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November 9, 2011

Chair Ann Ravel and Commissioners
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

RE: Agenda Item 25: Amendment of Regulations 18940 through 18950.4 – Gift
Regulation Project

Dear Chair Ravel and Commissioners:

On behalf of the League of California Cities City Attorneys FPPC Committee, I submit this letter for comment on the above-referenced agenda item. Our Committee has worked extensively over the past months in support of the Commission's efforts to improve and clarify the gift regulations. We have participated in the IP meetings, and had numerous telephone conferences with your staff to provide input to and suggestions on draft revisions. We have also sought the advice of ethics staff from some of the larger cities, and recently met with the California Political Attorneys Association on this subject to share our interests and perspectives with that organization.

First, it is important to state that we truly appreciate the collaborative approach afforded this important project. You have provided unprecedented access to staff, and Mr. Lenkeit has been responsive, patient, thoughtful, and open to suggestions to improving the drafts, while at the same time insuring the Commission's interests are respected. In our view this collaborative approach should serve as a model as the Commission advances its Regulation Clarification project in the coming year.

Addressing the draft before you, there is no doubt that the proposed amendments substantially advance the Commission's interest in adopting clearer rules that are easier to apply than those we currently live with. We also believe that after the Commission review on the 10th, the end product of all this effort will be well served by some final refinements before adoption. If the Commission agrees, our group is committed to make ourselves available to participate in a quick turn around time toward that end.

Last week, we were advised that the draft which was published as part of the agenda will move forward without the "personal benefit" definition [18940.1(f)] and the regulations pertaining to travel. Our understanding is that these topics will be separately studied and brought back for Commission action in the near future. We do offer the following comments and suggestions based on the latest draft of the regulations. Please know that while these comments may appear lengthy, there are many more proposed amendments we wholeheartedly support. Our comments and proposed revisions are as follows:

1. In 18940(a), consider adding the words: "the forgiveness of a debt or obligation and" after the words: "[A] gift includes. . ." in line 4 of that regulation.
2. In 18940(b), consider adding a reference cite to the income section at the end.
3. 18940.1 is probably not needed and may provide more confusion than clarity. "Consideration" has a legal definition and is understood to mean something of value given in exchange for something else. The current wording in the draft is confusing, and appears to be attempting to state that consideration need not be given in exchange for benefits that are not personal. We do not see this as necessary.
4. In 18940.1(g) "Rebate or Discount" is: (1) unnecessary; (2) more regulatory than definitional; and (3). seems to amend and broaden the statute. Public officials get offered discounts all the time. They get offered discounts to events, dinners and meetings/speeches. The statute says that those discounts are gifts unless offered to the public—in the regular course of business. So a discount offered only to public officials would not qualify as a non-gift. The proposed regulation would authorize such discounts.

Common sense would support a view that offering discounts to predominantly public officials or only nominally to members of the public should also not be considered a non-gift. If the Commission wants to pursue a definition, it seems like the term that should be defined is "made in the regular course of business," and not "rebate or discount." We would offer the following:

"Made in Regular Course of Business." A rebate or discount as set forth in Section 82028 is "made in the regular course of business" when it is offered to the public at large, and not when an offering is made to a select group comprised of only public officials, or predominantly public officials.

5. In 18941 add the words "the official's agent, family member," after the word "official" at the end of line 3, since otherwise it could be read as limiting the qualifying receipt by the family member to be limited to situations where it is actually a gift to that family member.

6. In 18942(B)(ii), Home Hospitality add the words "and otherwise qualifies for this conclusion" after the word "host" at the end of line 1; and add: "or the payment otherwise does not qualify for this exclusion," since there can be otherwise disqualifying factors (e.g., the host takes a tax deduction for the hospitality).

8. We think that gift exception 18942(13) needs to be discussed. We have been (mistakenly perhaps) advising our clients that this exception is limited to bona fide competitions (e.g., an essay contest), not raffles, drawings, or games of chance. We believed we were in line with the Commission's views on this and recognize that some of the advice letters may now be superseded by the adoption of 18944.2 Agency Raffles and Gift Exchanges.

Public officials routinely attend conferences where vendors offer to have them drop their business cards in the hat or fishbowl for a drawing. The mechanics of the drawing are no different from the facts leading to the advice in letters A-01-225 and I-10-122. While those letters dealt with worthy endeavors, raffle drawings and door prizes are not bona fide competitions. They are lotteries or games of chance either prohibited or allowed by the California penal Code.

We think that the words: and shall not include: lotteries, raffles or games of chance".

It appears the intent is to create an exception that would permit public officials to participate in lawful raffles operated to raise funds for charitable purposes. We suggest an exception be added to make this clear, and distinguish this activity from bona fide competitions.

9. In 18942.1, we believe that sub-section (c) deals with "transportation" which is travel and may want to be considered as part of the travel study.

We also note that the statute [82028(b)(1)] says: "[N]o payment for travel or reimbursement for any expenses shall be deemed "informational material".

Recognizing the need to accommodate special trips to inspect remote public facilities, perhaps this section could be relocated. If the Commission determines to do so, we suggest narrowing the draft slightly, by taking (c)(1) and incorporating that phrase into subsection (3) [the new (2)] to read as follows:

(2) The transportation is provided solely at the site of an on-site demonstration, tour and inspection and substantially assists in the conveyance of the information.

This allows for the ride through Jurassic Park in authorized vehicles, but eliminates (hopefully) the complimentary ride in Airship California.

10. Definition of Home Hospitality. As drafted, 18942.2, tracks the expansion of this concept in advice letters. However, the result of adopting this proposed regulation

will be to formally amend the gift statutes. Our Committee was not in support of the expansion.

It is important to acknowledge that this is one of the key exceptions to the definition of gifts, and it is perhaps the most prominent one which cannot be traced to the statute. The exception is supposed to allow for normal social interactions which occur between people---going to someone's house for dinner and "occasional lodging".

Creating this exception makes sense when the exception is narrow. We do not think the exception is consistent with the purposes of the Act if it is expanded to vacations, yachts and timeshares. We believe that if the exception is narrowed as we suggest, the normal interactions of a dinner at someone's home can be accommodated, even when the host is someone who does business with the official's agency. We cannot get there when the exception includes vacation homes and yachts.

We can support a definition as follows:

means any benefit received by the official consisting of food, typical home entertainment, or occasional overnight lodging provided by an individual in the individual's home when the individual is present. The home can include a facility in which the individual has a right-to-use such as a community clubhouse for the normal benefits of home hospitality. Any benefit received, other than the use of the premises by any guests of the official other than the official's spouse and children who are present at the request of the official or the official's agent, are gifts to the official.

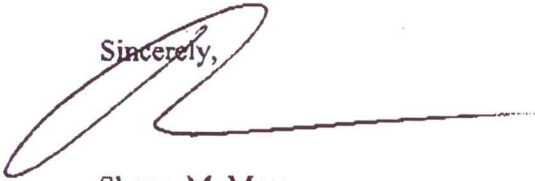
As far as the limiting OPTION offered, if the Commission believes that one week stays in a vacation rental should be accommodated, we suggest that you (1) make it reportable; and (2) establish special valuation rules so the official can comply with the statutory gift limit.

11. Valuation of Air transportation: We believe that existing regulation 18946.5 gets it right and the proposed amendment is not in the best interests of good government and otherwise is unworkable. Private air travel is never mainstream and trying to figure out the cost of first class airfare is impossible. It will depend on when you book it, the carrier you choose and how many first class seats remain available. Sometimes a first class upgrade can be as low as \$50, while a first class ticket can be several thousand. Consider the public's inability to provide their necessary oversight. An official is offered Gulfstream travel to New York. He checks the first class fare two days before the trip and finds that US Airways is offering a first class upgrade on their redeye for \$200. He enters the US Airways fare and the upgrade on his Form 700, in March of the next year -- is it possible for the public to provide its checks and balances?

In closing, I would like to again thank you and your staff for providing the opportunity to collaborate with the Commission in its important work to draft regulations which provide

clear direction to the regulated community, while at the same time carry out and implement the policies adopted in the Act. We look forward to continuing to work with you in this effort and in the larger Regulation Clarification project.

Sincerely,

A handwritten signature in dark ink, consisting of a large, stylized initial 'S' followed by a horizontal line extending to the right.

Shawn M. Mason
City Attorney of San Mateo
Chair, League of Cities FPPC Committee