

August 19, 2014

Jason D. Kaune, Partner
Nielsen Merksamer
Parrinello Gross & Leoni LLP
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901

Re: Your Request for Informal Assistance
Our File No. I-14-135

Dear Mr. Kaune:

This letter responds to your request for advice regarding the gift provisions of the Political Reform Act (the "Act"). This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (In re Oglesby (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.¹ Also, please note that our advice is based solely on the provisions of the Act and does not address any past conduct.²

QUESTION

Are food and beverages provided by Chevron to governmental officials attending drills and exercises for potential oil spills required by law considered gifts to the official?

CONCLUSION

Food and beverages provided by Chevron to a governmental official at the drills are not considered gifts to the official if the food and beverages meet the criteria of Regulation 18950.1 as addressed below. However, because the food and beverages must be reported by the official's agency to rebut the presumption that the food and beverages confer a personal benefit to the

¹ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

² 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.

official, Chevron must treat food and beverages provided to a governmental official as a gift unless the official's agency has advised Chevron that it is reporting the payments pursuant to the regulation.

FACTS

Chevron and its other business units conduct drills and exercises to prepare for potential oil spills at California facilities across the state, including facilities in Richmond and El Segundo. The drills may be accomplished in one day or may span several days. At a minimum, Chevron will conduct one unannounced drill annually and one other drill every three years. In this calendar year, Chevron will conduct both the annual state sponsored unannounced drill and the three-year drill, which is known as the National Preparedness for Response Exercise (the "NPREP Drill"). The drills are conducted according to U.S. Coast Guard guidelines and Department of Fish and Wildlife regulations.

A drill may include 300-400 total attendees, including participants from Chevron and its private sector partners. Such a drill may involve 30-40 public officials, including the California Office of Spill Prevention and Response (the "OSPR") employees, employees from other state agencies (e.g., California Emergency Management Agency) and local agencies (counties, fire departments, etc.) Some of these employees may not be in designated positions specified in a state agency's Conflict of Interest Code. However, some employees have decision making positions such that providing anything of value to them could result in a "gift" under the Act. Representatives of federal agencies, including the Coast Guard, are invited and routinely attend as well.

Chevron typically provides meals at these drills in the \$15-\$25 per person range. The meals may be offered in different variations potentially including both lunch and breakfast, and sometimes snacks. Training related to the drill may extend to a meeting before the actual drill, in a hotel conference room, which may also include a hot meal. Historically, Chevron has treated meals provided at these events to designated agency officials as "gifts" unless reimbursed in a timely manner. Chevron has disclosed the meals as activity expenses on Lobbyist Employer Reports (Form 635) when required, and participants have also been notified of these gifts for their potential disclosure on their Statements of Economic Interests (Form 700).

Earlier this year, officials with the OSPR questioned whether meals provided at the state mandated NPREP Drill should be considered gifts and drafted a letter to Chevron stating that:

"Drills should be considered 'operational.' Drills are not a party, they are not a conference, they are not a retreat and it is not training being provided by Chevron. Drills are a statutory and regulatory requirement and require OSPR staff to attend and the continuity of drill play is essential to a proper evaluation of the drill."

In light of recently adopted Regulation 18950.1, you seek assistance regarding the potential application of this regulation to food and beverages provided to governmental officials at the legally mandated drills.

ANALYSIS

The Act regulates the receipt of gifts by public officials³ in three ways:

First, the Act places limitations on the acceptance of gifts by certain public officials. The current limit is \$440 from a single source in a calendar year. (Section 89503; Regulation 18940.2.) This gift limit applies to all elected state and local officials or other individuals designated in Section 87200; all candidates for state, local, or judicial office; and any employee designated in his or her agency's conflict-of-interest code, as adopted pursuant to Section 87300, if the employee would be required to disclose the receipt of income or gifts from the source of the gift on his or her statement of economic interest. (Section 89503.)

Secondly, the Act imposes reporting obligations on certain public officials, requiring that any gifts that aggregate to \$50 or more from the same source received during the calendar year are disclosed on the officials' statements of economic interest. Reporting requirements apply to all officials listed in Section 87200 (Section 87202), all candidates for an office specified in Section 87200 (Section 87201), and employees designated in an agency's conflict-of-interest code as specified in the code (Section 87302(b)).

Finally, the Act prohibits any public official from making, participating in making, or using his or her position to influence the outcome of a governmental decision involving the donor of a gift or gifts with an aggregate value of \$440 or more provided to, received by, or promised to the official within the 12 months prior to the date the decision is made. (Sections 87100, 87103(e), Regulations 18700, 18703.4.)

A gift is "any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received." (Section 82028.) In adopting Regulation 18950.1, the Commission identified certain payments that do not confer a personal benefit on the official and do not constitute gifts or income to an official because of the nature in which the payments are made. Because there is no personal benefit, any payment meeting the criteria of Regulation 18950.1 and reported pursuant to the terms thereof is not a gift.

³ A "public official" is "every member, officer, employee, or consultant of a state or local governmental agency." (Section 82048.)

Regulation 18950.1 applies solely to travel payments, including food and beverages,⁴ that meet all of the following requirements:

- (1) The payment must be made directly to or coordinated with the government employer. (Regulation 18950.1(a)(1) and (b).)
- (2) The payment must be used for official agency business. (Regulation 18950.1(a)(2) and (c).)
- (3) The government employer must determine the official who will make use of the payment. (Regulation 18950.1(a)(3) and (d).)
- (4) The payment must not provide a personal benefit to the official who makes use of the payment. (Regulation 18950.1(a)(4) and (e).)
- (5) The duration of the travel is limited to that necessary to accomplish the purposes for which the travel was provided as determined by the governmental employer using the same standards imposed for travel paid with government funds. (Regulation 18950.1(a)(5).)
- (6) The government employer must report the payment as specified in Regulation 18950.1(f).

Of the criteria established under Regulation 18950.1, food and beverages provided to a governmental official attending a drill implicate questions regarding whether the payment is for the official agency business, the potential personal benefit to the official, and the requirement for the agency to report the payment.

Official Agency Business

In pertinent part of Regulation 18950.1, a payment is used for official agency business any time it is made for the travel expenses of an official for the purpose of “performing a regulatory inspection or auditing function that the governmental employer is mandated to perform” or “receiving training directly related to the official’s job duties and the payment is provided by an organization that commonly provides such training. (Regulation 18950.1(c)(2) and (5).) Based upon the facts provided, it appears that any governmental official attending a drill is either required to attend to evaluate the drill or will be there to receive training directly

⁴ A “payment for travel” for purposes of Section 89506 and Regulations 18950.1 through 18950.3 is “any payment that provides transportation to an official from one location to another location as well as a payment for lodging and food connected with the travel.” (Regulation 18950.) As clarified in Staff’s Memorandum to the Commission, Proposed Amendments to Regulation 18944 and Travel Regulations 18950 through 18950.4, dated August 12, 2013, the proposed definition of travel was not intended to “have a mileage limit.” Thus, a “payment for travel” for purposes of these provisions includes food and beverages even when the official’s work place is only a short distance from the event or meeting. (See *Keys Advice Letter*, No. 14-013.)

related to the official's job duties. Accordingly, any payment for food and beverages provided to a governmental official attending the drill will be made for official agency business.

Personal Benefit

Under Regulation 18950.1, a payment for travel meeting the other enumerated criteria must also not have a personal benefit on the official. Attempting to ensure that there is no personal benefit, the regulation requires that the travel be for purposes approved by the governmental employer under the same requirements applicable to travel using its own funds, the official must be representing his or her governmental employer in the course and scope of his or her official duties, and the expenses must be limited to no more than the expenses allowable for travel for agency business that would reasonably be paid at agency expense (except as specified in Regulation 18950.1(b) and (g)). Regulation 18950.1(b) permits the provision of food so long as the food is provided as part of the admission to the event, while all other payments for food must be made to the government employer pursuant to the employer's per diem travel policy. Similarly, Regulation 18950.1(g), states that the regulation does not restrict a payment for any lodging or food if the lodging and food is provided at a site where the official attends a widely attended meeting or conference and the value is substantially equivalent in value to the lodging or food typically made available to the other attendees.

For purposes of the drills in question, food and beverages provided to all individuals attending the drill would not confer a personal benefit on a government official so long as all other requirements in Regulation 18950.1 have been met. Moreover, the value of food and beverages would not be restricted under Regulation 18950.1 by the per diem policy of the official's employer, so long as the food and beverages are provided to all individuals attending the drill as part of the admission to the event. (Regulation 18950.1(b)) However, if food and beverages are provided to a limited group of those individuals attending the drill and are not part of the admission to the event, the food and beverages must be within the approved per diem rates for the official's agency. (See Regulation 18950.1(b).)⁵

Agency Reporting

Prior to the implementation of current Regulation 18950.1, any travel, including food provided in connection with travel, were presumed to confer a personal benefit on an official and constituted gifts to the official absent an exception. (See *Gault* Advice Letter, No. A-07-158.) In adopting Regulation 18950.1, the Commission created an exception to this presumption but expressly required the agency of the official receiving the payment to maintain a report detailing any payment and to make that report available for public inspection (Form 801). (Regulation 18950.1(f).) To the extent that the agency does not maintain a Form 801, payments for travel

⁵ We note that any time food is restricted pursuant to the employer's per diem policy under Regulation 18950.1(b), food is permissible so long as it is within the monetary thresholds established under the policy. It is not necessary that the food is actually permitted under the policy. For example, a state official is not prohibited from receiving a lunch, which is within the state's per diem rate for a lunch, at a one-day event notwithstanding the fact that the state's per diem policy does not permit a lunch at a one-day event.

and food are presumed to confer a personal benefit on the official and constitute a gift to the official barring any other applicable exception.

Chevron's Reporting

As a lobbyist employer, Chevron must treat any payment for food and beverages provided at a drill as a gift unless the agency of the official receiving the food and beverages has advised Chevron that it is reporting the payment pursuant to the regulation. (See *Keys Advice Letter, supra.*)⁶ To the extent that payments for food and beverages must be considered gifts to the officials, Chevron, a lobbyist employer, is required to report the payments as activity expenses pursuant to Sections 86111 and 86116(f) and must notify the beneficiary of the gift as required by Section 86112.5. If the recipient's agency has advised Chevron that it is reporting a payment pursuant to the regulation, the payment is not a reportable activity expense. However, Chevron must include the payment in reporting the "total of all other payments to influence legislative or administrative action" under Section 86116(i).

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

⁶ Additionally, you have asked whether previous advice issued in the *Vallance Advice Letter*, No. A-09-096, which found no personal benefit for food provided to state at offshore oil platforms while performing inspections and testing pursuant to state regulations, has been superseded by Regulation 18950.1. As the Commission expressly addressed travel and food provided during a regulatory inspection or audit in Regulation 18950.1(c)(2), we find that the regulation applies in these circumstances and requires an agency report to rebut the presumption that the food provided confers a personal benefit on the official.