



TO: William J. Lenkeit, Esq.
Zackery P. Morazzini, Esq.
Fair Political Practices Commission

FROM: Chip Nielsen

DATE: November 1, 2011

RE: Regulations 18950 - 18950.3

I am very aware and supportive of your considerable and diligent work on these proposed changes to the FPPC's Gift and Travel Regulations and of your extensive communications with all those persons mentioned in your October 31, 2011 memo, including two of our partners. Last night I read that memo; it is excellent, and I comment on it later in this memo.

My own and only serious reservation is your decision to leave 18950.3 as the only Travel Regulation.

A. Regulations 18950 - 18950.1

I believe that Regulations 18950 and/or 18950.1 should not be rescinded permanently and that now or later they should provide vital information to persons trying:

(1) to understand the rules for payments made for "travel," both when officials are making speeches (Government Code 89506) and when officials are otherwise traveling on official business that does not include speeches (18940(a) and 18940.1(f));

(2) to understand that "travel" in the PRA means more than just the transportation to and from the location of the speech/panel/seminar/official business;

(3) to understand the different rules for travel in California, throughout the rest of the United States and outside the United States;

(4) to understand notwithstanding that the "informational materials exception" (82028(b)(1) and 18942(a)(1)) does not include "travel," this

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does not mean that travel to become “informed” is prohibited (we need more listeners and fewer talkers); and

(5) to find the definition of “speech given,” which is currently hidden in Regulation 18931.1 (one of the honoraria regulations).

By leaving 18950.3 as the only “Speeches” Regulation, and a minor one at that, the FPPC’s excellent “Fact Sheet” on “Limitations and Restrictions on Gifts, Honoraria, Travel and Loans” will become the de facto, and maybe underground, “Travel Regulation.”

B. 18950.3 Payments in Connection with Speeches

From January 1993 through February 2010, this section covered the rules on travel costs when the speech and the travel were within California.

The FPPC rescinded this exception in February 2010, and Government Code Section 89506 became the only guidance for travel payments in connection with speeches, in California, in the U.S. and worldwide.

But instead of just rescinding 18950.3 and showing that rescission in its history (so that persons who might have heard that there was an intra-California speech exception could see that it had been rescinded), the FPPC adopted a narrow speech exception in its place that relates only to agency officials being hosted by a government agency.

I suggest you move the current Regulation to 18950.4 (and move campaign travel in 18950.5) and rename new 18950.4 “Payments in Connection with Speech where Travel Paid by Public Agency.”

C. Three Additional Observations

(1) 18941: Receipt, Promise, Acceptance and Return of a Gift

Subsection (a) on page 10 of the proposed Regulations lines 3 through 8, covers the process of “accepting a gift,” but it does not either codify or rescind the following three FPPC Advice Letters where the FPPC concludes that an official receives a gift by asking, or recommending to, a person to make a gift to a third party:

Maitland Advice Letter, A-99-158: “We have advised that an official exercises direction or control over a gift by selecting the individual who will receive the gift.”

Hew Len Advice Letter, A-97-026: “Any step the Senator might take in ‘routing’ the gift towards any particular individual is an exercise of ‘control’ that, under Regulation 18941, would make the Senator herself a recipient of the gifts distributed at her discretion.”

Morrissey Advice Letter, A-95-388: “You have asked whether a third party may pay for your staff member’s travel expenses. . . . [W]here a third party makes a payment to a staff member of your choosing, you would be deemed the recipient of the gift”

Shouldn’t the FPPC now, or soon, clarify in this Regulation, or elsewhere, whether “asking or recommending” does or does not make that requesting official the recipient of the gift to the third party?

(2) 18946.6: Exception – Valuation of Gifts – Air Transportation

In section (b), consider the price structure of Southwest Airlines, California’s finest, and expand “first class ticket” to read “first class if available or business select ticket” (for a commercial flight for the same trip).

(3) 18940 Guide to the Gift Regulations

(a) A new section (e) to the Guide Section could include a statement that in 2011 the Commission reviewed all Gift and Travel Regulations to make them consistent with Government Code section 82028 and that henceforth all prior FPPC Opinions and Advice Letters on gift questions remain valid only so far as they are consistent with these November 2011 amended regulations.

(b) It could also have a new section (f) to refer the reader to your Fact Sheet on Gifts, Honoraria, Travel & Loans.

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D. “Administrative History” of These Amended Regulations

Your October 31, 2011 memo will become “administrative history” for each of these Regulations that are adopted. For persons trying to understand these regulations without retaining a CPAA attorney, please consider editing each explanation, once adopted, to be that Regulation’s history and storing it on the FPPC website linked to that Regulation.

Thank you for letting me share these thoughts with you. The November 10th meeting should be interesting.