there is a gift to the official would result in some gifts being improperly classified as gifts to the official. This is particularly true in the case where a gift is not from an individual but from an organization, such as a college. Given the wording "working, social, or similar relationship", it is unclear whether the term "similar relationship" would apply, for example, to the relationship between a college and a prospective or enrolled student who is the child of an official. For instance, if a college provides free lodging or free travel to prospective students the college is most anxious to enroll, and the gifts are offered to all similarly situated students without regard

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to their parents' official status, these travel payments should not be considered a gift to the official. Likewise, if a college provides gifts to students who are attending that school, and these gifts are made available to all similarly situated students without regard to the official status of their parents, these gifts should not be considered gifts to the official. It is possible, however, that applying the proposed language in paragraph (1) above alone would establish that there is a gift to the official.

We also note there may be instances where there is no established "working, social, or similar relationship" between the donor and the family member and there still is no intent to influence the official. Option 2 appears to be consistent with the FPPC staff's purpose in amending the gift and travel regulations. In the FPPC staff's memo regarding Adoption of Proposed Amendments to the Gift and Travel Regulations dated October 31, 2011 (October 31, 2011 memo), FPPC staff stated, "[T]he Act's rules restricting gifts should only be focused on those gifts related to the last two reasons." Those two reasons were described as "to curry favor with someone or influence the actions of another". In light of these statements made in the October 31, 2011 memo, we believe Option 2 appears to be the most consistent with the FPPC staff's proposed goals regarding gifts.

In addition, we note the following clarifying edits to Proposed Regulation 18943(c)(2)(B) which will make it consistent with language used elsewhere. Proposed Regulation 18943(c)(2)(B) should be modified to read:

(B) The payment is made to a family member of a state or local government agency official by a donor, or the donor's agent, if the donor is involved in an action or decision before the official's agency in which the official will reasonably foreseeably participate, or an action or decision in which he or she has participated within the last 12 months. (redlined to show changes from the proposed Regulation 18943 as recently revised on October 31, 2011)

§ 18945. Source of Gifts.

Proposed Regulation 18945 states in part:

- (a) The person who makes the gift to the official(s) is the source of the gift unless that person is acting as an intermediary. The person is acting as an intermediary for the source of the gift when the gift to the official was provided under any of the following conditions:
 - (1) the person receives a payment from a source and the payment is made to the official after the source identifies the official as the intended recipient of the gift; . . .

We believe the intent here is that the source of the payment needs to identify to the person making the payment to the official that the gift needs to go to that particular official. We think that this intent is not sufficiently clear in (a)(1). We recommend proposed Regulation 18945(a)(1) should be revised to read:

- (a) The person who makes the gift to the official(s) is the source of the gift unless that person is acting as an intermediary. The person is acting as an intermediary for the source of the gift when the gift to the official was provided under any of the following conditions:
- (1) the person receives a payment from a source and the payment is made to the official after the source identifies to the person that the official ~~is~~ as the intended recipient of the gift; . . .
- (redlined to show changes from the proposed Regulation 18945 as recently revised on October 31, 2011)

§ 18946.2. Exception — Valuation of Gifts: Attendance at Invitation-Only Events and
§ 18946.4. Exception --- Valuation of Gifts: Attendance at Nonprofit or Political
Organization Fundraising Events.

A. Value of item provided to officials

Proposed Regulation 18946.2(a) provides:

- (a) Invitation-Only Events. Except as provided in subdivisions (c) through (d) of this regulation, and in Regulation 18946.4, the admission value of the benefit received by an official who attends an invitation-only event, is the official's pro-rata share of the cost of the food, catering services, entertainment, and any item provided to the official that is available to all guests attending the event. Any other specific benefit provided to the official at the event, such as golf green fees, is valued at fair market value.

In proposed Regulation 18946.2(a) it appears that any item available to all guests attending the event is valued at the "pro-rata share of the cost" of that item. Any other specific benefit provided to the official at the event is valued at fair market value.

In contrast, proposed Regulation 18946.4. Exception --- Valuation of Gifts: Attendance at Nonprofit or Political Organization Fundraising Events, provides in part:

- (a) Nonprofit Fundraiser. Except as provided in subdivision (b), the value of a ticket or admission by invitation to a fundraising event for a non-profit, tax exempt organization that is not a committee covered by subdivision (c) is determined as follows:
- . . .
- (2) If there is no ticket, or other official information provided by the organization indicating the value of the nondeductible portion of the admission, the value of the admission is the pro-rata share of the cost of any food, catering services, and entertainment as determined under Regulation 18946.2 for invitation-only events. Any other specific benefit provided to the official at the event, such as golf green fees, is valued at fair market value.

We note that the wording of proposed Regulation 18946.4 does not include among the items that are to be valued on a pro rata basis, "any item provided to the official that is available to all

guests attending the event". Thus, Proposed Regulation 18946.4 seems to say that all specific benefits provided to officials at an event are to be valued at fair market value. We are not aware of any reason for the different rules here and suggest that they be consistent in both places. One simple option would be to revise the first sentence in proposed Regulation 18946.4(a)(2), to read:

(2) If there is no ticket, or other official information provided by the organization, indicating the value of the nondeductible portion of the admission, the value of the ~~the~~ admission is the pro-rata share of the cost of any food, catering services, ~~and~~ entertainment, ~~and any item provided to the official that is available to all guests attending the event,~~ as determined under Regulation 18946.2 for invitation-only events. (redlined to show changes from the proposed Regulation 18946.4 as recently revised on October 31, 2011)

B. Nominal Refreshments

Proposed Regulation 18946.2(c) provides in part:

(c) Drop-In Visit. Except as provided in subdivision (d) of this regulation, if an official attends an invitation-only event and does not consume any meal or stay for any entertainment and consumes only minimal appetizers and drinks, the value of the gift received is the [OPTION 1] cost of the food consumed by the official and guests accompanying the official, plus the value of any specific item that is presented to the official at the event [OPTION 2] nominal value of the benefit received and is not subject to the Act's reporting requirements.

We recommend that Option 2 be adopted but with some revisions. We think that Option 2 correctly recognizes that what is being accepted here are minimal appetizers and drinks and therefore need not be reported. However, the language currently contained in Option 2, because it only exempts the value of the minimal appetizers and drinks from the *reporting* requirements of the Act, would seem to require officials to keep track of these nominal gifts for purposes of the gift limit and disqualification. It would appear that if a gift is so nominal as to not be reportable, an official should not have to keep track of these gifts for disqualification and gift limit purposes either. Therefore, we believe that minimal appetizers and drinks should not be reportable, subject to the gift limit, or potentially disqualifying. There are three possible ways of achieving this, each of which would accomplish the recommended result. We recommend that proposed Regulation 18946.2 be modified to read:

(c) Drop-In Visit. Except as provided in subdivision (d) of this regulation, if an official attends an invitation-only event and does not consume any meal or stay for any entertainment and consumes only minimal appetizers and drinks, ~~the value of the gift received is the [OPTION 1] cost of the food consumed by the official and guests accompanying the official, plus the value of any specific item that is presented to the official at the event [OPTION 2] nominal value of the benefit received is not subject to the Act's reporting requirements."~~

[Alternative wording A]: the nominal value of the benefit received is neither subject to the Act's reporting requirements nor its conflict of interest provisions.

[Alternative wording B]: the nominal value of the benefit received is not a gift or income.

[Alternative wording C]: the nominal value of the benefit received is not a "payment" as defined in Section 82044.

(redlined to show changes from the proposed Regulation 18946.2 as recently revised on October 31, 2011)

Minor Typographical Errors

We suggest the following correction to proposed Regulation 18944 to correct two minor typographical errors.

Proposed Regulation 18944. Payments Made to an Agency For Use By Agency Official.

(g) Payments from ~~the~~ another government agency. Notwithstanding the above provisions, a grant, reimbursement, funding, or other payment received by a state or local government agency from ~~a~~ another government agency for education, training, or other inter-agency programs, is not a gift to the official who receives a personal benefit from the payment.

(redlined to show changes from the proposed Regulation 18944 as recently revised on October 31, 2011)

Conclusion

For the reasons stated above, we believe the FPPC should make the above revisions to the proposed gift regulations.

This letter is being sent to you by e-mail, so you will receive this information as soon as possible, as well as by regular mail.

Yours truly,

Lionel B. Wilson
Deputy General Counsel