CHAPMAN UNIVERSITY | FOWLER SCHOOL OF LAW

One University Drive
Orange, California 92866
www.chapman.edu

Ronald D. Rotunda
The Doy & Dee Henley Chair and
Distinguished Professor of Jurisprudence
Email: rrotunda@chapman.edu
(714) 628-2698 • Fax (714) 628-2576

http://www1.chapman.edu/~rrotunda/

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

Re: Agenda Item #54 -- Proposed Amendment to Regulation 18239 – Definition of Lobbyist

Dear Chair Remke and Commissioners:

Introduction

As a former FPPC Commissioner (2009 to 2013), I maintain a continuing interest in your work as you interpret and implement the Political Reform Act ("the Act") in a manner consistent with the voters' charge to the Commission from its inception − to ensure the full enforcement of the provisions of this Act. This power includes the charge to enforce the laws related to lobbying [§81002(b): "The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials."]

Agenda item #54 for your July 21, 2016 meeting purports to amend the definition of lobbyist, but it much more than that. It is an unlawful effort to shift the burden of proof to the defendant in any FPPC enforcement action.

All prosecutors (including those who prosecute civilly instead of criminally) would like to make their work easier by shifting the burden of proof to the other side. However, in our system, that is inappropriate, unconstitutional, and wrong. As I explain below, a new "rule" that shifts the burden of proof is not within the power of the FPPC (whose job it is to enforce the law, not issue special rules of evidence).

The FPPC's proposed rule imposes (or certainly appears to impose) recordkeeping requirements on persons who are not subject to regulation by the Commission. This vague rule requires entities and people to maintain records so they can *disprove* that they have not engaged in lobbying activities as a defense in a civil or administrative investigation and prosecution. I do

not understand how the FPPC can assert authority over those who are not within its jurisdiction simply by passing a rule changing the burden of proof. It is always the state's obligation to prove it has jurisdiction. The FPPC, on the other hand, rejects that bedrock principle, by announcing that it is the defendant's obligation to prove that the FPPC does not have jurisdiction.

The Commission's approach is highly unusual, is probably beyond the Commission's authority to adopt under the Act, raises concerns about the proper use of presumptions under the laws of evidence, and imposes recordkeeping requirements on persons who are not subject to regulation by the Commission, because those persons must maintain records to *disprove* that they have engaged in lobbying activities as a defense in a civil or administrative investigation and prosecution.

This proposed rule also raises serious constitutional problems, because lobbying has important protections under our First Amendment, which specifically protects the right to petition the government.[1] Lobbying is classic petitioning.[2] This new and vague purported "evidentiary" rule is vague, and that vagueness creates an additional problem when dealing with any rules that impinge on First Amendment rights.[3]

In short, the FPPC's proposed "rule" significantly burdens expressive conduct and activity associated with petitioning government under the First Amendment and the Due Process Clause of the Fourteenth Amendment. [4] This proposed evidentiary rule provides that a person

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[1] E,g,, RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 20.54(e)(iii) (5th ed. Thomson-West, 2013), vol. 5.

[2] *E.g., Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981): "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example."

[3] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 20.8(a) (5th ed. Thomson-West, 2013), vol. 5.

[4] See also, Gov. Code §83111.5. Actions to Implement Title.

> The Commission shall take no action to implement this title that would abridge constitutional guarantees of freedom of speech, that would deny any person of life, liberty, or property without due process of law, or that would deny any person the equal protection of the laws.

may be subjected to maintaining records of substantially or entirely private transactions to *disprove* an allegation that the person has engaged in potentially reportable lobbying activity.

The agenda summary of proposed amendment states that it would:

> "…establish a rebuttable presumption that certain payments made to an individual are for direct communication with a qualifying official for the purpose of influencing legislative or administrative action. The presumption affects the burden of producing evidence in administrative and civil actions and will be triggered only if the following facts are proven: (1) the individual receives or is entitled to receive compensation from a person for services including direct communication; (2) the compensation is $2,000 or more; and (3) the compensation is for services in a calendar month. The presumption may be rebutted by evidence that may include testimony, records, bills, and receipts establishing the allocation of the individual's compensation for all other goods and services provided."

While this FPPC proposal is kind enough to allow defendants to prove they are not covered by the FPPC ("a rebuttable presumption"), it does mean that many people and entities engaging in free speech are not at all within the FPPC jurisdiction unless they keep records so they can prove the FPPC mere allegation is wrong. Let us now turn, in more detail, to several of the reasons this new-found power of the FPPC to shift the burden of proof to anyone its accuses is not within the power of the FPPC, likely unconstitutional, and plain wrong,

1. Statutory Authority

The proposed regulation expressly attempts to govern burdens in civil and administrative proceedings. The FPPC's civil and administrative proceedings are subject to the rules set forth in the Code of Civil Procedure and the Evidence Code generally. I can find no special authority for the Commission to enact rules or regulations governing the rules of proceedings, or the rules of evidence for such proceedings, different from those set forth in these generic statutes. For example, Evidence Code sections 100, 115, 500 and 600(b), and other provisions of the Evidence Code, define presumptions affecting the production of evidence and burden of proof, and the manner in which such presumptions operate.

If the FPPC can change the rules of evidence to make its job a lot easier, any California agency can do the same. The California legislature could not have intended that it would be so easy for state agencies to override the Code of Civil Procedure and the Evidence Code.

2. Unusual Presumption – Appears to Operate as Presumption as to Burden of Proof

The proposed regulation is also unusual in that, unlike regulations that establish interpretive standards to define the obligations of persons under the law, it does not establish such standards, or even safe harbor exceptions. Rather, it creates a "rebuttable presumption" that is described as affecting the "burden of production" of evidence that would be used in civil and administrative prosecutions that raise the issue of a respondent's alleged *violation* of the lobbying registration and reporting rules.

While the FPPC staff argues that this rule merely affects the burden of production, that claim is as hard to swallow as a fly in my soup. If the FPPC simply makes the claim and sits down, the defendant can (and probably will be) be found guilty.

Courts understand this fact. Courts review the substance of such presumptions to determine their character. Even the case the Commission staff memorandum cites in support of its position (*Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644), looked at the character of the presumption created by the local rent control ordinance at issue in the case to evaluate whether it was a presumption affecting the burden of proof in tenant eviction proceedings. The Supreme Court concluded that the regulation was in fact a presumption affecting the burden of proof. A key part of the court's determination turned on whether the presumption was intended to effectuate judicial efficiency to resolve factual issues in a particular case or to effectuate policy extrinsic to the judicial function. (*Fisher*, at pp. 722-724). Here, it is difficult to escape the conclusion that the presumption, made in the context of attempting to create a revised regulatory definition of lobbyist, was intended to effectuate policy.

This presumption – whether it is a burden of proof or of production − will require a number of persons who are not admitted lobbyists to maintain records to *prove they are not*, if they are investigated and prosecuted by the FPPC about their alleged activity.

I understand that the Commission recently amended Regulation 18616 (2 CCR § 18616) to require lobbyist employers to itemize payments to persons who receive $2,500 or more in a calendar quarter and are paid to assist lobbying efforts.[5] While I have no quarrel with the Commission adopting additional disclosures to enable the public to see who is being paid by lobbyist-employers to assist in lobbying efforts, it isn't too hard to imagine that this new mother lode of information will provide a ready opportunity to investigate such persons as well as others. They would be subject to the new requirement to maintain information to *dis*prove they were engaged in lobbying activity that would require them to register and file regular reports. They could face civil or administrative sanctions *for failure to prove* they were not doing so. Many such persons will not meet the definition in the regulation, but that would not excuse them

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[5] Regulation 18616 will require identification of persons who are paid by lobbyist employers as consultants or government relations experts, involved in providing governmental consulting, advocacy, or strategy; public affairs, coalition building, grassroots campaigns and public policy initiatives, media campaigns, canvassing, special events, advertising, and research, including feasibility studies, analysis, polling, and public opinion research.

from exercising additional caution, involving substantial burdens, to maintain records that are likely to include records of private transactions entirely unrelated to lobbying, just in anticipation of hearing the proverbial "knock at the door" from an FPPC investigator.

3. Constitutional Concerns

The underlying constitutional concerns concern both the First Amendment and the Due Process Clause as noted above. The First Amendment is implicated by the right of citizens to speak and to petition government for the redress of grievances, without undue burdens on those rights imposed by government agencies. (*FPPC v. Superior Court* (1979) 25 Cal. 3d 33, at 48 ["transaction reporting requirements will often be so onerous as to constitute a significant interference with the fundamental right to petition. The extent of reporting required is not directly related to the extent of lobbying activities but is determined mainly by lobbyist and employer transactions with others, which may be entirely unrelated to lobbyist activities"]; (*City of Carmel-By-The-Sea v. Young* (1970) 2 Cal.3d 259, 272; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 671); *Harriss v. United States* (1954) 347 U.S. 612. The Due Process Clause of the Fourteenth Amendment is implicated not only by vagueness but also by legal presumptions that may in practice operate as conclusive presumptions affecting the burden of proof. (*Warden v. Franklin* (1985) 471 U.S. 307; *Sandstrom v. Montana* (1979) 442 U.S. 510.)

All of this suggests that the Commission should consider an approach that does not expose it to unnecessary litigation, or impose on private citizens either the burden on speech and expressive conduct of either steering far clear of activity that might subject them to potential investigative inquiries or requiring them to prepare and maintain "evidence" to enable them to prove a negative, that they were not engaged in lobbying activities. This burden could apply even if they face an investigation and have to defend themselves and disclose to the FPPC staff and the public their private transactions entirely unrelated to lobbying.

Sincerely,

Ronald D. Rotunda

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Doy & Dee Henley Chair and Distinguished Professor of Law