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March 11, 2002

Karen Getman, Chair
and Commissioners
Fair Political Practices Commission
428 J Street, 8th Floor
Sacramento, CA 95814

Re: Proposed Emergency Regulation 18572 (Lobbyists Contributions)

Dear Ms. Getman and Commissioners:

This firm represents the Institute of Governmental Advocates ("IGA") a trade association representing the interests of registered lobbyists, lobbying firms and lobbyist employers in California. As you know, IGA has challenged the constitutionality of Government Code section 85702. We continue to believe that the prohibition on the making of contributions by lobbyists unfairly and unconstitutionally singles-out a class of professionals that are vital to our system of representative democracy.

Thus, we encourage you to narrow the application and scope of the ban on contributions in order to lessen the impact on constitutionally protected activities. We have expressed these concerns to you in the past and have worked with your staff in developing the proposed regulation. We appreciate their efforts.

Generally, we concur with the staff's analysis and proposed regulation, with one exception. We do not believe that subdivision (c) is statutorily authorized, as outlined more fully below. We also believe that greater clarity can be provided with the use of language that more closely follows the language of section 85702 and former regulation

section 18626, which serves to define terms used in the statute.[1] In this regard, we have attached a proposed revision to the staff's proposed language for your consideration and a copy of the former regulation.

Analysis

Section 85702 only prohibits contributions to specified candidates "from a lobbyist." That term has been previously defined by the Commission to mean the lobbyist's personal funds. Any extension of this ban by reference to the "affiliated entities" statute (Gov. Code, § 85311) is improper.

The reasons why we believe this interpretation is correct, are twofold. First, section 85702 clearly applies only to "lobbyists." It does not apply to "lobbyist employers," "lobbying firms," "persons," "entities" or any other term defined by the Political Reform Act. The term "lobbyist" is a defined term. Section 82039 makes it clear that a lobbyist is an "individual." Thus, the contribution ban only applies to a sub-set of "individuals."

The affiliation statute, section 85311, on the other hand, applies to "persons." The term "person" can include an "individual" and an "entity." Indeed, the purpose of section 85311 is to determine when an "individual" and an "entity" are the same "person" for purposes of the contribution limits. It is important to note that the contribution limits sections of Proposition 34 apply to "persons." It is equally clear that section 85311 does not require affiliation and aggregation of two or more "individuals." Thus, section 85311 can never apply to a ban on contributions by individuals alone.

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[1] For example, the staff's proposal under subdivision (a) uses the term "covered elected state officer" presumably to refer to such officers and candidates that the lobbyist is registered to lobby. However, neither the statute or the PRA defines the term "covered." Moreover, the concept provided for in the statute is not ambiguous and needs no clarification.

Furthermore, had the authors of Proposition 34 wanted to extend the ban on contributions to entities "directed or controlled" by lobbyists, it would have been easy to do by use of those words.

Second, legislative history leads to the unescapable conclusion that the Legislature and voters understood that the ban only applies to the "personal funds" of a lobbyist.

A simple comparison between the language added by Proposition 34 with the language repealed from Proposition 208 makes the point. After the adoption of Proposition 208, which contained a ban on contributions "from, through, or arranged by a lobbyist," the Commission adopted a regulation defining each of those three terms. (former 2 Cal. Code of Regs., § 18626(a) copy attached.)

Proposition 34 specifically and directly repealed the terms "through" and "arranged by" from the ban on contributions, leaving only the term "from."[2]

Both the Legislature and voters are presumed to know the meaning of defined terms when those terms are used in new legislation. (*In re Lance W*, 37 Cal.3d 873, 890, fn. 11 (interpreting a provision of Proposition 8).) The Commission has previously

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[2] Section 85702 was added by Proposition 34 to read: An elected state officer or candidate for elected state office may not accept a contribution ***from*** a lobbyist, and a lobbyist may not make a contribution to an elected state officer or candidate for elected state office, if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer.

Former section 85313(c) added by Proposition 208 and repealed by Proposition 34 read: No elected officeholder or officeholder account shall solicit or accept a contribution to the officeholder account ***from, through, or arranged by*** a registered state or local lobbyist or a state or local lobbyist employer if that lobbyist or lobbyist employer finances, engages, or is authorized to engage in lobbying the governmental agency of the officeholder. (emphasis added.)

defined the term "from a lobbyist" to mean contributions "made from the lobbyist's personal funds or resources..." (former 2 Cal. Code of Regs., § 18626(a)(1)). Thus, it seems clear as a matter of legislative history and as a matter of statutory construction that section 85702 only bans contributions from the lobbyist's personal funds or resources. Such an analysis does not leave a void in the contribution prohibition. Indeed, most of the policy questions raised by staff through reference to the "affiliated entity" statute are addressed more easily and properly by defining the term "personal funds."

The staff correctly concludes that a contribution made by a non-lobbyist spouse from funds held in a separate or joint checking account is not attributed to the lobbyist under the Commission's long-standing regulation. (2 Cal. Code of Regs. § 18533.) Indeed, this exception was provided in the Commission's prior regulation defining the term "from a lobbyist."

The staff is also correct that the ban would apply to the business of a sole-proprietor lobbyist, because all funds of the business are in fact the "lobbyist's personal funds or resources."

Staff is also correct that the ban would apply to a lobbying firm "wholly owned" by more than one lobbyist, since the resources of the firm would consist entirely of the personal resources of lobbyists.

Finally, staff is correct that the ban would apply to a PAC comprised "solely of lobbyists" because, here too, the PAC's only funds consist of the personal resources of lobbyists.

However, in a mixed business, a mixed lobbying firm, or a mixed PAC, where the resources of the entity are attributable both to lobbyists and non-lobbyists, contributions from such funds are not made from the lobbyists' personal funds or resources, and thus the ban would not apply.

Such an interpretation is 1) consistent with the only legislative intent that you have; 2) consistent with basic rules of statutory construction; and 3) furthers the policy

concerns expressed by the Commission and staff by prohibiting contributions made from the personal funds and resources of an individual lobbyist through an entity consisting entirely of the personal funds or resources of a lobbyist. Furthermore, such an interpretation does not rely on the improper application of section 85311 in order to achieve the same objective.

Moreover, by attempting to "bootstrap" the affiliation statute into section 85702, the staff's proposed regulation (subdivision (c)) confuses the "directs and controls" test by referencing the funds of the entity rather than the contribution made. Under section 85311, the analysis is on the individual that directs and controls the making of a contribution, not the individual that directs and controls the funds of an entity. Thus, subdivision (c) as presently written is incorrect and would invalidate prior advice given by the commission (see *Churchwell Advice Letter* A-01-115).

Finally, we do not believe the staff's proposal to include a prohibition on laundering contributions through an "intermediary" is necessary, since section 84301 already prohibits money laundering, whether the purpose is to evade a contribution limit or a contribution prohibition.

If you have any further questions, I will be prepared to respond to them at the Commission's March meeting. Thank you for your consideration of these comments and the revisions proposed herein.

Very truly yours,

Thomas W. Hiltachk

TWH:lc
Enclosures

1333.01

IGA PROPOSED AMENDMENTS UNDERLINED AND ITALICIZED.

18572. Lobbyist Contributions - Making a Contribution Defined.

For purposes of Section 85702 the following terms have the following meanings:

(a). a contribution is "from a lobbyist" when the contribution is made from the personal funds or resources of the lobbyist.

(b) a candidate "accepts a contribution" when he or she or his or her controlled committee deposits a contribution from the personal funds or resources of a lobbyist prohibited from making a contribution.

(c) "personal funds or resources" means

(1) funds possessed by a lobbyist, excluding funds contributed by a non-lobbyist pursuant to 2 Cal. Code of Regs. section 18533;

(2) funds of a business entity, including a lobbying firm, which is wholly-owned by a lobbyist or lobbyists;

(3) funds of a committee comprised solely of contributions from lobbyists.

~~(a) A lobbyist makes a contribution prohibited by Government Code section 85702 when he or she mails, delivers or otherwise transmits to a covered elected state officer, a candidate for elective state office or his or her controlled committee, or to a committee primarily formed to support or oppose such a candidate, a contribution as defined in Government Code section 82015 and 2 Cal. Code Regs. section 18215, and the contribution is made from the lobbyist's personal funds or assets. [**Decision 1:** A contribution will be deemed to be made from a lobbyist's personal funds or assets when~~

~~the contribution is made from assets which are the personal property of the lobbyist, unless pursuant to 2 Cal. Code Regs. section 18533 the contribution is attributed to another person.]~~

~~[**Decision 2:**~~

~~(b) In addition to a lobbyist's personal funds, a lobbyist is deemed to make a contribution prohibited by Government Code section 85702 when any of the following occur:~~

~~[(1) The contribution is made by a business entity, including a lobbying firm, wholly- owned by the lobbyist, and the lobbyist directs the making of the contribution.]~~

~~[(2) The contribution is made by a committee comprised solely of lobbyists.]~~

~~[(3) The contribution is made by a third party acting as an intermediary on behalf of the lobbyist within the meaning of Government Code section 84302 and 2 Cal. Code Regs. section 18432.5.]~~

~~[**Decision 3:**~~

~~(c) Contributions made by a lobbyist from funds under the lobbyist's direction and control will be attributed to the lobbyist in accordance with the provisions of Government Code section 85311.]~~

NOTE: Authority cited: Section 83112, Government Code.
Reference: Sections 82015, ~~[85311]~~ and 85702, Government Code.

Finding of Emergency

The Fair Political Practices Commission finds that an emergency exists and that

amendment of the foregoing regulation is necessary for the immediate preservation of the public peace, health, safety or general welfare. A statement of the facts constituting such emergency is:

Statement of Facts

On November 7, 2000, the voters approved Proposition 34, which makes significant additions and amendments to the Political Reform Act (Government Code section 81000 et seq.). The statutory changes affect the conduct of the political process at the state and local level, and also similarly affect the exercise of political rights by individuals, parties and organizations. Clarification and orderly implementation of these statutory changes by the Commission in emergency regulations are necessary to minimize disruption of the political process.

18626. Contributions from Lobbyists

(a) Contributions "from" a lobbyist.

(1) A contribution is from a lobbyist when the contribution is made from the lobbyist's personal funds or resources, except that if the contribution is made from a lobbyist's joint checking account, 2 Cal. Code Regs. 18533 shall be used to determine whether the contribution is from the lobbyist.

(b) Contributions "through" a lobbyist.

(1) A contribution is "through" a lobbyist when the cash, check, or other negotiable instrument by which the contribution is made is delivered or transmitted, by any means, by a lobbyist.

(2) Neither Government Code Sections 85704, 85313(c), nor this regulation shall be construed to forbid a lobbyist from attending a fundraising event using a ticket purchased by any person other than a lobbyist.

(c) Contributions "arranged by" a lobbyist.

(1) A contribution is "arranged by" a lobbyist when the lobbyist exercises primary control over the contribution, including the decisions whether to make a contribution, to whom to make the contribution, or the amount of the contribution.

(2) Neither Government Code Sections 85704, 85313(c), nor this regulation shall be construed to forbid a lobbyist from advising his or her client, in private communication, about contributions.

(d) Solicitation of a contribution from, through, or arranged by a registered state or local lobbyist, within the meaning of Government Code Sections 85704 and 85313(c), includes but is not limited to:

(1) Solicitations directed to a lobbyist for further transmittal or forwarding to the lobbyist's client or employer.

(2) Solicitations directed to a lobbyist's client or employer, but sent "in care of" the lobbyist.

(e) Registered state or local lobbyist.

(1) As used in Government Code Sections 85704 and 85313(c), "registered state lobbyist" means an individual who registers, or is required to register, as a lobbyist pursuant to Section 82039 and Chapter 6 of Title 9 of the Government Code.

(2) As used in Government Code Sections 85704 and 85313(c), "registered local lobbyist" means any individual who registers, or is required to register, as a lobbyist with a local government agency pursuant to an ordinance or other law.

(3) Government Code Sections 85704 and 85313(c) shall not be construed to apply to any individual not required to register as a lobbyist pursuant to Section 82039 and Chapter 6 of Title 9 of the Government Code, or pursuant to an ordinance or other law.

(f) State or local lobbyist employer.

(1) As used in Government Code Section 85313(c), "state lobbyist employer" means any person who qualifies as such pursuant to Section 82039.5.

(2) As used in Government Code Section 85313(c), "local lobbyist employer" means any person who is defined as such by a local government agency pursuant to an ordinance or other law.

(g) Identifying the government agency or agencies for which a lobbyist finances, engages, or is

authorized to engage in lobbying.

(1) A registered state lobbyist finances, engages, or is authorized to engage in lobbying a particular government agency, within the meaning of Government Code Sections 85704 and 85313(c), if:

(A) The lobbyist incurs a reporting obligation with regard to an activity expense or activity expenses attributable to an official or employee of the government agency pursuant to Title 2, California Code of Regulations Section 18611.

(B) Where the lobbyist is a partner, owner, or officer of a lobbying firm, any government agency required to be identified in the lobbying firm's registration as required by Government Code Section 86104(d), unless the lobbyist's certification identifies other agencies with which the lobbyist engages in or is authorized to engage in direct communication.

(C) Where the lobbyist is employed by a lobbyist employer, any government agency required to be identified in the lobbyist employer's registration as required by Government Code Section 86105(e), unless the lobbyist's certification identifies other agencies with which the lobbyist engages or is authorized to engage in direct communication.

(2) Whether a registered local lobbyist finances, engages, or is authorized to engage in lobbying a particular government agency or agencies shall be determined under the ordinance or other law pursuant to which the lobbyist registered. If, under the relevant ordinance or other law, it is impossible to determine conclusively that a registered local lobbyist finances, engages, or is authorized to engage in lobbying a particular government agency or agencies, then Government Code Sections 85704 and 85313(c) shall not be construed to apply to that lobbyist.

Note: Authority: Section 83112, Gov. Code

Reference: Sections 82039, 82039.5, 85313(c), 85704, 86104(d), and 86105(e). Gov Code

History

(1) New section filed 8-4-97; effective upon filing.