

Fair Political Practices Commission

Memorandum

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery, and Rotunda

From: Zackery P. Morazzini, General Counsel
William J. Lenkeit, Senior Commission Counsel

Subject: Adoption of Proposed Amendments to the Gift Regulations

Date: November 28, 2011

Proposed Commission Action and Staff Recommendation: Approve for adoption, the repeal, renumbering, and amendment of the Political Reform Act's (hereinafter "the Act")¹ gift regulations as discussed below.

At the November 2011 Commission meeting, the Commission approved adoption of Regulations 18940, 18940.1, 18940.2, 18941, 18942.2, 18943, 18944.1, 18944.2, 18944.3, 18945, 18945.1, 18945.2, 18946, 18946.1, 18946.3 and repealed Regulations 18945.3 and 18946.5. That leaves six regulations remaining from the proposed amendments to the gift regulations as submitted at the last meeting and discussed in staff's memorandum dated October 31, 2011. The remaining proposed regulations are discussed as follows:

Regulation 18941.1 — Somehow overlooked in the process last month was the repeal of Regulation 18941.1. As stated in last month's memorandum, this regulation adds nothing to the gift analysis and actually creates confusion. Therefore, we are proposing its repeal. The regulation adds nothing to understanding the gift process. Any payment made to covered candidates for food is already a gift if it meets the definition, and will remain so unless there is an exception. There is no special rule for candidates and elected officials.

Regulation 18942 — This regulation lists the exceptions for gifts. These exceptions were fairly thoroughly discussed at the November meeting, providing staff with valuable input to consider in making a few adjustments. Proposed language was approved through subdivision (a)(15).

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Two new revisions are being proposed to subdivisions (a)(13) and (a)(14) since the last meeting. In subdivision (a)(13), the language from former Regulation 18944.5 (Bona Fide Competition) that required the reporting of the prize or award as income has been reinserted, but it now provides an exception for winnings received from the California State Lottery. Subdivision (a)(14) changed the last word from wedding to “event” to be consistent with the previous reference to “wedding or civil union.”

The remainder of our discussion regarding Regulation 18942 concerns the new exceptions: Acts of Neighborliness, Bona Fide Dating, Acts of Human Compassion, and long term friendships, and the extent to which these exceptions are qualified by the provisions in the little i’s (Regulation 18942(a)(17)(D)(i)-(iii).)

Acts of Neighborliness (a)(16) — When last we left this issue, the Commission asked staff to make modifications limiting what may be included as an act of neighborliness. The goal was to allow for ordinary everyday common courtesy type behavior that does not warrant regulation by the Commission, so as to eliminate the need for the protections afforded under the little i’s. Staff has now modified the proposed language to address the Commission’s concern and incorporated the provisions of the former proposed language regarding acts of a good Samaritan, because they now seem so closely intertwined. The little i’s no longer apply to this exception. The examples provided in this exception suggest common everyday experiences that one would likely envision as acts of neighborliness.

Bona Fide Dating (a)(17)(A) — As discussed at the last meeting, because the personal nature of the dating relationship raised privacy concerns, the limitations provided under the little i’s do not apply in the same manner to bona fide dating as to the other exceptions. A public official will not have to report the details of his or her dates nor be limited in how many times he or she can go out.

While this will continue the current practice in that dating gifts will not be limited or reportable, the proposed codified rule will, for the first time, restrict public officials from participating in certain decisions involving their dating partners.

While there has been some anecdotal evidence of the potential for abuse that may result from legislators dating lobbyists if they do not have to report any gifts received in the relationship, there has been no evidence that any legislator has received a dating gift from any lobbyist. Nevertheless, while staff acknowledges this concern, we believe that sacrificing the dating privacy of thousands of public official’s is an expense that should not have to be paid. Unfortunately, rules that are tailored to fit the bad actors rarely seem to fit anyone else very well.

Prohibiting dating gifts is not the way to address this issue. To the extent that legislator/lobbyist dating is a problem, real or perceived, staff defers to the legislature to police its own house.

Staff stands behind its recommendation to let the bona fide dating relationship exception out of the basement after all these years and codify it with appropriate restrictions so that public officials can no longer participate in decisions that financially effect those whom they are dating. Staff believes that it is never appropriate for someone to have to ask the State's permission before she can accept an engagement ring or go out on a date.

Acts of Human Compassion (a)(17)(B) — Under current law, certain officials are prohibited from accepting charitable assistance in excess of the gift limit, even if such assistance is provided by someone who has no connection to the official in his or her official capacity. We believe this restriction is overly broad. The proposed change would allow such assistance, with appropriate restrictions.

Just because we have opened the door it does not mean that we do not need to stand guard over what comes through it. Public officials in need of assistance as a result of catastrophic circumstances will benefit significantly by this change, and such needs can be significantly met without any aid from lobbyists.² We believe that these restrictions are necessary and appropriate to prevent potential abuse. Any exceptions should be tailored to specific needs without providing a means for those who seek to influence to get around the gift prohibitions.

Best Friends Forever (a)(17)(C)— This exception is proposed to cover situations where a gift made can be tied to a long term personal friendship of the type where gifts are commonly exchanged. The little i's would apply. Even the college roommate should not be allowed to use the exception to make gifts for the purpose of influencing the official.

Catch-all (a)(18) — As stated in our last memo, this proposed new paragraph is a catch all for gifts that should not be subject to the Act's disclosure and limitation provisions. It was intended to provide an out when overly-broad conflict of interest codes prohibit acceptance of gifts that have no relationship to the official's activities and there is no basis for the prohibition to begin with.

Regulation 18942.1 — This regulation provides the definition of “informational material.” At the November meeting, the Commission approved a language change that is now reflected in the current proposed version, adding the words “and is integral to” in language under subdivision (c)(1). This regulation was not included among those approved for adoption at the November meeting because we had not yet discussed a suggestion by Nielsen Merksamer to add language exempting food provided under certain circumstances at informational events. Staff believes that this issue is best addressed under the “personal benefit” definition and travel regulations, which are now being addressed in a separate project to be considered early next year. Food could rarely,

² The population of California is over 37 million. Subtract out the number of registered lobbyists and the population in California is over 37 million. Excluding lobbyists does not negatively impact the pool of individuals that may be drawn from. Including them may negatively impact the political process.

if ever, be categorized as informational material. Accordingly, staff proposes that this regulation be adopted as modified at the last meeting.

Regulation 18942.3 — This regulation provides the definition of “ceremonial role.” It was not included among those approved for adoption at the November meeting because staff was asked to go through the regulations and be consistent throughout with respect to the number of tickets being exempted for certain events (see also Regulations 18946.2 and 18946.4 below), including those provided for performing a ceremonial role. Staff has now added an option including the official and one guest under the ceremonial role exception in Regulation 18942 (a)(12). Accordingly, there was no need to alter the proposed definition of ceremonial role.

This proposed regulation now clarifies that there must be some ceremonial purpose performed under the ceremonial role exception and restricts the exception to that purpose. With the added restrictions this regulation will no longer be open to potential abuses that have occurred in the past. Staff proposes that this regulation be adopted.

Regulation 18946.2 — This regulation addresses the valuation method for “invitation-only” events. For the same consistency reasons set forth above with respect to the number of admissions to events covered by these provisions, staff has now added an option for the official and guest throughout this regulation, including the provisions for “drop-in” visits. The remaining language in this regulation was approved by the Commission at the last meeting.

Regulation 18946.4 — This regulation addresses the valuation method for non-profit and political fundraising events. For the same consistency reasons set forth above with respect to the number of admissions covered under this regulation, staff has now provided an option that either one or two tickets be covered.

Regulation 18946.6 — This regulation provides the valuation method for air travel. The language proposed at the last meeting provided a choice in valuing air travel on a chartered flight as either the price of first class air fare on an equivalent flight or the charter fare for the flight divided by the number of passengers aboard. At the meeting, issues were raised that the first class air fare valuation method substantially undervalued the true cost of the flight. Staff was asked to look into what other jurisdictions do in addressing this issue.

Preliminary research indicates that the rules are all over the board. Many jurisdictions do not have a separate valuation for air travel, so they use fair market value. A number have \$50 gift limits with no pay down, so the travel is prohibited. Some are vague. For example, Minnesota uses “the amount the official would have to pay to obtain equivalent commercial air transportation.”³ Oregon uses either the fair market value of the flight or the whole cost of the flight divided by the number of people on the

³ Eth. Prac. Bd. Op. No. 188 (1994)

flight. Washington allows reasonable travel for a work purpose, but reasonable travel does not include first class or private aircraft. Washington does not have a specific rule on valuing air travel, however, in a stipulation entered into in September 2004, where a head coach for a university accepted rides in a private jet owned by Nordstrom, the flight was valued at the fair market value of the cost of the charter divided by the number of passenger seats on the airplane.⁴

The federal government's rules differ depending on who is making the travel and the purpose of the travel. For example, for campaign travel, the value is "the pro rata share per campaign traveler of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size. The pro rata share shall be calculated by dividing the normal and usual charter fare or rental charge by the number of campaign travelers on the flight that are traveling on behalf of such candidates or their authorized committees, including members of the news media, and security personnel traveling with a candidate."

Under new rules adopted by the House of Representatives, members are prohibited from accepting transportation on private aircraft, unless certain circumstances apply, and are prohibited from using any funds whether personal funds, campaign funds, or official funds, to pay for or reimburse the expenses of traveling on a private aircraft.⁵

Based on the above, staff has amended the proposed language to take out first class airfare as a valuation method and proposes the value be established by the cost of the flight divided by the number of passengers aboard. This seems to be the most commonly applied method.

⁴ Washington State Ethics Board; Case No. 03-145, In the Matter of Richard G. Neuheisel, Jr.

⁵ House Rules, Rule XXIII, cl. 15; see also

<http://www.policyarchive.org/handle/10207/bitstreams/4414.pdf>