July 12, 2016

VIA E-MAIL

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

Re: Proposed Change to Regulation 18239 – Definition of Lobbyist

Dear Chair Remke and Commissioners:

This letter is submitted on behalf of the California Political Attorneys Association's Regulatory Committee, in response to the proposed amendment to Regulation 18239 – Definition of Lobbyist.

The CPAA has concerns with the proposed amendment, as written, because it appears to create an unconstitutional *mandatory* rebuttable presumption that certain individuals qualify as "lobbyists" under the Act. We offer instead a safe harbor that we believe is more appropriate to the context of lobby registration and would provide a clearer bright line to the regulated community.

FPPC staff states the reason for the amendment as follows:

> The FPPC encounters ongoing issues with individuals who are not registered lobbyists, but who appear to meet the basic statutory and regulatory thresholds for lobbyist registration and reporting. Upon inquiry or investigation, these individuals often are unable to provide records or other evidence that adequately tracks the amount of compensated time for direct communications with qualifying officials versus other services they may have provided, leaving their status as a lobbyist uncertain.

(FPPC Notice for Interested Persons Meeting of June 21, 2016.)

As drafted, the presumption is triggered when: (1) the individual receives or becomes entitled to receive compensation from a person for services including direct communication for the purpose of influencing legislative or administrative action, (2) the compensation is $2,000 or more, and (3) the compensation is for services within a calendar month, *unless those individuals can prove otherwise*. (*See id.*)

Such a presumption would be unique in FPPC regulations. While a number of FPPC regulations create presumptions, none creates a mandatory presumption that makes an individual subject to the Act unless he or she can prove that he/she is not. For instance, the presumption of coordination contained in Regulation 18225.7 characterizes the actions of candidates and certain individuals hired by committees that are already subject to the Act. The presumptions created by Regulation 18217 regarding nonprofit organizations, create safe harbors setting forth when those organizations are *not* considered controlled committees under the Act. There does not exist an FPPC regulation that creates a mandatory presumption that subjects individuals to the Act who are not otherwise covered by it. This is particularly troublesome because that presumption could automatically prove an essential element of an enforcement case against an individual who would not otherwise fall within the Act's requirements. Indeed, that is the stated purpose of this proposed amendment.

To illustrate this point, the proposed regulation could potentially subject a consultant, who is paid to do many things for a client, to the lobbyist registration and reporting requirements of the Act, as well as FPPC enforcement, if he or she is paid $2,000 or more in a calendar month, which may include a communication with a state official. One can imagine that numerous paid consultants, for whom communicating with state officials makes up only a *de minimus* portion of their overall services, may fall within this presumption. The proposed amendment does not simply create an inference that these individuals *may* be lobbyists, it actually makes them lobbyists subject to the Act, unless they can prove otherwise.

Please keep in mind that individuals who are not lobbyists are not subject to the Act and, thus, have no recordkeeping or reporting requirements in the course of their regular duties. This proposed regulatory change imposes a burdensome requirement on a large number of individuals simply for occasional communications with government officials. They will be deemed lobbyists and subjected to administrative and/or civil penalties for not keeping records to prove they did not qualify as such. In other words, the FPPC is effectively proposing a reverse-record-keeping requirement – mandating that individuals who do not fall under the provisions of the Act maintain records to prove they do not meet the registration/reporting thresholds under the Act.

The U.S. Supreme Court has been highly suspicious of mandatory rebuttable presumptions in other instances if they do more than just create permissive inferences. When these rebuttable presumptions actually prove an element of the government's case, they have been struck down. (*See Warden v. Franklin* (1985) 471 U.S. 307, 317 (mandatory rebuttable presumption that the acts of a person of sound mind and discretion are presumed to be the product of a person's will was unconstitutional); *Mullaney et al. v. Wilbur* (1975) 421 U.S. 684, 703 (mandatory rebuttable presumption that required a defendant to prove a specific mental state to reduce a charge down was unconstitutional); *Sandstrom v. Montana* (1979) 442 U.S. 510, 521 (mandatory rebuttable presumption was unconstitutional when it served to automatically prove an element of the government's case).) While FPPC staff has limited the latest version of the proposed regulation to administrative and civil proceedings, the new rule still operates in the same objectionable manner in those contexts.

As an alternative, we suggest that the Commission adopt a "safe harbor" provision in order to protect individuals who keep appropriate records reflecting that they did not meet the definition of lobbyist. Accordingly, we suggest the following change to the proposed amendment:

> (b) A lobbyist is an individual who receives or becomes entitled to receive $2,000 or more in compensation in any calendar month for engaging in direct communication, other than administrative testimony, with one or more qualifying officials for the purpose of influencing legislative or administrative action. An individual who receives or who becomes entitled to receive compensation from a person for services that include direct communication, other than administrative testimony, with a qualifying official for the purpose of influencing legislative or administrative action, is presumed not to qualify as a lobbyist if he or she maintains records, bills, and receipts establishing that the allocation of the individual's compensated time in each calendar month for such direct communication with qualifying officials totals less than $2,000. An individual who fails to maintain or provide records, bills or receipts that prove or disprove the amount of compensation received for direct communication in a calendar month may provide a sworn statement that such activity did not occur, and shall be presumed not to qualify as a lobbyist.

By creating a safe harbor, the Commission would encourage records to be kept by individuals who are not subject to the Act, without creating any disfavored mandatory rebuttable presumptions.

We appreciate the opportunity to comment on the proposed amendment.

Please contact us should you have any further questions.

Very truly yours,

Joseph A. Guardarrama

JAG:dn

cc: Emelyn Rodriguez, Senior Commission Counsel