



FAIR POLITICAL PRACTICES COMMISSION

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March 8, 2004

Amy Bisson Holloway
Department of Education
1430 N Street
Sacramento, CA 95814

**Re: Your Request for Advice
Our File No. A-04-043**

Dear Ms. Holloway:

This letter is in response to your request on behalf of the Department of Education for advice regarding the gift provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. Are payments for travel made by the Milken Family Foundation to Kim Edwards for her attendance at the National Education Conference subject to the gift limit and reportable?
2. Can these payments be made to the Department of Education, Ms. Edwards' employer, so that they are gifts to the agency under regulation 18944.2 rather than gifts to her?

CONCLUSIONS

1. The payments for travel made by the foundation are not subject to the gift limit but may be reportable gifts to Ms. Edwards under her department's conflict of interest code. (See discussion.)
2. The requirements of regulation 18944.2 cannot be met, so these payments will be gifts to Ms. Edwards.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

The Milken Family Foundation (“the foundation”) is a 501(c)(3) organization which funds the Milken Educator Awards awarded to teachers in various states including California. This organization does not provide funding directly to the State of California but works with the California Department of Education (“the department”) to administer this awards program with the assistance of a “State Milken Educator Coordinator” (“state coordinator”). The duties of the state coordinator include disseminating information and responding to questions about the program and coordinating the application and funding process. The state coordinator is a department employee who has no decision making authority with regard to the granting or awarding of funds from the foundation. In addition, the department has the authority to designate a new state coordinator at any time.

The current state coordinator is Kim Edwards, an employee of the department. Serving as a state coordinator is only one of a number of duties she performs. Ms. Edwards is designated in the department’s conflict of interest code under “All professional education classifications.” This classification must report according to “Category I” and “Category II” as described in the code. The code provides:

Category I.

Persons in this category shall report investments, business positions, and income to the extent that they know or have reason to know that the business entity in which the investment or business position is held or the source of income is a publisher, manufacturer, or vendor of instructional materials, educational materials, supplies, machines, equipment, food commodities or consulting services offered to educational institutions in the State of California. They shall also report any investments, business positions and income in or from any private school in the State of California.

Category II.

Persons in this category shall report investments, business positions, and income to the extent that they know or have reason to know that the business entity in which the investment or business position is held or the source of income is engaged in the performance of educational, research or professional consulting services, or publishes, manufactures, or sells supplies, books, machines, equipment, food commodities, or other items purchased by the Department.

The department has recently received an invitation from the foundation to have the state coordinator attend its National Education Conference to be held in Washington, D.C. from May 4, 2004 through May 6, 2004. The event is being held to honor the recipients of the 2003 Milken Educator Award. There will also be workshops designed to assist the state coordinators with their program responsibilities. Attendance at the

conference will allow the state coordinator to learn more about the award process and will be beneficial for agencies participating in the program.

The invitation was addressed to the California State Superintendent of Public Instruction. The invitation mentioned the current state coordinator, Ms. Edwards, by name by acknowledging her past contributions to the foundation. The invitation included the offer to pay for travel and hotel expenses, offering to purchase the ticket for Ms. Edwards's use and putting her hotel room on a master bill. Under this scenario, no money would be sent to the department to reimburse it for costs associated with Ms. Edwards's travel.

ANALYSIS

The Act requires a designated employee listed in an agency's conflict of interest code to report gifts on his or her statement of economic interests. (Section 87300 et seq.) A "gift" is defined as "any payment² that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received . . ." (Section 82028.)

In addition to the Act's disclosure requirements, the Act limits certain gifts to \$340 in a calendar year. (Sections 87200 - 87313; regulation 18940.2.) Specifically, under section 89503(c), no designated employee shall accept gifts in violation of the gift limit if the employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.

You have stated that Ms. Edwards is only required to disclose those economic interests described in Category I and Category II. You have not provided enough information for us to determine whether the foundation is a type of entity described in either category of the conflict of interest code. If the foundation *is not* described in either category, she is not required to report gifts from this nonprofit entity, and gifts from this entity to her would not be subject to the gift limit.

If the foundation *is* an economic interest listed in Category I or Category II,³ then both the gift reporting and gift limit rules apply to such payments unless another exception applies. (See below.)

² "Payment" means a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible." (Section 82044.)

³ Please note that although neither category specifically states that "gifts" shall be reported, the definition of "income" for purposes of the Act includes "any gift." (Section 82030.) Therefore, a gift from the sources described in the conflict of interest code would have to be reported. In addition, although "income" generally "does not include income received from any source outside the jurisdiction," this jurisdictional limitation does not apply to "gifts." (*Ibid.*)

Informational Material

Under regulation 18942(a)(1), “informational material” is not a gift and so is neither subject to the gift limit nor reportable. “Informational material” means:

“any item which serves primarily to convey information and which is provided for the purpose of assisting the recipient in the performance of his or her official duties or of the elective office he or she seeks. Informational material may include:

(a) Books, reports, pamphlets, calendars, periodicals, videotapes, or free or discounted admission to informational conferences or seminars.

(b) Scale models, pictorial representations, maps, and other such items, provided that where the item has a fair market value in excess of \$340, the burden shall be on the recipient to demonstrate that the item is informational material.

(c) On-site demonstrations, tours, or inspections designed specifically for the purpose of assisting the recipient public officials or candidates in the performance of either their official duties or of the elective office they seek. No payment for transportation to an inspection, tour, or demonstration site, nor reimbursement for any expenses in connection therewith, shall be deemed “informational material” except insofar as such transportation is not commercially obtainable.” (Regulation 18942.1.)

Because attendance at the conference will allow Ms. Edwards to learn more about the award process, payments for her admission constitute informational materials. Such payments made by the foundation are not gifts and are therefore not subject to the gift limit nor are they reportable, regardless of whether she must report payments from the foundation under the conflict of interest code.

Payments for transportation to the conference do not fall under this “informational materials” exception and will still be gifts to Ms. Edwards. (Regulation 18942.1(c).) In addition, the Act’s disqualification rules may be triggered. If the foundation ultimately becomes a source of gift(s) to Ms. Edwards (see section 87103, enclosed), she may become disqualified from making, participating in making, or influencing governmental decisions involving the foundation regardless of the department’s conflict of interest code. She should keep this in mind in deciding whether or not to receive travel payments from the foundation.⁴

⁴ We have enclosed the Commission’s publication “Can I Vote?” for Ms. Edward’s reference.

Travel Payments: Gifts to Ms. Edwards

As mentioned, if the foundation is covered by the department's conflict of interest code, the gift limit would apply to gifts received from the foundation. However, there are exceptions to the gift limit under certain circumstances.

Section 89506 provides, among other things, that payments, advances, or reimbursements, for travel reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, are not prohibited or limited if either the travel is in connection with a speech given or the travel is provided by a governmental agency or a bona fide nonprofit, 501(c)(3) organization, or an educational institution. (Section 89506(a).)

In particular, this section provides:

“(a) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence that is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, are not prohibited or limited by this chapter if either of the following apply:

¶...¶

(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. “ (Section 89506(b).)

Regulation 18950.1(b) further specifies:

“(b) Travel Provided By Governmental Entity or Charity. A payment made for travel, including actual transportation and related lodging and subsistence, is not subject to the prohibitions or limitations on honoraria and gifts specified in Government Code Sections 89501, 89502, or 89503 if:

(1) The travel is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy; and

(2) The payment is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private

educational institution, defined in Section 203 of the Revenue and Taxation Code, or by a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person that is domiciled outside the United States and that substantially satisfies the requirements for tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

Except as provided by California Code of Regulations, Title 2, Section 18950.3, any payment made for transportation, lodging, and subsistence, specified by subdivision (b), shall be reported in accordance with Government Code Section 87207(c)."

Payments governed by provisions of section 89506(a)(2) and regulation 18950.1(b) are not subject to the gift limit but must be reported⁵ with the source of the gift being identified.

In the situation you have presented, the foundation will be making a payment to Ms. Edwards for travel to the conference. If she must report payments from the foundation, then she should determine whether regulation 18950.1 applies. Because attendance at the conference will allow the state coordinator to learn more about the award process and will be beneficial for agencies participating in the program, we find that this travel is "reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy." Therefore, subdivision (b)(1) of regulation 18950.1 above is met. In addition, the foundation, a 501(c)(3) organization, meets the criteria of subdivision (b)(2). Consequently, *if* payments of travel received by Ms. Edwards from the foundation are gifts to her which must be disclosed, they would *not* be subject to the gift limit under regulation 18950.1(b).

Rules for "Gifts to An Agency"

Regulation 18944.2 provides that a payment which is a gift will be deemed a gift to a public agency, and not a gift to a public official, if all of the following requirements are met:

- "(1) The agency receives and controls the payment.
 - (2) The payment is used for official agency business.
 - (3) The agency, in its sole discretion, determines the specific official or officials who shall use the payment.
- However, the donor may identify a specific purpose for the agency's use of the payment, so long as the donor does not designate the specific official or officials who may use the payment.

⁵ These payments must be reported "in accordance with Government Code Section 87207(c)." (Regulation 18950.1(b).) Section 87207(c), enclosed, describes the manner in which such payments shall be reported.

(4) The agency memorializes the payment in a written public record which embodies the requirements of subdivisions (a)(1) to (a)(3) of this regulation set forth above and which:

(A) Identifies the donor and the official, officials, or class of officials receiving or using the payment;

(B) Describes the official agency use and the nature and amount of the payment; and

(C) Is filed with the agency official who maintains the records of the agency's statements of economic interests where the agency has a specific office for the maintenance of such statements, or where no specific office exists for the maintenance of such statements, at a designated office of the agency, and the filing is done within 30 days of the receipt of the payment by the agency.

(b) Notwithstanding subdivisions (a)(3) and (a)(4) of this regulation, a donation to a California public college or university for a specific research project which is received consistent with the requirements of California Code of Regulations, Title 2, Section 18702.4(c) and for meals received in the course of an official fundraising activity, which qualify under federal and state law for a deduction as a charitable contribution for educational purposes, will be deemed a gift to the college or university."

With regard to subdivision (a)(3), a donor may not designate the specific official or officials who may receive or use a payment. (*Rood* Advice Letter, No. A-02-261.) Invitations and letters from the donor may be probatory as to whether or not the payment was earmarked to specific officials; however, such invitations will not necessarily be the determinative factor. (*Ibid.*) In the past, we have advised that even if a payment was not earmarked by invitation for use by a specific official or officials, other facts may indicate that the payment was so earmarked; the totality of the surrounding circumstances are considered and not the invitations alone. (*Rood, supra; Kaye* Advice Letter, No. A-93-490.) For instance, we have advised that if an invitation is extended to specific officials and subsequently withdrawn in order to be reissued to the officials' agency, and if the agency designates the original invitees to attend, subdivision (a)(3) of regulation 18944.2 is not satisfied and the gift would be to the officials and not the officials' agency. (*McLaughlin* Advice Letter, No. A-96-199a; *LeRoy* Advice Letter, No. I-01-191.)

Under these rules, it is possible that a gift from the foundation could instead be considered a gift to the department. However, from the facts you have provided, it does not appear that the department, in its sole discretion, determined the identity of the official who will make the trip to the National Education Conference since it is clear that the foundation made the offer to pay specifically for travel by Ms. Edwards, the current state coordinator who had performed services relating to the foundation in the past as acknowledged in the foundation's invitation. Consequently, the designation of Ms.

Edwards as the recipient of the travel payments was not the result of an exercise of the department's sole discretion, and it is evident that the foundation exercised a voice in determining who was invited by identifying Ms. Edwards.⁶

Because subdivision (a)(3) cannot be met, the travel payments are not governed by regulation 18944.2 and will be gifts to Ms. Edwards.

Honoraria Provisions

Please note that section 89502(c) provides, in part, that no designated employee of a state government agency shall accept an honorarium from any source if the employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests. An honorarium means any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering. (Section 89501(a).)

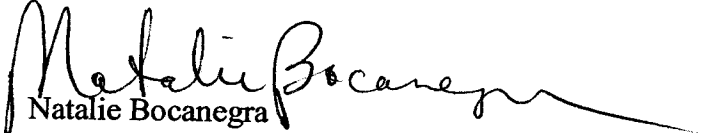
The prohibition on receiving honoraria includes several exceptions. (Section 89501; Regulations 18932.4 and 18932.5; *Leichter* Advice Letter, No. A-03-064; *Swanson* Advice Letter, No. I-98-169.) Regulation 18932.4(g), for example, states that any payment made for transportation, lodging and subsistence that is exempted from prohibitions on honoraria by section 89506 and regulations 18950, et seq, is not an honorarium.

Since payments for Ms. Edwards' travel to the conference would be governed by section 89506 and regulation 18950.1(b) as discussed above, the payments are not honoraria subject to the honoraria prohibition.

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

Sincerely,

Luisa Menchaca
General Counsel

By: 
Natalie Bocanegra
Counsel, Legal Division

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Enclosures

⁶ See also *McKenchnie* Advice Letter, No. I-94-190 (labeling of an office by the donor could constitute a gift made to a specific official or officials under the Act, depending on the facts; thus, the use of individual names or titles in descriptions of programs or solicitations is strongly discouraged).