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March 13, 2012

Fair Political Practices Commission
Zachery P. Morazzini, General Counsel
428 J Street, Suite 620
Sacramento, CA 95814-2329

Re: Support of Petition to Amend Regulation 18705.5 with Suggested Additional Language Concerning "Specially Tailored" Appointment Decisions

Dear Mr. Morazzini:

We appreciate the opportunity to comment on the proposed amendment to California Code of Regulations, title 2, section 18705.5 ("Regulation 18705.5") as submitted by Ash Pirayou of Rutan and Tucker and identified on the March 15, 2012 meeting agenda for the California Fair Political Practices Commission ("FPPC"). Our office serves as legal counsel to a number of local agencies, although our comments are not made on behalf of those local agencies. We support the proposed amendment with added language, as further explained below, to provide that a public official may not participate in his/her appointment where such decision is specially tailored or conditioned to the individual needs or circumstances of that particular public official.

The amendment as proposed by Mr. Pirayou will allow a public official to make, participate in making, or use his/her official position to influence his/her appointment to a committee, board, or commission of a public agency, because such government decision will not be deemed to have a material financial effect on the public official's economic interests in his/her personal finances.

The proposed amendment provides much needed consistency with the long-standing language of the Political Reform Act, Government Code 81000 *et seq.* (the "Act") expressly *excluding* salary and reimbursement for expenses and per diem received from a state, local or federal government agency as a "source of income". (See Gov. Code § 82030, subd. (b)(2).) Applying the economic interest category for personal finances to the appointment of a public official to a public agency committee, board, or commission which may result in, for example, per diem from a public agency which may foreseeably fall within the materiality threshold without any unique personal financial effect on the public official is overbroad, inconsistent with



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language of the statutory government salary exception, and a confusing and potential trap for those seeking in good faith to comply with the Act.

The proposed amendment also reduces the practical difficulties posed by the conflicting interpretation of the economic interest in personal finances category in light of the Act's statutory government salary exception. For example, if all public officials who could potentially be appointed to such position were to disqualify themselves, there would be no quorum to make such a decision. (See, e.g., 4 Ops.Cal.Atty.Gen. 100 (2011).) Even under the rule of legally required participation, which would allow only the minimum number of public officials necessary to participate in the making of the government decision, some public officials would likely still remain disqualified from participating in these important decisions contrary to the express statutory language of the Act.

Consequently, we support the proposed amendment to Regulation 18705.5 with added language, as shown below in bold text, to except those appointment decisions specially tailored or conditioned to the individual needs or circumstances of a particular public official:

(c) Notwithstanding subsection (b), pursuant to Government Code Section 82030(b)(2) and California Code of Regulations, Title 2, section 18232, a public official may make, participate in making, or use his/her official position to influence or attempt to influence, a government decision of his/her appointment to a committee, board, or commission of a public agency, including, but not limited to, a special district, a joint powers agency or authority, a joint powers insurance agency or authority, or a metropolitan planning organization, **provided the terms and conditions of such appointment decision are not specially tailored or conditioned to the individual needs or circumstances of that particular public official**, because such government decision is not deemed to have a material financial effect on the public official's economic interests in his/her personal finances.

With the additional language shown above in bold, the amendment would still allow a public official to participate in a government decision of his/her appointment to a committee, board, or commission of a public agency where there is no unique personal financial effect on that public official.

However, in some circumstances the appointment decision may be specially tailored or conditioned to the individual needs or circumstances of a particular public official. The additional language will satisfy the concerns that arise in this more limited circumstance where the public official would have a unique personal financial interest. (Cf. *Lexin et al. v. Superior Court* (2010) 47 Cal.4th 1050, 1099-1102 (where retirement board trustees approved contracts in



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which their only financial interest was an interest in benefits shared generally with their constituency at large, their actions were excluded from the Government Code section 1090 contracting prohibition; but contracts that actually involve unique financial interests not shared by the board's constituency remain prohibited.)

For these reasons, we support the proposed amendment to Regulation 18705.5 with the suggested additional language to address any appointment decisions specially tailored for a particular public official. Please don't hesitate to contact the undersigned should you have any questions.

Very truly yours,

A. Aiko Yamakawa
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