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August 15, 2012

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

RE: Agenda Item 26; Regulation 18706
("Reasonably Foreseeable")

Dear Chair Ravel and Commissioners:

As chair of the League of California Cities City Attorneys Department FPPC Committee, I submit this letter for comment on the above-referenced agenda item. While members of the committee have discussed this regulation on a number of occasions, committee member schedules did not allow for a quorum to meet and discuss the final proposal submitted by staff for your consideration. Moreover, the publication of staff's August 13 memorandum came after the informal meeting by less than a quorum of our members on staff's proposal. Therefore, this letter contains comments and recommendations from me as an individual that are informed by previous discussions with the committee, but without their formal approval.

The Committee's Approach to This Effort

Our committee has endorsed the Commission's rule clarification project, and support staff's stated goal to amend Regulation 18706 to make it "easier to understand" and "more helpful in serving as a guide in determining if a conflict of interest exists under the Act." In addition, based upon my conversations with staff and upon additional research into the history of this regulation, I agree with staff that the current regulation's definition of "reasonably foreseeable" as "substantially likely" is inconsistent with the purposes of the Act. I believe this definition sets a degree of probability that a material financial effect will result from a government decision that is too high. I agree with staff that under certain circumstances the probability that financial effects will occur as a result of a decision need not even be "likely" to be "reasonably foreseeable." The challenge then is

to adopt regulatory language that fixes the range of probability that material effects will occur in a simple, straightforward manner that provides sufficient guidance to officials whose conduct is regulated by the Act.

With due respect to the staff, I and members of our committee have significant concerns about the language presented in staff's recommendation. First, we believe the proposed value of the direct/indirect approach in subsections (a) and (b) results in complexity that is unnecessary and outweighs whatever utility it might add. This concern is highlighted by the CPUC's comments about the manner in which "parties" are "named" in their proceedings.

In addition, I and members of our committee were unclear about what was intended by the factors listed in subsection (b). The language in (b)(1) seems to raise more questions than it answers, and subsections (b) (2), (3), and (6) all seem to be saying the same thing in slightly different ways.

Recommendation

From my perspective, the goals of the rule clarification project would best be served by keeping things as simple and straightforward as possible. A revised regulation should simply inform the public, to the greatest extent possible, where on the probability continuum "reasonably foreseeable" lies. The regulation should not become unduly complicated by the listing of factors (that are not intended to be a complete list, anyway) or the introduction of unnecessary "direct/indirect" formulas.

I have spent a good deal of time and effort drafting various versions that would achieve this end. (It's a lot more challenging than one might imagine.) In the end I would recommend something very similar to the description of the rule contained in the 2010 booklet published by the Attorney General's Office and referenced on page 7 of your August 6 staff report. A draft regulation that I would respectfully submit for your consideration is as follows:

Section 18706. Determining Whether Material Financial Effect Is Reasonably Foreseeable.

A material financial effect on an official's economic interest is reasonably foreseeable, if there is a substantial possibility that the effect will occur as a result of the decision. The occurrence of the effect need not be likely for there to be a substantial possibility that the effect will occur as a result of the decision. However, the possibility that the material financial effect will occur must be more than merely conceivable.

I understand that this language is not mathematically precise, and that it will not necessarily lead everyone to reach the same conclusion in every case. However, I do believe it gives the appropriate and sufficient guidance to the regulated community on how "likely" the effects that would result from a decision must be to determine they are "reasonably foreseeable" under the great majority of cases.

I would also support staff's recommendation to maintain in a separate section the language indicating that the simple possession of a professional license will not result in reasonably foreseeable effects on an official. It was our committee's recommendation that this be stated in a separate regulation than the one defining the term for clarity's sake, and we appreciate staff's adoption of this approach.

Conclusion

In conclusion I would like to thank the Commission and your staff for the IP meetings conducted on this regulation, and for your staff's openness to discussing the proposed revision of this important regulation. These discussions were very enlightening and resulted in my gaining a better understanding of the concept of "reasonable foreseeability," and a change in my perspective in how this regulation should be revised.

I hope you find these comments helpful in your deliberations on this matter.

Sincerely,



Shawn M. Mason

City Attorney of San Mateo
Chair, League of California Cities City Attorneys
Department FPPC Committee

cc: Zackery P. Morazzini, General Counsel