



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION

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To: Chair Miadich and Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel, Legal Division
Brian Lau, Assistant General Counsel, Legal Division
Kevin Cornwall, Counsel, Legal Division

Subject: Memorandum on Amendment of Regulation 18702.4

Date: October 8, 2019

Requested Action and Summary of Proposed Action

As part of an ongoing effort to amend the conflict of interest materiality regulations to clarify and provide bright line standards, staff proposes the amendment of Regulation 18702.4 for prenotice discussion. The amendments would enumerate specific criteria for determining when a gift from a non-profit organization would qualify as a financial interest for an official. The proposed amendment is substantively the same as amendments made to Regulation 18702.3 earlier this year, which concerned non-profit sources of income. Today, staff is proposing incorporating the same recently-adopted materiality standards for non-profit sources of gifts. By harmonizing the materiality standards applicable to non-profit sources of income and sources of gifts (as was the case prior to the recent amendment of Regulation 18702.3), the Commission would provide officials with a clearer understanding of the circumstances in which a governmental decision's effect on a non-profit source of gift is considered material.

Discussion

I. Background

The Political Reform Act's (the Act) conflict of interest provisions ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. Section 87100 states, "[n]o 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." Under Section 87103, a public official has a financial interest in a decision within the meaning of Section 87100 if it is "reasonably foreseeable" that the decision will have a "material financial effect" on the official, a member of his or her immediate family, or on certain enumerated interests. These enumerated interests include "[a]ny donor of, or any intermediary agent for a donor of, a gift or gifts aggregating [five hundred dollars (\$500)] or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made."

II. The Existing Regulation

Currently, Regulation 18702.4(c) provides that the financial effect of a governmental decision on a source of gift (as defined in Section 87103(e)) is considered material if “[the] source is a nonprofit that will receive a measurable financial benefit or loss, or the official knows or has reason to know that the nonprofit has an interest in real property that will be financially affected under the standards applied to a financial interest in Regulation 18702.2.” That is the same standard formerly featured in Regulation 18702.3 with respect to nonprofit sources of income, until Regulation 18702.3 was amended earlier this year. As was the case with Regulation 18702.3, one of the difficulties with the current standard is that there is no express threshold or definition for the term “measurable financial benefit or loss.” Regulation 18702.3 was amended with the intention of creating a clearer standard for determining whether a governmental decision would have a material financial effect on a non-profit source of income. Regulation 18702.3 now includes clear “bright line” rules for determining materiality, which would also be a benefit to Regulation 18702.4.

II. Proposed Incorporation of Bright Line Rules

Staff proposes amending the language of Regulation 18702.4 to incorporate the new Regulation 18702.3 standards by reference. The proposed amendment to Regulation 18702.4 would alter subdivision (c) to provide that “[t]he financial effect of a governmental decision on the source of a gift to a public official, as identified in Section 87103(e), is material if . . . [t]he source is a nonprofit organization that will be financially affected under the standards applied to a nonprofit source of income interest in Regulation 18702.3” The proposed amendment would therefore replace the current “measurable financial benefits and losses” standard with the bright line rules now found in Regulation 18702.3. In other words, when determining the materiality of a financial effect on a nonprofit source of gift, Regulation 18702.3(a)(3) would apply and a financial effect would be considered material if:

(3) The source is a nonprofit organization and one of the following applies:

(A) The decision may result in an increase or decrease of the organization’s annual gross receipts, or the value of the organization’s assets or liabilities, in an amount equal to or more than:

(i) \$1,000,000; or

(ii) Five percent of the organization’s annual gross receipts and the increase or decrease is equal to or greater than \$10,000.

(B) The decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than:

(i) \$250,000; or

(ii) One percent of the organization’s annual gross receipts and the change in expenses is equal to or greater than \$2,500.

(C) The official knows or has reason to know that the organization has an interest in real property and:

(i) The property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) through (6); or

(ii) There is clear and convincing evidence the decision would have a substantial effect on the property.

By incorporating Regulation 18702.3's recently adopted bright line rules, we would similarly establish clearer standards for officials who have received gifts from non-profit organizations. Additionally, by tying the standard to Regulation 18702.3 by reference, we would ensure that any future amendment to Regulation 18702.3 would not also require amendment of Regulation 18702.4 for the sake of harmonization.

Lastly, staff notes that the repeal and adoption of Regulation 18702.5, pertaining to the materiality of a financial effect on personal finances, is also being presented for pre-notice discussion. Regulation 18702.4(b) provides that the financial effect of a governmental decision on a source of a gift is considered material if "[t]he source is an individual that will be financially affected under the standards applied to an official in Regulation 18702.5" Accordingly, the Commission should be aware that the repeal and adoption of Regulation 18702.5 would not only affect the materiality standard relating to personal finances, but also the materiality standard for individual sources of gifts.

Attachments:

- Proposed Amendment of Regulation 18702.4