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Jodi Remke, Chair
and Commissioners
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: Proposed Amendments to Regulation 18239

Dear Commissioners:

This firm represents the Institute of Governmental Advocates, a trade association representing the interests of registered lobbyists under the Political Reform Act. This letter is submitted in response to the proposed amendments to Regulation 18239 and the long-standing “accompanying rule.”

The Institute of Governmental Advocates opposes the proposed amendment for two reasons: (1) the proposed amendment is said to be necessary because of a recent enforcement case that “brought to light” a perceived ambiguity in the law. There is no ambiguity – the enforcement division simply got the law wrong. (2) the purpose of a regulation should be to make clear that which is not clear. Existing Regulation 18239, as written, is clear. The proposed amendment makes the rule less clear and creates ambiguity.

A. Application of the Current Accompanying Rule.

Commission staff has created “ambiguity” where none existed. First, a recent press statement attributed to the Chief of Enforcement stated: “Unfortunately, political operatives have expanded that exception and exploited it as a way to influence legislation behind the scenes. The easiest way to say you’re not a lobbyist is to say, ‘Well, I accompanied lobbyist Joe Smith and everywhere I went I, I went with Joe Smith.’”

Similarly, in the Cruz Bustamante matter, FPPC No. 13/1210, the Enforcement Division determined that it could not proceed with an enforcement action stating:

But it appears many of your communications took place in the company of a registered lobbyist paid by your client. This means those communications were not “direct communications” under the Act due to the so-called “ride along” exception in the Act’s regulations that excludes from the definition of “direct communications” communications made in the presence of a registered lobbyist.

The existing exception does not apply in this manner and never has applied in this manner.

The accompanying exception does not apply to *any* person who meets or speaks with a qualifying official in the company of a registered lobbyist. It applies only in limited, specific circumstances. [“an individual does not engage in ‘direct communication’ when he or she meets or speaks with a qualifying official in the company of a registered lobbyist retained by the individual or individual’s employer or by a bona fide trade association or membership organization of which the individual or individual’s employer is a bona fide member.” (Regulation 18239.)]

This limited exception does not apply to outside consultants hired by lobbyist employers. The FPPC’s manual on lobbying (excerpt also attached) clearly explains how this limited exception applies:

I work for a public relations firm. On behalf of a client, I attend meetings to discuss with legislators the client’s positions on legislative issues and am accompanied by the client’s contract lobbyist. Must I count the time at these meetings toward qualifying as a lobbyist?

Yes, as you are engaging in “direct communication.” Although the client’s lobbyist accompanies you, the exception for engaging in direct communication in the presence of a lobbyist *only applies to the client, employees of the client, or, when the client is an association, members of the association.* (Emphasis added.)

No amendment is necessary to clarify the accompanying rule.

2. The proposed amendment to Regulation 18239 makes the exception less clear.

The proposed regulation adds a qualifier: “...and participates as a subject matter expert.” (Proposed language of Regulation 18239.)

The regulation does not define who is a “subject matter expert,” and doing so would be nearly impossible. Identifying the “subject” is itself challenging. Is the “subject” the topic of proposed legislative or administrative action? How narrowly is that to be applied? Is the legislative process itself a “subject?” How is “expertise” to be evaluated?

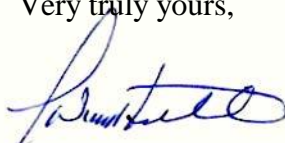
Because of these ambiguities, the proposed amendment makes the regulation unclear and provides no help to the public or the Enforcement Division.

The lobbying registration laws are designed to impose prohibitions on individuals employed in the profession of lobbying. They are not designed to impose a burden on individuals with a limited and occasional engagement in the political process. The proposed amendments to Regulation 18239 loses sight of this.

The request for advice that prompted this proposed amendment was submitted because of the manner that Enforcement staff applied the accompanying rule in the Bustamante matter. If you review the request for advice, you will see that it asks “whether the conclusion of the Enforcement Division in Advisory Letter - Cruz Bustamante, FPPC No. 13/1210 is correct.” The answer should be: “No, it was not correct.”

Thank you for considering these comments.

Very truly yours,



Thomas W. Hiltachk

Answering Your Questions

A. I work for a public relations firm. On behalf of a client, I attend meetings to discuss with legislators the client's positions on legislative issues and am accompanied by the client's contract lobbyist. Must I count the time at these meetings toward qualifying as a lobbyist?

Yes, as you are engaging in "direct communication." Although the client's lobbyist accompanies you, the exception for engaging in direct communication in the presence of a lobbyist only applies to the client, employees of the client, or, when the client is an association, members of the association.

B. The Department of Housing and Community Development has just requested proposals from building contractors to provide a number of low and moderate-income housing units throughout the state. We would like to bid on the contract. Because we are trying to influence the decisions of an administrative agency, are we engaged in lobbying?

No. While the Department is an administrative agency, awarding a contract is not considered administrative action.

Exception: With regard only to placement agents, administrative action includes the decision by a state agency to enter into a contract to invest state public retirement system assets on behalf of a state public retirement system.

C. Our agency is supporting an Indian gaming compact. To do so, we will contact the Governor's office and discuss why we think the Governor should sign the compact. Is this lobbying?

Yes. Supporting an Indian gaming compact has been determined to be an administrative action, and the Governor's office is an administrative agency for this purpose. Therefore, attempting to influence the Governor concerning these compacts qualifies as lobbying.