

California Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery and Rotunda

From: Zackery Morazzini, General Counsel
Sukhi K Brar, Commission Counsel

Re: Proposed Adoption of Regulation 18730.1

Date: August 31, 2012

I. Introduction

At the May 2012 Commission meeting staff presented a memorandum to the Commission discussing the need to acknowledge jurisdictional restrictions on the reporting of gifts by designated employees in order to comply with established case law. Staff now proposes the Commission adopt a regulation that provides direction to agencies to tailor conflict of interest codes in a way that designated employees are not required to report gifts from outside a designated employee's agency's jurisdiction when such gifts do not have the potential to affect any action the designated employee make take in his or her official capacity.

II. Background and Current Law

In order to effectuate the Political Reform Act's (the "Act"), disclosure requirements and to ensure that the public is made aware of potential conflicts of interest, Section 87300 requires every agency to adopt and promulgate a conflict of interest code covering agency officials who engage in governmental decision making. An agency's conflict of interest code must specifically designate the employees of the agency who are required to file a statement of economic interests, disclosing their reportable investments, business positions, interests in real property, and sources of income.

Section 87309 provides that "No Conflict of Interest Code or amendment shall be approved by the code reviewing body or upheld by a court if it (a) fails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented..."

Existing case law states that financial disclosure laws must meet certain constitutional standards, and overbreadth must be avoided. (See *City of Carmel-by-the Sea v. Young* (1970), 2 Cal.3d 259; *County of Nevada v. MacMillen* (1974), 11 Cal. 3d 662.)

In *Carmel* (*supra*), the California Supreme Court held that a financial disclosure law that generally required every public official and candidate for state or local office to file a statement disclosing the nature and extent of his or her investments in excess of \$10,000 (excluding homes used for personal or recreational purposes) as well as those of his or her spouse and minor children, undertook an overbroad intrusion into the right of privacy and thereby impermissibly restricted the right to seek or hold public office or employment.

Four years later, in *County of Nevada* (*supra*) the same court addressed a new financial disclosure law and found that it had been "specially tailored to meet and satisfy the primary concerns of our *Carmel* ruling." The court explained that its "major objection" to the provisions

considered in the *Carmel* case was that “No effort is made to relate the disclosure to financial dealings or assets which might be *expected* to give rise to a conflict of interest; that is, to those having some rational connection with or bearing upon, or which might be affected by, the functions or jurisdiction of any particular agency, whether statewide or local, or on the functions or jurisdiction of any particular public officer or employee.” (*County of Nevada, supra*, p. 671 [emphasis added].)

In 1979, the California Supreme Court considered the definition of income in the Act in light of its previous decisions in *Carmel* and *County of Nevada* (See *Hays v. Wood*, (1979) 25 Cal. 3d 772.) The case dealt primarily with issues concerning the source of income and the disclosure of the names of clients paying attorneys and brokers who were also public officials required to file a Statement of Economic Interests. The court found that “the provisions of the Act were within the guidelines established by *City of Carmel* and *Nevada*,” stating as one of the reasons for its finding:

“As originally enacted, the Act’s current definition of reportable ‘income’ encompassed, with specified exceptions, ‘income of any nature from any source.’ (citations omitted.) *Thus it failed to include a provision crucial to our validation of the 1973 statute – a limitation to income with substantial potential for influence on public duties.* Effective January 1, 1977, however, the section was amended to exclude ‘income received from any source outside the [official’s] jurisdiction’ if the entity constituting the income’s source neither plans to do business nor has done business within the jurisdiction in the two years preceding the report. By so confining reportable ‘income,’ the amended Act adopts an objective standard of material relevance to actual conflict of interest similar to that which we approved in *Nevada*. (11 Cal. 3d at pp. 669-670.)” (*Hays, supra*, p. 782, emphasis added.)

Because of the Commission’s previous interpretation that gifts cannot be limited by jurisdiction for full disclosure designated employees,¹ many conflict of interest codes that are currently in effect require the disclosure of gifts by designated employees in cases where there is no foreseeable potential conflict of interest. Staff has recognized the need, to incorporate the case law discussed above, as well as the requirements of Section 87302, into the gift reporting requirements for designated employees.

III. Regulatory Changes

The proposed regulation addresses the gift reporting requirements for designated employees and provides direction to agencies when developing disclosure categories for conflict of interest codes. The regulation would implement guidelines that direct agencies to tailor conflict of interest code disclosure categories so that designated employees who report sources of gifts are not required to report gifts from outside the employee’s agency’s jurisdiction that are unlikely to influence the designated employee in his or her official capacities. Reporting of gifts received from sources within a designated employee’s agency’s jurisdiction would be further tailored through the disclosure categories developed for each agency’s conflict of interest code.

IV. Costs for Compliance

This regulation is not likely to increase costs for compliance.

¹ The “gifts from anywhere in the world rule only applies to Section 87200 filers and not designated employees where limitations on disclosure are required to relate to the job duties of the position.