



FAIR POLITICAL PRACTICES COMMISSION

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October 22, 2004

Randall W. Keen
Manatt Phelps & Phillips, LLP
1215 K Street, Suite 1900
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-04-219

Dear Mr. Keen:

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

QUESTIONS

1. May CPF pay the actual transportation and related lodging and subsistence costs associated with a proposed trade mission on behalf of officials in the Schwarzenegger administration, consistent with the Act's gift limits?
2. Who would be the source of the gift if CPF solicited and accepted donations from private entities to defray the costs of the trip, and if CPF directs and controls the use of the donations, and the individuals do not earmark or direct their payments to any clearly identified officials?
3. May CPF extend an offer to the Governor's administration to pay for the trade mission, but consistent with regulation 18944.2, allow the Governor's administration in its sole discretion to determine which specific officials may participate in the trade mission?

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

4. Would payments to the economic development and trade promotion account established by the Secretary of Business, Transportation and Housing "for the purposes of promoting international trade and investment," be subject to the gift limits of the Act?

CONCLUSIONS

1. The payments would be exempt from the gift limits of the Act.
2. CPF will be considered the source of the gift to the Governor and his staff unless the private entities direct and control the use of the payment as a gift to the Governor and his staff.
3. So long as the donors and donations comply with regulation 18944.2, the payments will not be "gifts" to public officials.
4. As long as the donors and donations comply with regulation 18944.2, it will not change the conclusion to question 3, even if the payments are made to the economic development and trade promotion account established by the Secretary of Business, Transportation and Housing.

FACTS

The California Protocol Foundation is a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code. According to its articles of incorporation, the foundation "engage[s] in charitable and educational activities...that lessen the burdens of government." The foundation was established in 2001 and raises funds to conduct a variety of activities. For example, the foundation has conducted receptions for foreign dignitaries, conducted trade meetings, and promoted California to foreign countries. These functions have reduced the need of the state budget to conduct these activities at a time of limited state resources.

In furtherance of the foundation's goals, the foundation would like to provide financial assistance to the administration to support the administration's recently-announced plans to conduct a trade mission to Japan in mid-November. While the foundation would provide funding for the trade mission, the foundation would not necessarily designate or request that any specific person in the administration go on the trade mission. The foundation would pay for the travel, subsistence, and lodging for some or all of the administration officials on the trade mission. Although an exact budget has not been set, the foundation may pay for a chartered jet, and the foundation anticipates that the total cost could approach five hundred thousand dollars.

The foundation would fund the trip from its existing funds, supplemented by donations that would be solicited from a variety of private sources, including businesses with an interest in trade with Asia, and individuals, other foundations, and businesses with no specific interest in trade with Asia or in the trade mission itself. It is expected

that the donations would range from \$10,000 to \$50,000. The donors would understand that their donations may be used for the trade mission, or that their donations may be used for other foundation activities. The donors will not designate or request that any specific person in the administration go on the trade mission. Some of the donors may also go on the trade mission and they would separately pay for their share of expenses. Because the foundation is organized under section 501(c)(3) of the Internal Revenue Code, the contributors will expect that their donations to the foundation will be tax deductible as a charitable expense.

In the alternative, CPF would solicit payments to the economic development and trade promotion account established by the Secretary of Business, Transportation and Housing "for the purposes of promoting international trade and investment."

ANALYSIS

1. Payments for Travel

The Act prohibits certain public officials from accepting gifts from any single source in any calendar year with a total value of more than \$340.² (Section 89503; reg. 18940.2.) The Act also states that any person who *makes* a gift in violation of the gift limit is liable in a civil action for an amount of up to three times the amount of the unlawful gift. (Section 89521.) A gift is defined as "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(a).) The Governor and designated employees in the Governor's office are subject to the gift limits of the Act. (Section 89503(a) and (c).)

However, where a gift is a gift of travel, section 89506 controls whether the gift is subject to the gift limit. (Section 89506(b).) Section 89506 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:

"(1) The travel is in connection with a speech given by the elected state officer, local elected officeholder, candidate for elected state office or local elected office, an individual specified in Section 87200, member of a state board or commission, or designated employee of a state or local government agency, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech, and the travel is within the United States.

² The gift limit is adjusted biennially to reflect changes in the Consumer Price Index. (Regulation 18940.2(a).)

“(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.”

It appears that the trade mission described in your letter is reasonably related to an issue of state, national, or international public policy pursuant to the exception in section 89506. Moreover, you stated that the CPF is a charitable organization formed pursuant to Internal Revenue Code Section 501(c)(3). Consequently, the gift will be exempt from the limits of the Act.³

2. Third Party Payments for Travel

In determining the treatment of the payments, it is necessary to determine who the source of the payments is. We have advised that under some circumstances it is appropriate to pierce through an organization which appears to be the source of a gift, to the actual donors of funds used to provide the gift. We have said that donors of gifts who utilize intermediary organizations for channeling donations to officials are the true donors to the officials. (*Katz* Advice Letter, No. I-90-269; *Harper* Advice Letter, No. A-87-088.)

“A person is the source of a gift if the person makes a gift to an official and is not acting as an intermediary.” (Regulation 18945(a).) If a person makes a payment to a third party and in fact *directs and controls* the use of the payment to make a gift to a clearly identified official, the person is the source of the gift to the official. (Regulation 18945(a)(1).) Thus, the CPF will be considered the source of the gift to the Governor and his staff unless the private entities direct and control the use of the payment to make a gift to the Governor and his staff. So long as this is not the case, the source of the gift to the Governor and his staff is the CPF, and not the private entities.

3. 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 receipt of a gift of free travel and accommodations may still be reportable and may result in a conflict of interest for the officials in future decisionmaking. However, these obligations would be on the official, and not the donor and therefore, we cannot advise you with respect to these issues.

“(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.

“(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.”

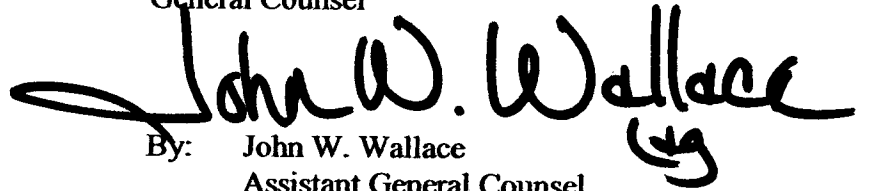
With regard to subdivision (a)(3), a donor may not designate the specific official or officials who may receive or use a payment. (*Rood* Advice Letter, No. A-02-261.) In the past, we have advised that even if a payment was not earmarked by invitation for use by a specific official or officials, other 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.) As noted above, it appears that facts suggest that specific officials may receive the payments and therefore this exception would not apply.

If the donors and donations did comply with regulation 18944.2, it would not change the conclusion to question 3 even if the payments are made to the economic development and trade promotion account established by the Secretary of Business, Transportation and Housing rather than the Governor's office. We have concluded that payments from the economic development and trade promotion account fall within the exemption of section 89506 and are not reportable by the Governor. (*Kolkey* Advice Letter, No. A-98-067.)

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

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in black ink that reads "John W. Wallace". The signature is written in a cursive style with a large, sweeping initial "J".

By: John W. Wallace
Assistant General Counsel
Legal Division

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