

Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Casher, Eskovitz, Wasserman, and Wynne

From: Zackery P. Morazzini, General Counsel
Heather M. Rowan, Senior Commission Counsel

Subject: Proposed Amendment to Regulation 18239: Definition of Lobbyist

Date: September 9, 2013

Proposed Commission Action and Staff Recommendation

Regulation 18239 provides an interpretation for the definition of “lobbyist” found in Section 82039. The proposed amendment creates a limited exception, applicable only to placement agents, that allows knowledgeable people to attend meetings with public officials, but not register as lobbyists in certain circumstances.

Regulation 18239 defines lobbyist and is currently out of step with the real workings of placement agents who communicate with public retirement boards on behalf of an external manager. Updating Regulation 18239 to apply the “accompanying” exception to placement agents will recognize that those people who are most knowledgeable about a particular investment might not be placement agents who are required to register as lobbyists. The proposed change would extend the existing accompanying exception and would address an issue with people who register unnecessarily as lobbyists.

Background and Current Law

In the wake of a scandal involving the fees paid to placement agents by hedge funds and private equity firms seeking investment money from CalPERS, California enacted legislation in 2010 that includes “placement agents” in the definition of lobbyist under the Political Reform Act. (Section 82047.3.) Placement agents – the intermediaries who connect private money managers with pension funds like CalPERS and CalSTRS – must register as lobbyists with the state if they sell or market securities, assets, or services of an “external manager” to California state public retirement systems. In addition, persons acting as placement agents for potential investments by local public retirement systems in California must comply with local lobbying rules.

Since 2011 when the legislation came into effect, the Commission has been advising and interpreting these new provisions on a case-by-case basis. Also in 2011, the Commission added placement agents to the regulatory definition of lobbyist to comport with the statutory changes. At the time, the only exceptions that applied to placement agents were statutory. Staff received

many requests for advice regarding whether a person could accompany a placement agent to a meeting with a state public retirement system. Staff advised in the *Recht* Letter, No. I-11-015 that a person who accompanies a registered placement agent on an occasional basis and does so to provide specialized information need not register as a lobbyist.

Regulation 18239 allows a similar scenario for a registered lobbyist. That is, a person may attend a meeting or have occasional contact with a public official and need not register as a lobbyist, as long as the person attends in the company of a registered lobbyist and does not otherwise meet the definition of a lobbyist. The accompanying persons are generally knowledgeable about the topic at hand, and attend the meetings to provide further, often technical, information. They are not registered lobbyists and do not become registered lobbyists when they engage in direct communication with a public official to provide additional information, as long as they are accompanied by a registered lobbyist.

As noted above, Commission staff has extended this lobbyist “accompanying” provision to placement agents by advice letter, rather than via regulatory amendment. As an unintended result, many people attending meetings with placement agents to provide technical information to public officials are registering as lobbyists in California out of caution, rather than necessity. This over-registration makes quarterly reports more difficult than necessary, creates excessive registration in the Secretary of State’s office, and inhibits members of the public who want to see disclosure from obtaining relevant information. Staff proposes to codify this rule through regulatory amendment in order to clarify and publicize the rule and thereby reduce unnecessary registration.

During an Interested Persons meeting in July on the subject, staff received several comments that informed the current version of this draft. Attorneys from CalPERS were present and addressed some of the questions and also offered CalPERS’s recommendations for edits given the practical workings of CalPERS’s investment staff.

Proposed Action

Staff recommends that the Commission Adopt Amended Regulation 18239.

1 Amend 2 Cal. Code Regs. Section 18239 to read:

2 **§ 18239. Definition of Lobbyist.**

3 (a) Introduction.

4 (1) If an individual engages in direct communication, other than administrative
5 testimony, with a qualifying official for the purpose of influencing legislative or administrative
6 action on behalf of any person other than his or her employer, apply Section 82039 and
7 subdivision (b) of this regulation to determine if the individual is a lobbyist.

8 (2) If an individual engages in direct communication, other than administrative
9 testimony, with a qualifying official for the purpose of influencing legislative or administrative
10 action only on behalf of his or her employer, apply Section 82039 and subdivision (c) of this
11 regulation to determine if the individual is a lobbyist.

12 (3) Except as provided in Section 86300, if an individual is a “placement agent” as
13 defined in Section 82047.3, he or she is a lobbyist for purposes of the Act, regardless of the
14 definitions in subdivisions (b) through (d), below. An individual does not become a placement
15 agent under Section 82047.3 solely as a result of communicating with a state public retirement
16 system representative provided that the individual accompanies a registered placement agent
17 who represents that individual or his or her organization, is present only to provide additional
18 substantive information, and would not independently qualify as a placement agent under
19 Section 82047.3.

20 (b) A lobbyist is an individual who receives or becomes entitled to receive \$2,000 or
21 more in compensation in any calendar month for engaging in direct communication, other than
22 administrative testimony, with one or more qualifying officials for the purpose of influencing

1 legislative or administrative action.

2 (c) A lobbyist is an individual who spends one-third or more of the time, in any calendar
3 month, for which he or she receives compensation from his or her employer, engaging in direct
4 communication, other than administrative testimony, with one or more qualifying officials for
5 the purpose of influencing legislative or administrative action.

6 (d) Definitions.

7 (1) "Administrative testimony" means either of the following:

8 (A) Influencing or attempting to influence administrative action by acting as counsel in,
9 appearing as a witness in, or providing written submissions, including answers to inquiries, that
10 become part of the record of any regulatory or administrative agency proceeding:

11 (i) That is conducted as an open public hearing for which public notice is given;

12 (ii) Of which a record is created in a manner that makes possible the creation of a
13 transcript; and

14 (iii) Where full public access is provided to the record or transcript and to all written
15 material that is submitted as part of the record.

16 (B) Any communication made at a public hearing, public workshop, public forum, or
17 included in the official record of any proceeding, as defined in Section 82002(b) or (c), before
18 the California Public Utilities Commission.

19 (2) "Compensation" means any economic consideration, other than reimbursement for
20 reasonable travel expenses, i.e., expenses for transportation plus a reasonable sum for food and
21 lodging.

22 (3) "Direct communication" means appearing as a witness before, talking to (either by

1 telephone or in person), corresponding with, or answering questions or inquiries from, any
2 qualifying official, either personally or through an agent who acts under one's direct supervision,
3 control, or direction.

4 (A) Direct communication does not include any request for or provision of purely
5 technical data or analysis to an administrative agency by a person who does not otherwise
6 engage in direct communication for the purpose of influencing legislative or administrative
7 action.

8 (B) For the purpose of determining whether an individual qualifies as a lobbyist pursuant
9 to subdivisions (b) or (c), an individual does not engage in “direct communication” when he or
10 she meets or speaks with a qualifying official in the company of a registered lobbyist retained by
11 the individual or individual's employer or by a bona fide trade association or membership
12 organization of which the individual or individual's employer is a bona fide member.

13 (4) “Influencing legislative or administrative action” means communicating directly or
14 taking any other action for the principal purpose of supporting, promoting, influencing,
15 modifying, opposing, delaying, or advancing any legislative or administrative action.

16 (5) “Qualifying official” means:

17 (A) Any elected state official;

18 (B) Any legislative official;

19 (C) Any appointed, elected, or statutory member or director of any state agency;

20 (D) Any staff member of any state agency who makes direct recommendations to the
21 persons listed in subdivision (5)(C) of this subdivision, or who has decision-making authority
22 concerning such recommendations.

1 Note: Authority cited: Section 83112, Government Code. Reference: Section 82039,
2 Government Code.

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