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October 17, 2012

Via Electronic & U.S. Mail

Fair Political Practices Commission
Zachery P. Morazzini, General Counsel
Attn: Sukhi Brar
428 J Street, Suite 620
Sacramento, CA 95812

Re: Petition to Amend Regulation 18705.5(c)

Dear Ms. Brar:

This firm represents the California Association of Sanitation Agencies ("CASA") in various legal and regulatory matters, and is the primary point of contact for initiating this petition for regulatory change. CASA is a statewide nonprofit association representing 120 California local government agencies, including special districts that provide wastewater collection, treatment, and water recycling services to millions of Californians. As public entities, CASA's member agencies and their respective boards and board members are subject to the rules and regulations of the Fair Political Practice Commission ("FPPC" or "Commission"). CASA has been asked by some of its member agencies to seek a regulatory amendment to address an issue that could directly impact their ability to efficiently function in the coming year.

The issue raised by CASA's members, and the impetus for this regulatory amendment request, is the Commission's interpretation of title 2 of the California Code of Regulations section 18705.5(c) ("Section 18705.5"), a regulation which was adopted earlier this year at the behest of a number of southern California cities. That change request arose out of several complaints sent by the FPPC regarding appointments to outside boards by city council members, and allegations that such appointments violated conflict of interest rules. In March of 2012, the FPPC modified Section 18705.5 to allow for such appointments under specified circumstances by adding subdivision (c) to Section 18705.5. However, the language that was ultimately adopted by the Commission was written in such a way as to potentially exclude appointments of a board member to internal standing or ad hoc committees of the board member's own agency, simply because those internal appointments may not be "required by law" as mandated by the regulation. Many if not most of CASA's member agencies make such internal appointments each year, and there is little if any difference between those appointments made to an internal committee and those made to an outside entity as required by law. Thus, CASA and some of its member agencies are concerned that they will not be covered by this regulation as it relates to internal appointments, and thus will be required to take other costly and time consuming actions to act in compliance with Section 18705.5 as currently written. The proposed amendments below are designed to address this issue in a broad, comprehensive manner.

This request is being made pursuant to Government Code section 11340.6 (or rather the functional equivalent, former Government Code section 11426, as we have been informed that the Commission is subject to the provisions of the Administrative Procedures Act

("APA") as it existed in 1974 when the Political Reform Act was adopted). CASA also specifically requests that this petition for amendment be placed on the Commission's December 2012 meeting agenda. As discussed in detail below, this is a matter of great urgency for CASA's member entities because many of them make internal standing committee appointments in January of each year. Thus, if the regulation is not amended by the FPPC in December and made effective by January of 2013, local entities will be left without a definitive resolution to this problem.

Finally, there is no known opposition to this regulatory change. The potential impact that is driving CASA to request this amendment appears to be the result of little more than an oversight when drafting the original language of the amendment to section 18705.5. This issue of internal versus external appointments, and how Section 18705.5(c)(2) might be applied to internal standing or ad hoc committee appointments, was never considered or discussed by the Commission or those requesting the original amendment. Thus, CASA considers this to be technical "clean-up" amendments of the regulation, and is seeking to have the FPPC adopt a simple amendment to address the issue.

Background

In December of 2011, a group of southern California cities petitioned the Commission to amend Section 18705.5. The impetus for this proposed regulation was summarized aptly by the attorneys representing those cities in the original petition to amend Section 18705.5 dated December 20, 2011 (attached hereto as Exhibit A), and need not be restated in full here. In brief, city council members received a number of FPPC complaints and faced the threat of potential enforcement action based on alleged violations of FPPC conflict of interest provisions for their role in making certain appointments. To address the concerns raised by the cities, in March of 2012, the FPPC voted to adopt regulatory amendments to Section 18705.5, adding new subsections 18705.5(c)-(c)(3). The intent of the amendment was to establish the conditions under which public officials may vote and/or participate in the making of their own appointments to compensated positions where the amount of compensation will be at least $250 in a twelve-month period. The newly added subsections authorize public officials to make, participate in making, or use their official position to influence or attempt to influence, a government decision (thus alleviating conflict of interest concerns) where all of the following conditions are satisfied:

> (1) The decision is on his or her appointment as an officer of the body of which he or she is a member (e.g., mayor or deputy mayor), or to a committee, board, or commission of a public agency, a special district, a joint powers agency or authority, a joint powers insurance agency or authority, or a metropolitan planning organization.
>
> (2) The appointment is one required to be made by the body of which the official is a member pursuant to either state law, local law, or a joint powers agreement.
>
> (3) The body making the appointment referred to in paragraph (1) adopts and posts on its website, on a form provided by the Commission, a list that sets forth each appointed position for which compensation is paid, the salary or stipend for each appointed position, the name of the public official who has been appointed to the position and the name of the public official, if any, who has been appointed as an alternate, and the term of the position.

It is our understanding that this amendment was designed to address specific concerns regarding appointments of city council members to external boards, committees, and Joint Powers Authorities ("JPAs"). However, during the amendment process, it appears that the FPPC did not consider the extent to which, if any, the amendment addresses the participation of a public official in a decision to appoint himself or herself to a standing committee or ad hoc committee of the official's own public agency, where the appointment results in the official receiving a stipend of at least $250 in a twelve-month period. After discussing this issue with counsel for the cities that requested the original amendment, as well as staff counsel for the FPPC, we were able to confirm that this distinction between internal appointments to a standing or ad hoc committee and external appointments was not analyzed or discussed at that time.

In fact, it is difficult to imagine that the FPPC, when adopting the amendments to Section 18705.5 earlier this year, intended to create a disparity in how "external" and "internal" appointments are treated. There is no apparent distinction between a public official participating in a decision involving an "internal" appointment to an advisory committee of his or her own agency as compared to participating in a decision involving an "external" appointment to another agency that would be covered by the regulation. However, a recent FPPC publication, a Frequently Asked Questions ("FAQ") document regarding Form 806, Agency Report of Public Official Appointments (attached hereto as Exhibit B), raised some concerns as to the applicability of this section to such internal appointments. Specifically, FAQ number 2 stated as follows:

> Q. May officials vote to appoint themselves to either an ad hoc committee or a non-governmental entity, such as League of California Cities or California State Association of Counties, if the stipend is at least $250 in a 12-month period?
>
> A. No. The official may not vote and must recuse himself/herself and leave the room. The provisions of FPPC Regulation 18705.5 may be applied only to appointments that are (1) required by state or local law (presumably appointment to an ad hoc committee would not be so required) and (2) to other committees, boards, or commissions of public agencies (which would not include a nongovernmental agency). (Emphasis added.)

This recent FPPC guidance, indicating that the Commission would determine that the form required by Section 18705.5(c)(3) ("Form 806") is not applicable with respect to appointments to ad hoc committees except where the appointment is "required" by state or local law, is disconcerting. While this response does not specifically identify internal standing committees, counsel for some of CASA's member agencies have contacted the FPPC advice resources and been told that the same response (i.e., inability to use this exception when appointing members to internal ad hoc and internal standing committees) may be the case as well. Based on our understanding of how the FPPC may apply (or rather, may not apply) this regulation as it relates to internal appointments to ad hoc or standing committees, CASA's member agencies and their Board members are worried that they could be in jeopardy of facing an enforcement action by the FPPC by making appointments to standing and ad hoc committees without the express protection of Section 18705.5(c).

Issue Presented

CASA's primary concern, and the impetus for the petition for regulatory change, is that the recent amendment to Section 18705.5 described above has created an unintended distinction between the ability of a local public official to be involved in his or her appointment to an outside agency as required by law, which is what those amendments were specifically designed to authorize, and the ability of a public official to be involved in his or her appointment to an internal ad hoc or standing committee of his or her own agency, which is seemingly not covered by the language as written. For the reasons described in greater detail below, this unintended consequence of the language in Section 18705.5 has created considerable confusion among a number of CASA's member agencies and could lead to severe hardship on these agencies and their board members if a regulatory amendment is not adopted.

Reasons for Request

Many of CASA's member entities are concerned that they will not be able to adequately and appropriately staff ad hoc and standing committees without potentially acting in violation of the FPPC's conflict of interest rules. A few example scenarios that have been articulated by our member agencies include:

- The chair of a local wastewater agency needs to make appointments for a standing committee for the year to address a subset of specialized issues that frequently face that agency. Under the FPPC's existing interpretation of the law (and apparent limitations on the exemption set forth in Section 18705.5(c)), no member of the board may express interest in serving on the standing committee or vote on their appointment to that committee, lest that member be considered to "participate in making, or use their official position to influence or attempt to influence, a government decision" related to their appointment to the standing committee. The chair, then, is prevented from requesting of the board who is interested and then appointing the proper and most appropriate board member who has the time, level of interest, and specialized skill set to deal with the specific issues of that standing committee.

- Under the scenario articulated above, even if a board member who is interested in serving on a standing committee recuses his or herself from the decision, they have theoretically expressed their interest in serving on that committee by doing so and may be in violation of the conflict of interest rules, and not subject to the exemption in Section 18705.5(c). Moreover, a board member recusing his or herself could work an even greater hardship on agencies where boards tend to be smaller or have a greater number of vacancies. Recusal of an interested board member may create quorum issues that would result in the inability to appoint anyone to the standing committee.

- The same scenarios articulated above may arise in the context of an ad hoc committee, as opposed to a standing committee, where the issues raised and need for the committee are more urgent and immediate.

These are just a few of the demonstrated hardships that application (or rather, non-application) of the exemption afforded by Section 18705.5(c) would have on CASA's member agencies. It is CASA's understanding that it was not a purposeful effort on the part

of the FPPC to produce this result, but rather a mere unanticipated consequence of the language of the recently adopted amendments to Section 18705.5.

CASA has considered a number of alternatives rather than requesting an amendment to the regulation, but none appear to solve the problem for all parties. Most involve a considerable amount of additional time and expense to accomplish what is, in the end, the same underlying goal. For example, one potential solution that has been discussed is the adoption of local ordinances mandating the creation of standing committees to satisfy the current language in Section 18705.5(c)(2). In theory, even without the proposed amendment below, local agencies could enact a local ordinance that requires an ad hoc or standing committee to exist or meet, thus making the appointment to that committee one that is "required to be made" pursuant to a local law. However, this would inevitably involve considerable time and expense for all agencies pursuing this route with no perceptible benefit in terms of public disclosure or accomplishing the goals of the FPPC or the local agency. Adopting ordinances is an expensive and time consuming proposition for an agency that includes publication costs, staff time, attorney time, and a myriad of other expenses. Requiring hundreds of agencies to engage in such activities represents a considerable waste of resources to meet the requirements of this regulation, as it currently exists. In contrast, these agencies could accomplish the same result by promoting a one-time amendment to Section 18705.5 that would obviate the need to go through the ordinance adoption process. This would seem to be a more positive solution for all agencies.

CASA also considered the possibility of procuring a general advice letter from the FPPC on the subject to provide local agencies with a framework to deal with these issues. However, the agencies determined that this would not have the type of broad effect they needed. Specifically, it is our understanding that formal advice letters are interpretations of existing law providing only limited immunity related to a specific factual pattern, meaning each of CASA's member special districts would have to seek advice for their particular circumstances in order to be assured that their public officials are not at risk if they participate in decisions related to their appointment to their own agency's standing and ad hoc committees. Similarly, conversations with technical advisors at the FPPC have indicated that appointments to standing and ad hoc committees cannot be addressed through telephonic advice but only through an advice letter submitted with case specific facts. A change to the existing regulation, in contrast, would provide a broader solution to this problem and resolution of this issue. It would also avoid the FPPC being inundated with such requests.

There may be some concern that by including internal ad hoc or standing committee meetings under the exception afforded by Section 18705.5, the FPPC could be seen as somehow allowing an increase in the available compensation to board members for their attendance at standing or ad hoc committee meetings. However, to alleviate these potential concerns, statutes governing these types of appointments by many of CASA's member entities prevent board members from being compensated for more than six such meetings, and cap the level of compensation for their participation and attendance at such meetings. Moreover, most special districts are already authorized under their principal act to compensate board members for their participation on advisory committees (i.e., standing committees and ad hoc committees). For example, Health and Safety Code section 4733 (County Sanitation Districts), Health and Safety Code section 6489 (Sanitary Districts), and Government Code section 61047 (Community Services Districts) all authorize compensation to directors for attendance at certain functions that include advisory committee meetings (i.e., standing committees and ad hoc committees), and also limit compensation for such attendance to no more than six days of service in a month. While appointments and compensation for

attendance at these committee meetings are already authorized by law, that authority does not necessarily "require" board member participation on those advisory committees, and therefore may not meet the condition set forth in Section 18705.5(c)(2) as currently written. This works a serious hardship on special districts because it greatly limits the ability of the special district board to assess the interest and qualifications for a given member to sit on particular advisory committee.

Proposed Language

Section 18705.5(c) currently reads as follows:

> (c) Notwithstanding subsection (b), pursuant to Section 82030(b)(2) and Regulation 18232, a public official may make, participate in making, or use his or her official position to influence or attempt to influence, a government decision where all of the following conditions are satisfied:
>
> (1) The decision is on his or her appointment as an officer of the body of which he or she is a member (e.g., mayor or deputy mayor), or to a committee, board, or commission of a public agency, a special district, a joint powers agency or authority, a joint powers insurance agency or authority, or a metropolitan planning organization.
>
> (2) The appointment is one required to be made by the body of which the official is a member pursuant to either state law, local law, or a joint powers agreement.
>
> (3) The body making the appointment referred to in paragraph (1) adopts and posts on its website, on a form provided by the Commission, a list that sets forth each appointed position for which compensation is paid, the salary or stipend for each appointed position, the name of the public official who has been appointed to the position and the name of the public official, if any, who has been appointed as an alternate, and the term of the position.

In CASA's estimation, the most effective and straightforward manner of rectifying the issues noted above would be to amend the language of subdivision (c)(2) to read as follows (new proposed additions in bold and italics):

> (2) The appointment is ***to a standing or ad hoc committee of the public agency of which the public official is a member or*** one required to be made by the body of the which the official is a member pursuant to either state law, local law, or a joint powers agreement.

As the Commission can see, this is a minor technical amendment to the regulation that was adopted earlier this year, but one that will address the issues raised by a number of CASA's agencies. This change will allow them to effectively select board members to fill standing and ad hoc committee seats beginning in 2013.

Authority for the FPPC to Take the Requested Action

The FPPC has the authority pursuant to section 83112 of title 2 of the California Code of Regulations to adopt the regulatory changes identified above. That provision states that "[t]he Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission. These rules and regulations shall be adopted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 et seq.) and shall be consistent with this title and other applicable law." (Gov. Code, § 83112.) As noted above and as referenced in former Government Code section 11426 (now repealed), the FPPC is governed by provisions of the 1974 APA, which also allows the Commission to act on this type of request for a petition to adopt or amend a regulation. Specifically, that provision states that:

> Except where the right to petition for adoption of a regulation is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a state agency requesting the adoption or repeal of a regulation as provided in this article. Such petition shall state clearly and concisely:
>
> (a) The substance or nature of the regulation, amendment, or repeal requested;
> (b) The reasons for the request;
> (c) Reference to the authority of the state agency to take the action requested.

This petition for regulatory change satisfies these criteria and CASA requests that it be considered by the FPPC at its next meeting in December.

Additional Request and Urgency

This issue is an urgent one for a number of CASA's member agencies. Many of CASA's member agencies appoint board members to standing committees each January, meaning the FPPC's meeting and regulatory amendment process scheduled for December of 2012 would be the last opportunity to get these amendments adopted, and potentially effective by January 1, 2013. In the event that the FPPC is unable to adopt the proposed regulatory changes at its December, 2012 meeting, we additionally request that the Enforcement Division of the FPPC take no action against entities for these types of appointment related conflict of interest issues until such an amendment can be adopted, or an alternative solution to this issue can be reached. As noted above, the potential options for local entities proceeding in the absence of this amendment are costly, cumbersome, and a waste of local agency resources. In lieu of an amendment, each individual agency will need to come up with a different approach, all of which would cost additional time and resources for these entities, and some of which could include advice requests being sent to the FPPC by hundreds of agencies that would be affected. CASA's member agencies (and we presume, the FPPC) want to avoid such an occurrence.

Conclusion

In sum, the underlying arguments for the March 2012 amendment that allowed local officials to participate in their appointments to outside boards are exactly the same as those that would support allowing such participation as it relates to internal ad hoc and standing committees. It simply appears that the distinction was never raised, and thus the language

was never scrutinized from that vantage point or modified to ensure that such internal appointments would fall under these provisions as well. Regardless of whether the appointments are external or internal, the issue is one of balancing the public benefit of a public official participating in a decision in which he or she has a material interest against the risk of abuse. In adopting the March 2012 amendment to Section 18705.5, the FPPC recognized that there are situations where it is a benefit to the public for an official to participate in a decision from which the public official would normally be disqualified. To balance that benefit against the potential for abuse, the FPPC requires increased levels of transparency through the use of Form 806. This reasoning should also be applied where the public official is being appointed to internal committees of his or her own agency.

CASA is not currently aware of any opposition to this proposal or the intent behind it. As confirmed by conversations with the technical advisors at the FPPC as well as the attorneys who worked on the request for regulatory amendment that resulted in Section 18705.5(c), this issue of appointments to internal standing and ad hoc committees was not considered when the amendment was adopted, and was not therefore opposed at that time. We would welcome the opportunity to discuss any of the issues raised above and the process for effecting this regulatory change as soon as possible.

Please feel free to contact me at (916) 446-7979 or alink@somachlaw.com if you have additional questions or concerns related to this proposal.

Very truly yours,

Adam D. Link

ADL:jm

cc: Roberta Larson
Robert Krimmer

EXHIBIT A

RUTAN
ATTORNEYS AT LAW

Direct Dial: (650) 320-1515
E-mail: apirayou@rutan.com

December 20, 2011

VIA FACSIMILE (916) 322-0886 AND OVERNIGHT DELIVERY

Fair Political Practices Commission
Zachery P. Morazzini, General Counsel
Attn: John Wallace
428 J Street, Suite 620
Sacramento, CA 95812

Re: Petition to Amend Regulation 18705.5

Dear Mr. Wallace:

This law firm represents the following public agencies that have authorized this petition to be sent to the California Fair Political Practices Commission ("Commission") relating to certain provisions of the Political Reform Act[1] (the "Act"): the City of Anaheim; the City of Dana Point; the City of Irvine; the City of La Palma; the City of Newport Beach; the City of San Clemente; the City of Villa Park; and the City of Yorba Linda ("Clients"). Our Clients have several council members who are appointed by a vote of each respective city council to serve on the governing boards of legally-established joint powers authorities, special districts or other similar agencies that remunerate the appointed councilmember $250 or more in a 12-month period ("Appointed Paid Boards").

This letter petitions the Commission to amend Regulation 18705.5. This request is made pursuant to Section 11340.6.[2] Our clients specifically request that this petition for amendment be placed on the Commission's March 2012 meeting agenda. I attach to this petition our firm's previous letter to the Commission outlining our position relating to the issues raised by the amendments adopted by the Commission in 2005 relating to Regulation 18705.5 ("November Letter") (Exhibit A) and our proposed amendment (Exhibit B).

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[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 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.

[2] The Commission is subject to the provisions of the Administrative Procedures Act as it existed in 1974, when the Political Reform Act was adopted. In 1974, the Government Code section corresponding to current Section 11340.6 was Section 11426. The old and new sections are substantially similar.

Background

In 2005, as set forth in our November Letter, the Commission considered amendments to Regulation 18705.5 that inserted the term "appoint" in the regulation. As we have previously outlined, the practical implications of the amendments in 2005 to Regulation 18705.5 are far reaching. Subsequently, in your reply letter to our firm dated December 6, 2011 ("General Counsel December Letter"), you advised us that the Commission, in 1985, based upon amendments made by the Legislature to Section 87103, adopted Regulation 18702.1 to include the following language found in subdivision(c)(2):

> The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency. *This subsection does not apply to decisions to hire, fire, promote, demote, or discipline an official's spouse which is different from salaries paid to other employees of the spouse's agency in the same job classification or position.* (Emphasis in original).

As set forth in the General Counsel December Letter, this language was included by the Commission as a way to interpret the new revisions made by the Legislature, in 1985, via AB 670 (Klehs), which amended Section 87103 to add the following new phrase:

> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, *on the official, a member of his or her immediate family,* or on any of the following: (Emphasis in original and footnote omitted].
>
> This is commonly referred to as the "personal financial effects" (PFE) rule.

In the General Counsel December Letter, you further stated as follows:

> The record is clear that as of 1985 the Commission decided the new amendment to Section 87103 applied even to government income and *explicitly* stated so in the 1985 regulation in the second sentence of (c)(2) -- the "exception to the exception" as it were (hereafter the "hire-fire" rule). It appears from your letters that you focused exclusively on Section 82030 and its relationship to Regulation 18705.5, and that you may not have been aware that the

> Commission had to also consider the 1985 amendment to Section 87103 and sought to harmonize the two acts of the legislature.
>
> The Commission at the time made a reasonable policy interpretation of the new statutory language and had the advantage of contemporaneous knowledge of the legislative history that is hard to reconstruct after the fact. (Emphasis in original and footnote omitted.)

The essence of the position expressed in the General Counsel December Letter is that the Commission believes the 1985 legislative amendments to Section 87103 necessitated the creation of the so-called "hire-fire" rule that excluded such decisions from the exception of "government income" found in Section 82030(b)(2). It appears, further, that you do not cite any information in the Legislative Counsel's Digest relating to AB 670 that would suggest the Legislature intended to create an "exception to the exception" for purposes of Section 82030(b)(2). Presumably, if the Legislature had so intended, it would have, in parallel to adopting amendments to Section 87103, amended Section 82030(b)(2), the Act's definition of "income."

Further, as we explained in our November Letter, the Commission's previous advice letters (specifically *Gutierrez Advice Letter*, A-00-15) suggest that the Commission had subsequently (in 2000) rejected the application of the "personal financial effects" rule in a fashion that effectively would swallow up or undermine the "government salary exception" to the Act's definition of "income" found in Section 82030(b)(2). Subsequent to our November Letter, we have discovered additional information indicating that the Commission, at times, has sought to "make it clear that personal financial effects will not in the future be employed in a 'reanalysis' of effects secondary to an impact on government salary" and "that the Commission should announce that personal financial effects may *not* be used to nullify the government salary exception." (Emphasis in original.) (*See*, Fair Political Practices Commission Memorandum – February 17, 2000: "Adoption of Regulations Developed in Conflicts Projects E, F, and G (Phase 2): Personal Financial Effect Rule; Government Salary Exception; and Materiality Standards For Governmental Entities Which are Sources of Income.")

Accordingly, it appears that to the extent that the original 1985 regulation applied the "hire-fire" rule to the spouse and not the immediate family or to the official himself, and the 2005 amendments of Regulation 18705.5 expanded the "hire-fire" rule to create an "appoint-hire-fire" rule that applied not only to the official's spouse or immediate family, but to the official in the context of appointments to Appointed Paid Boards, the Commission should develop a comprehensive and reasonable policy approach that would consider the practical application of these rules to the daily governance issues facing municipalities in California.

Petition For Amendment

Attached as Exhibit B to this letter is our Clients' proposed amendment to Regulation 18705.5 as currently adopted. The proposed amendment adds subsection (c) to address the issues identified in our November Letter, including the ability of a public official to participate, without limitation, including voting, in a decision as to whether the public official can be appointed to serve on Appointed Paid Boards.

Reasons For Request

While we intend to provide a more detailed explanation as to the need for the proposed amendment to Regulation 18705.5 in advance of the Commission's March 2012 meeting (assuming this request is placed on that meeting agenda), below is a summary of the key reasons for this request:

1. The current Regulation is contrary to the Act's express language as set forth in Section 82030(b)(2), as outlined in our November Letter.

2. The Commission's stated policy purposes for amending Regulation 18705.5 in 2005 related to concerns arising from appointments of a public official's *spouse* versus concerns relating to participation in decisions to appoint oneself to an Appointed Paid Board.

3. Arguably, while the Commission's efforts to "harmonize the two acts of the Legislature" should be commended in 1985, a vigorous analysis must be undertaken to evaluate whether the express language of the Act found in Section 82030(b)(2), as adopted in 1974 by the voters, can be swallowed up and undermined by the Commission's subsequently adopted regulation in 1985 relating to a different statute as amended by the Legislature (*i.e.*, Section 87103).

4. The concerns that were addressed by the 1985 amendments to Section 87103 and the subsequent language proposed at the time by the Commission contained a specific limitation to the PFE rule: the treatment of a spouse by the official that was somehow different than the treatment of other employees in the same classification in the same agency. The aim of this specific language (arguably) even in 1985 was to stop certain abuses, such as those outlined in the Commission's 2005 Staff memorandum (*e.g.*, where a public official made a decision to increase his spouse's salary when she was the only person in that classification or where a mayor appointed his spouse to an unsalaried position), versus impacting the very public process for making appointments to Appointed Paid Boards.

5. To the extent that the PFE rule, the expansion of the "hire-fire" rule to appointments, and the Act's specific statutory language found in Section 82030(b)(2) are in conflict, the regulated community should be provided the opportunity to address this conflict with the Commission, as requested in this petition.

6. Any policy decision that results in the expansion of the "hire-fire" rule by the application of the PFS rule to appointments to Appointed Paid Boards should be done after careful consideration of the practical governance issues arising from such a rule, as outlined in our November Letter.

7. The proposed amended Regulation 18705.5 would make it clear that it is limited in application to appointments of public officials to Appointed Paid Boards versus any decision of the public official as it relates to his or her immediate family or the official himself in those situations unrelated to appointment (*e.g.*, the public official is an employee of the agency).

Authority For Commission To Take Action Requested

The Commission has clear authority to take the action requested. Section 83112 permits the Commission to "adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title."

On behalf of our Clients, I respectfully request that this petition to amend Regulation 18705.5 be granted and that the matter be set for hearing in accordance with the Administrative Procedures Act and the Commission's regulations.

Additional Request

In addition, as set forth in the attached copy of the letter to the Enforcement Division (Exhibit C), we are respectfully requesting that the Enforcement Division take no further action for a period of thirty (30) days, including, but not limited to, proceeding with any administrative prosecution of the matters such as conducting any further investigations into the allegations or posting any warning letters on the Commission's website.

Thank you for your consideration regarding this matter.

If you have any questions relating to this letter, please contact me at (650) 320-1515.

RUTAN & TUCKER, LLP

Ash Pirayou

AP:jl
Attachments
cc: City of Anaheim
City of Dana Point
City of Irvine
City of La Palma
City of Newport Beach
City of San Clemente
City of Villa Park
City of Yorba Linda
Philip D. Kohn, Rutan & Tucker, LLP
John Ramirez, Rutan & Tucker, LLP

EXHIBIT A

RUTAN

RUTAN & TUCKER, LLP

Ash Pirayou
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November 14, 2011

VIA FACSIMILE (916) 322-0886 AND OVERNIGHT DELIVERY

Fair Political Practices Commission
Ann Ravel, Chairperson
Zachery P. Morazzini, General Counsel
Gary S. Winuk, Chief, Enforcement Division
428 J Street, Suite 620
Sacramento, CA 95812

Re: Appointed Boards and the Political Reform Act

Dear Chairperson Ravel, Mr. Morazzini, and Mr. Winuk:

This law firm represents the following public agencies which have authorized this letter to be sent to the California Fair Political Practices Commission ("Commission") relating to certain provisions of the Political Reform Act[1] (the "Act"): the City of Anaheim; the City of Dana Point; the City of Irvine; the City of La Palma; the City of Newport Beach; the City of San Clemente; the City of Villa Park; and the City of Yorba Linda ("Clients"). Our Clients have several council members who are appointed by a vote of each respective city council to serve on legally-established joint powers authorities or similar special districts ("Appointed Boards"). Some council members of these city councils received a complaint similar to the (redacted) complaint attached to this letter (Exhibit A) alleging that the council members' decision to participate in the vote to make such appointments to such Appointed Boards allegedly violates the Act's conflict of interest provisions.

For the reasons set forth in this letter, our Clients respectfully request that the Commission consider the following actions: (1) dismiss any conflict of interest complaints filed against any members of the city councils of the above-listed cities; and (2) consider immediate modifications to the Commission's Regulation 18705.5 and related regulations at the next Commission meeting in order to clarify the Commission's regulations and advice letters, particularly in light of the Act's clear statutory directive with respect to the "government salary exception" for conflicts of interest.

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[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 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.

A. ANY ENFORCEMENT MATTER ALLEGEDLY BROUGHT PURSUANT TO REGULATION 18705.5 IS CONTRARY TO THE ACT'S EXPRESS LANGUAGE AS SET FORTH IN SECTION 83020(b)(2).

"The Act's conflict-of-interest provisions *apply only* where a public official 'make[s], participate[s] in making or in any way attempt[s] to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [the official] *has a financial interest.*'" (*See*, Fair Political Practices Commission Memorandum – April 26, 2005: "Adoption of Amendments to Regulation 18705.5 – Materiality Standard: Economic Interest in Personal Finances" at footnote 2, citing Section 87100; regulation 18700(b)(2). ("Adoption Memorandum"). (Emphasis added.) Section 82030(b)(2) provides as follows:

> "Income" does *not* include: *Salary and reimbursement for expenses or per diem*, and social security, disability, *or other similar benefit payments* received from a state, local, or federal government agency and reimbursements for travel expenses and per diem received from bona fide nonprofit entity exempt from tax under Section 501(c)(3) of the Internal Revenue Code. § 82030(b)(2). (Emphasis added.)

Importantly, since being added by initiative measure in 1974 as part of the initial adoption of the Act, the only major legislative amendment to Section 82030(b)(2) has been to add the words "and social security, disability, or other similar benefits payments" in 2004. In other words, for nearly 40 years, the definition of "income" has excluded the salary and benefits received by a local official from a local government agency.

Equally important, in the seminal Commission Opinion interpreting both Sections 87100 and 82030(b)(2), *In re Moore* ((1977) 3 FPPC Ops. 33), the Commission took an expansive view of what constituted "income" for purposes of 82030(b)(2) relying on statutes outside of the Act's purview and stating as follows:

> We turn, therefore, to consideration of the applicability of Section 82030(b)(2) to a pension from a county retirement system. When an employee agrees to work for the County, he is entitled to certain benefits which comprise his compensation. He receives, for example, a monthly salary, vacation and sick leave and retirement benefits which, by law, must be provided *as an additional element of compensation*. Thus, as the California Supreme Court has observed, retirement benefits, such as a pension, "do not represent the beneficient (sic) gratuities of the employer; they are, rather, part of the consideration earned by the employee. . . . A pension,

> therefore, is essentially a type of deferred salary whereby an employee agrees to receive a small payment while working in exchange for the security of receiving the remaining portion of his compensation after he retires.
>
> Since a pension is, in essence, a deferred salary payment, we conclude that it is included in "salary," as that term is used in Section 82030(b)(2). . . . Accordingly, we conclude that the pension is "salary . . . from . . . a local government" agency and is, therefore excluded from the definition of income by Section 82030(b)(2).
>
> We recognize that this conclusion authorized participation by the retired employee board member in some decisions which involve a potential "conflict of interest" in the sense that the decisions can have an impact on the amount of his pension benefits. This potential "conflict," however, is not qualitatively different than the conflict of interest faced by other board members who are currently county employees. Current county employee board members participate in decisions which will affect the amount of their contributions to the retirement plan, and thus also affect the amount of their income. They can do so because Section 82030(b)(2) clearly eliminates as their salary as disqualifying financial interest.
>
> In concluding that the retired employee board member also can participate in decisions which may affect his income because a public pension falls within the ambit of Section 82030(b)(2), we avoid the anomaly of treating the retired board member differently than the other board members when he is, in reality, similarly situation. We think this is consistent with the provisions and the intent of the Political Reform Act. *In re Moore*, supra, at page 4-5. (Emphasis added.) (Citations and footnotes omitted.)

The situation facing our Clients and individual council members serving on our Clients' city councils is similar: they are, pursuant to enabling legislation of the respective Appointed Boards, authorized by law to receive compensation which can be viewed as an "additional element of compensation." The fact that the Appointed Boards might directly pay a council member versus reimbursing our Clients the compensation due to each council member (such that our Clients would then pay the council member directly as per any local salary ordinance) should not change the analysis per section 82030(b)(2). Consistent with the Act's express language and

intent, it would appear that the Commission would want "to avoid the anomaly" where public agencies must create different accounting methods to pay public officials with public funds.

The Commission's own regulations interpreting Section 82030(b)(2) bolster the argument that the definition of "income" is an expansive one and includes any "income" derived from serving on Appointed Boards as falling within the exception created by Section 82030(b)(2):

> For purposes of Government Code section 82030(b)(2), the following definitions apply:
>
> (a) "Salary" from a state, local, or federal government agency means *any and all payments* made by *a government agency* to a public official, *or accrued to the benefit* of a public official, as consideration for the public official's services to *the government agency*. Such payments include wages, fees paid to public official as "consultants" as defined in California Code of Regulations, Title 2, section 18701(a)(2), pension benefits, health and other insurance coverage, rights to compensated vacation and leave time, free or discounted transportation, payment of indemnification of legal defense costs, and similar benefits.
>
> (c) "Reimbursement for expenses" received from a state, local or federal government agency means a payment to a public official, in compensation for otherwise uncompensated actual expenses incurred or to be incurred within 60 days by the public official in the course of his or her official duties. Regulation 18232. (Emphasis added.)[2]

By its express terms, Regulation 18232 does not specify that the government agency must be only the agency that a public official has been *elected to* versus being *appointed to* and includes very broad terms such as "any and all payments" and "payments" that "accrue" to the benefit of the public official. Given the express language of Section 87100, Section 83020(b)(2), Regulation 18232, and the precedent established by *In re Moore*, the Commission has issued several advice letters applying the "government salary exception" broadly.

[2] Regulation 18232 was last amended in 2002 with the latest version being operative as of February 15, 2002, nearly 3 years before the Commission Staff presented the Commission with the proposed changes to Regulations 18705.5, as further discussed below.

Unfortunately, many of these opinions not only contradict the express language of Section 82030(b)(2) but also contradict each other, creating significant confusion for the regulated community. A summary of these letters is attached to this letter as Exhibit B. Importantly, any regulation "promulgated by [the Commission] in exercise of its duties imposed upon it by the [Act]" must clarify "any ambiguity that may exist in the practical application of the statute" and are deemed "valid so long as *they are consistent and not in conflict with the statute and reasonably related to effectuate the purpose of the statute.*" (*Watson v. FPPC* (1990) 217 Cal. App. 3d 1059, 1076.) (Emphasis added.) Here, given the clear language of the statute, the promulgated regulations, and the past advice letters, the fact that the Commission has issued so many advice letters in direct conflict with each other and the statute, the prosecution of any complaints filed against our Clients would seem to be nearly impossible given the substantial ambiguity caused by the Commission's regulations and advice letters. Furthermore, per section 83111, the "Commission has primary responsibility for the impartial, effective administration and implementation" of the Act." Section 83111. (Emphasis added.) In fact, Section 83112 provides that the "Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of [the Act], and to govern procedures of the Commission. . . ." Section 83112.

Arguably, as demonstrated in the analysis of the advice letters in Exhibit B, the Commission cannot administer or implement the Act until it resolves the central questions of (1) whether some of its regulations must be amended or completely rescinded and (2) whether some of its previous advice letters must be superseded because they have sanctioned the application of the so-called "personal financial effects" rule in a fashion that undermines the "government salary exception" to the Act's definition of "income."

B. ANY ENFORCEMENT MATTERS WOULD BE CONTRARY TO THE STATED POLICY PURPOSES BEHIND AMENDING REGULATION 18705.5(b).

Regulation 18705.5 provides as follows:

> (a) A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least $250 in any 12-month period.
>
> (b) The financial effects of a decision which affects only the *salary*, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall *not* be deemed *material*, *unless* the decision is to *appoint*, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official *or* a member of his or

> her immediate family, *or* to set a salary for the official or a member of his or her immediate family which is *different from salaries* paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family is the only person in the job classification or position. Regulation 18705.5. (Emphasis added.)

This regulation is referred to as the "materiality standard: economic interest in personal finances" and became operative as of November 23, 1998.

The amendment of subsection (b) to add the single term of "appoint" was filed on June 21, 2005, and became operative on July 2, 2005. In stating the reasoning for the inclusion of the term "appoint," the Commission staff explained as follows:

> Staff has identified two issues that are not addressed by the regulation:
>
> 1. The regulation permits public officials to participate in decisions to set a salary for a member of their immediate family, if the member of his or her immediate family is the only person in a job classification or position.
>
> 2. The regulation refers to hiring and firing, *but not appointments, by the public official.*
>
> To remedy this situation, staff proposes amendments to regulation 18705.5 to declare material the financial effect of a decision by a public official that has a *"unique"* financial effect *on a member of the official's immediate family; and to include "appointments" as decisions* which could have material financial effects on the public official or a member of his or her immediate family.
>
> By adding the word "appoint" to the regulation, the Commission would make it clear to a public official that it is unlawful for a public official to appoint the official or *his or her spouse* to a position that is salaried, or that is unsalaried but offers monetary benefits. By adding the suggested language to the end of the regulation, the Commission would make it clear to a public official that it is unlawful for a public official to increase the government salary of *a member of his or her immediate family*, when the family member is the only individual in the job classification or

> position. (*See*, Fair Political Practices Commission Memorandum – March 8, 2005: "Pre-Notice Discussion of Amendments to Regulation 18705.5 – Materiality Standard: Economic Interest in Personal Finances." ("Pre-notice Memorandum.") (Emphasis added.)

The examples provided in the Commission's Pre-notice Memorandum as being the "current advice" (as of 2005) were as follows:

> In 1997, the executive director of the Victor Valley Community College made a decision to significantly increase *his spouse's salary*. His spouse was a manager at the college and the only one in her classification. *The Enforcement Division was not able to pursue the case because the language of the regulation did not make the conduct a violation.*
>
> In 1997, the Mayor of Oakland *appointed his spouse* to an unsalaried position on the Oakland Port Authority. At the time, the *Oakland City Attorney advised* the mayor that he did not have a conflict of interest that prohibited him from making the appointment, even though his spouse received *a cell phone, membership to an exclusive dinner club, and a car allowance as a result of the appointment*. The *city attorney* based her advice on the language of the regulations, which refers to hiring and firing, but does not refer to appointment. Pre-notice Memorandum. (Emphasis added.)

Besides citing *one* example (nearly 10 years earlier) relating to an appointment arising from advice provided by a city attorney *versus* the Commission, at the pre-notice discussion stage of the amendment of Regulations 18705.5, the Commission Staff did not discuss in any way the implications of adding the term "appoint" to Regulation 187505.5(b) as it would be applied to situations where a city council is considering the appointments of its members to outside agencies. In addition, the focus of *both* examples – provided by the Commission Staff as illustrating the "problem" the amended Regulation 18705.5 was addressing – involved cases relating to public officials acting to benefit their spouses.

Furthermore, it appears that the Commission itself also did not have any discussions about the implications of the term "appoint" as it would be applied to votes to appoint council members to outside agencies, as evidenced by the subsequent Staff Memorandum to the Commission at the time of adoption of the proposed amendments.[3] (*See*, Adoption Memorandum.)

In fact, it appears that as part of the adoption of the amended regulation, the history of the Commission's past actions relating to the issues facing our Clients, as set forth in Exhibit B, were not raised or discussed in any way by the Commission Staff or the Commissioners. This lack of discussion would seem to be particularly concerning to public officials serving in the State of California.

C. THERE ARE A NUMBER OF PRACTICAL AND POLICY IMPLICATIONS RELATING TO THE COMMISSION'S "PERSONAL FINANCIAL EFFECTS" RULE.

There are a number of other public policy implications relating to governance of Appointed Boards that must be carefully considered by the Commission, and have been outlined by other members of the regulated community (e.g., when is it permissible for a council member to express an interest to serve on Appointment Boards, in light of the conclusions in the *Howard Advice Letter*, No. I-07-109 and I-07-117)? (*See*, Exhibit C: Letter from Woodruff, Spardline & Smart, dated November 10, 2011.)

Furthermore, it is unclear whether the Commission, as part of its process in creating the amendment to Regulation 18705.5 by adding the term "appoint," contemplated in any manner what the potential "solutions" or the impacts would be for our Clients and other California public agencies, besides the option outlined in the *Peak Advice Letter*, No. I-05-065: the official could vote on his or her appointment to Appointed Boards so long the official "waives the stipend." For example, one possible solution might be for our Clients to appoint someone other than the city council members (e.g., citizens) to the Appointed Boards but such an appointment might be in prohibited by a particular joint powers agreement and could also result in inefficiencies (e.g., communication breakdowns between the council members and the appointed citizens) that might ultimately lead to a potential loss of accountability to and control by the citizens elected council representatives.

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[3] The following is the only information provided in the Adoption Memorandum relating to the "pre-notice" discussion hearing held by the Commission in March 2005: "At the pre-notice meeting on this regulatory amendment, Commissioner Huguenin pointed out that the Attorney General has opined that a determination not to act is still considered participation in a government decision under certain circumstances. He asked how determinations not to act would be considered under this regulation."

Or, in order to comply with the amended Regulation 18705.5(b) provisions, our Clients might have to allow a single council member (e.g., the Mayor) to handle all of the appointments to the various Appointed Boards with the understanding that the particular council member would be deemed ineligible to serve on the Appointed Boards. This outcome might not be viewed by the citizens of our Clients as being particularly desired in some communities given that it concentrates power in one councilmember in a manner that is not an accepted or desired practice in most cities.

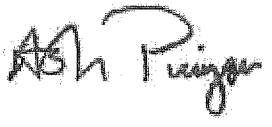
Finally, as outlined above, during the deliberate process in making the amendment to Regulation 18705.5 to add the term "appoint," neither the Commission Staff nor the Commission appears to have discussed the application of the "rule of necessity" (per Section 87101) to our Clients' efforts to make decisions as to who should serve on Appointed Boards, given the Commission's statements in the *Howard Advice Letter* (No. I-07-109 and I-07-117) relating to the fact that council members cannot cure any issues under Regulation 18705.5 even if they "withdraw" their "expression of interest" which could lead to a situation where the decision to make appointments to such boards is made with less than a quorum of council members participating.

Accordingly, we respectfully request that all enforcement matters be dismissed and that the Commission immediately conduct a thorough evaluation of its regulations as applied to decisions to appoint council members to Appointed Boards, particularly in light of the Commission's recent advice letter in the *Calonne Advice Letter*, No. I-11-172, which applied the revised Regulation 18705.5 to hold that "[a] councilmember nominated to be mayor may not vote on his or her appointment as mayor because it is a decision to appoint, promote the councilmember to a higher class, or hire the councilmember into the mayor class." Thus, the Commission continues to sanction applications of the "personal financial effects" rule in a fashion that undermines the "government salary exception" to the Act's definition of "income" as outlined in the letter.

Our clients take very seriously their obligations under the Act and appreciate the Commission's careful consideration of this letter.

If you have any questions relating to this letter, please contact me at (650) 320-1515.

RUTAN & TUCKER, LLP



Ash Pirayou

AP:jl
Attachments
cc: City of Anaheim
City of Dana Point
City of Irvine
City of La Palma
City of Newport Beach
City of San Clemente
City of Villa Park
City of Yorba Linda
Phil Kohn, Rutan & Tucker, LLP
John Ramirez, Rutan & Tucker, LLP

EXHIBIT A

FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

November 1, 2011

[redacted]

Re: Sworn Complaint against [redacted]

Dear Mr. [redacted]

The Fair Political Practices Commission ("FPPC") has received a complaint against you. Enclosed you will find a copy of that complaint. At this time, we have not made any determination about the allegation(s) made in the complaint. We are simply providing you with a copy as a courtesy. Within 14 days of receipt of the complaint, the complainant will be notified of the FPPC's decision regarding the complaint. A copy of that letter will be forwarded to you as well. We may be contacting you again to discuss this matter.

Should you have any comments on the allegation(s), your comments ***must*** be submitted in writing.

Sincerely,

For: Gary S. Winuk
Chief, Enforcement Division

GSW/tr

Enclosures

RECEIVED
FAIR POLITICAL
PRACTICES COMMISSION

11 OCT 31 AM 10:23

SWORN COMPLAINT FORM

(Form May Be Subject to Public Disclosure)*

AS REQUIRED BY GOVERNMENT CODE SECTION 83115, please complete the form below to file a sworn complaint with the Fair Political Practices Commission. **This form must be completed in its entirety and all pertinent information must be stated on this form, not as an attachment.**

Mail the complaint to: **Enforcement Division**
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, California 95814

Person Making Complaint

Last name: Delaney

First Name: Matthew

Street Address:
17602 #102 PMB 104

City: Tustin State: CA

Zip: 92780 -

Telephone: (714) 401 - 0529

Fax: ( ) -

E-mail:

***IMPORTANT NOTICE**

Under the California Public Records Act (Gov. Code Section 6250 and following), this sworn complaint and your identity as the complainant may be subject to public disclosure. Unless the Chief of Enforcement deems otherwise, within three business days of receiving your sworn complaint we will send a copy of it to the persons(s) you allege violated the law.

In some circumstances, the FPPC may claim your identity is confidential, and therefore not subject to disclosure. A court of law could ultimately make the determination of confidentiality. If you wish the FPPC to consider your identity confidential, do not file the complaint before you contact the FPPC (916-322-5660 or toll free at 866-ASK-FPPC) and discuss the complaint with an Enforcement Division attorney.

Complaint

Person or Persons who Allegedly Violated the Political Reform Act: (If there are multiple parties involved, attach additional pages as necessary.)

Last Name: [redacted]

First Name: [redacted]

Street Address:
[redacted]

City: [redacted] State: [redacted]

Zip: [redacted]

Telephone: ([redacted]) [redacted]-[redacted]

Fax: (_____) _____-_____

E-mail: _____

Provision or Provisions of the Political Reform Act Allegedly Violated: (If specific sections are not known, please provide a brief summary of the nature of the violation(s), and when it (they) occurred.) **You must state the suspected violation(s) on this form.**

Violation of Section 87100.

Description, With as Much Particularity as Possible, of Facts Constituting Alleged Violation and how you have personal knowledge that it occurred**

On [redacted] under agenda [redacted] of the meeting minutes, [redacted] voted and or participated in [redacted] to the [redacted] which pays an amount of $212.50 per meeting.

A public record of the vote can be found at the following URL:
http://www [redacted]

Note: The meeting minutes from this date can only be obtained by contacting the City Clerk's office.

Please attach copies of any available documentation that is evidence of the violation, (for example, checks, campaign materials, etc., if applicable to the complaint). **Note that a newspaper article is NOT considered evidence of a violation.

Name and Addresses of Potential Witnesses, in addition to yourself, if Known:

Last Name: _____

First Name: _____

Street Address:

_____

City: _____ State: _____

Zip: _____-_____

Telephone: (_____) _____-_____

Fax: (_____) _____-_____

E-mail: _____

Last Name: _____

First Name: _____

Street Address:

_____

City: _____ State: _____

Zip: _____-_____

Telephone: (_____) _____-_____

Fax: (_____) _____-_____

E-mail: _____

Last Name: _____

First Name: _____

Street Address:

_____

City: _____ State: _____

Zip: _____-_____

Telephone: (_____) _____-_____

Fax: (_____) _____-_____

E-mail: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ 10/26/2011

(Signature) **(Date)**

Matthew Delaney

(Please print your name)

EXHIBIT B

EXHIBIT B

Black Advice Letter, No. A-99-010

In 1999, in *Black*, that Commission began to attempt to address the issue of whether any conflicts of interest would arise from council members seeking appointment to Appointed Boards. The Commission was asked whether a county supervisor could represent a county on a joint powers authority board given that the county supervisors selected two of its members to serve on the joint powers authority board. The Commission concluded as follows:

> The Act would not prohibit [a supervisor] from representing the [county on the joint powers authority board], but he cannot participate as a member of the Board of Supervisors in *a decision to appoint him to the Board of Directors if the appointment would have a personal financial effect upon him.* If [the supervisor] serves on the Board of Directors he would be prohibited from participating in any decision by the Board of Directors that would have a reasonably foreseeable material financial effect on any of his economic interests, that is distinguishable from the effect on the public generally. (Emphasis added.)

The Commission then provided the following analysis:

> . . . a governmental decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Regulation 18703.5.) On that basis, we have previously concluded that a fire district board member may not participate in a vote by the district board to hire himself to perform computer services for the district. (*Aitken Advice Letter*, No. A-97-345.) Similarly, we have concluded that a city council member, who is also employed by the city as a part-time secretary may not participate in a vote by the city council to change her position from a part-time to a full-time position. (*Koski Advice Letter*, No. I-96-289.)
>
> However, Regulation 18705(c) states that, notwithstanding Regulations 18705.1 through 18705.5, an official does not have to disqualify himself or herself from a governmental decision if:
>
> The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency.

Because the Commission was not provided information about the "personal financial effects" at issue, it was not "able to make a determination as to whether a decision regarding whether to appoint" the supervisor would create a conflict of interest.

Gutierrez Advice Letter, No. A-00-015

The Commission held that a councilmember does not have a conflict of interest in a city's decision as to whether to provide a defense to an election contest challenging her election (by one vote) to the council, even if the council member had an "economic interest in the defense insofar as she receives a salary and benefits" (per Government Code Section 36516) in excess of $250 in any 12 month period." In applying the "exception" outlined in Section 82030(b)(2), the Commission stated as follows:

> In one of its first formal Opinions, the Commission determined that this "government salary exception" to the definition of income included pension benefits paid by a government entity. [citing *In re Moore*, supra] . . . . Since the *Moore Opinion*, we have applied the government salary to *many forms* of employment-related benefits paid by government entities . . .
>
> By operation of the "government salary exception," the salary and employment-related benefits [the council member] receives through her position on the city council are not "income" within the meaning of the Act. A decision to fund a defense to the election contest, even though it could potentially affect her government salary benefits, does not therefore affect her "income" within the meaning of Section 87103 or Regulation 18703.5.
>
> *Nor can such a decision have any other "personal financial effect.* If the immediate impact of a decision on a public official's "government salary" is excluded from conflicts analysis by operation of the "government salary exception," *derivative effects* may not be admitted to change that outcome. We understand that the loss of an official position may well cause a large change in an official's economic well-being, which my in turn affect the official's assets, expenses, or liabilities [as per Regulation 18703.5]. But these effects, when they are secondary to an effect on "government salary," are not potentially disqualifying "personal financial effects."
>
> *We have not always been consistent in describing an official's obligations in this area [citing the Owen Advice Letter, No. A-99-108 and stating that] [t]he Owen Advice Letter applied the "personal financial effects" rules in a fashion that effectively swallowed up the "government salary exception,"* and was superseded by the Commission at its public meeting on March 3, 2000 . . . *More generally, the Owen Advice Letter is superseded to the extent that it sanctions application of the "personal financial effects" rule in a fashion that undermines the "government salary exception" to the Act's definition of income."* (Emphasis added.) (Citations omitted.)

Critically, the *Owen Advice Letter*, published in 1999, specifically outlined the presumed regulatory bases for the so-called "personal financial effects" rule: Regulation 18703.5, Regulation 18704.5, and Regulation 18705.5.

Regulation 18703.5 states as follows: "[f]or purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in his or her *personal finances* and those of his or her immediate family. A governmental decision will have *an effect* on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing." Regulation 18703.5. (Emphasis added.) Regulation 18704.5 provides as follows: "[a] public official or his or her immediate family are deemed to be directly involved in a government decision which as any *financial effect* on his or her *personal finances* or those of his or her immediate family." Regulation 18704.5. (Emphasis added.) As it relates to Regulation 18705.5, *Owen* stated as follows: "[t]he Commission has promulgated a series of regulations containing guidelines for determining whether the foreseeable effect of a decision *is material.* The appropriate standard for determining whether *a personal financial effect is material is contained in Regulations 18705.5.* Under this standard, a reasonably foreseeable personal financial effect is material if the effect will be $250 or more in any 12-month." (Emphasis added.)

Dixon Advice Letter, No. I-02-098

In *Dixon*, that Commission (arguably) squarely addressed the issue of whether any conflicts of interest would arise from council members seeking appointment to Appointed Boards. In *Dixon*, the "mayor of the City of Costa Mesa" was "contemplating seeking appointment to the Orange County Fairgrounds Board of Directors" and asked whether a conflict of interest would exists, if he was "appointed" to the Board of Directors.

The advice letter did not provide any other "facts" as to whether the Commission considered the Orange County Fairgrounds to be a State Agency or who was going to make the appointment.[1] The Commission concluded as follows:

> Your positions as mayor of the City of Costa Mesa and as a member of the Orange County Fairgrounds Board of Directors are not economic interests which could be affected by decisions of either the Orange County Fairgrounds Board of Directors or the City of Costa Mesa.
>
> The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests . . ." (Section 81001.) Specifically, Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her

[1] The appointment to the Fairgrounds Board is done by the Governor and the Fairgrounds is considered a "state agency." See, *http://www.ocfair.com/ocf/AboutUs/board.asp* and *http://www.ocfair.com/ocf/AboutUs/PublicMeetings_New/Meetings.asp*.

official position to influence a governmental decision in which the official has a financial interest.

A public official has a "financial interest" in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) Among other things, an economic interest is any source of income, including promised income, which aggregates to $500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3). *However, income does not include*:

Salary[] and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. (Section 82030(b)(2).) [citing Regulation 18232(a).]

Consequently, you do not have an economic interest in the City of Costa Mesa, nor do you have an economic interest in the Orange County Fairgrounds. Since a conflict of interest will arise only when it is reasonably foreseeable that a decision will have a material financial effect on a public official's economic interest, your governmental positions[] do not create a conflict of interest under the Act.

In addition to the economic interests separately listed in section 87103, a public official *always* has an economic interest in his or her personal finances, and may have a conflict of interest in any decision foreseeably resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official or his or her immediate family, in the amount of $ 250 or more over a 12-month period. (Regulation 18703.5.) When the only potentially disqualifying economic interest is *governmental salary as defined in section 82030(b)(2) and regulation 18232, no potentially disqualifying economic interest exists under either section 87103(c) or the personal financial effects rule described in regulation 18703.5*. However, governmental salary is a disqualifying economic interest if there *is a unique effect on the official* or his or her immediate family as described in regulation 18705.5(b)." (Emphasis added.) (Citations and footnotes omitted.)

The Commission did not provide any additional analysis of Regulation 18705.5(b) but appears to have rejected, like the *Gutierrez Advice Letter*, the application of the "personal financial effects"

rule in a fashion that undermined the "government salary exception" to the Act's definition of "income" as it applied to Appointed Boards.

Sylvia Advice Letter, No. I-02-176

In *Sylvia*, the Commission addressed whether under Regulation 18705.5(b) "financial effects" test, a public official's "economic interest in his wife's income may disqualify him from voting on collective bargaining agreements with his wife's bargaining unit" at the school district where he served as member of the board of education. The Commission advised the City Attorney of San Francisco as follows:

> To the extent that his wife receives "income" as defined under the Act, you correctly understand that [the official] would have a community property interest in that income, and in the source of that income, as well as an interest in the "personal financial effects" of any governmental decision materially affecting the income or expenses of himself or his spouse.
>
> You recognize that, because the [d]istrict is a government agency under § 82041, the salary paid by the [d]istrict to [the official's] wife is not considered "income" under § 82030(b)(2), the "government salary exception" to the Act's definition of "income,". . . .
>
> While noting this exception, you are concerned that some terms of a collective bargaining agreement may involve "income" not covered under the "government salary exception."
>
> In addition to the statutory "government salary exception" of § 82030(b)(2), *subdivision (b) of regulation 18705.5 contains a parallel exception* making clear that "personal financial effects" potentially causing a conflict of interest *do not include the financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses received by a public official or members of the official's immediate family.*
>
> In particular, we conclude that provisions of a collective bargaining agreement such as the days and hours to be worked, professional development criteria for continued employment or advancement, and restrictions on outside employment, are "salary" provisions which, when provided by a state, local or federal government agency, fall within the exception provided at § 82030(b)(2) and regulation 18232(a). Governmental decisions relating to such terms will not give rise to a "personal financial effect" under the Act, so long as the decision does not concern [the official] or his wife alone, as provided in regulation 18705.5(b) . . . . (Emphasis added.)

Thorson Advice Letter, I-03-287

Notwithstanding the strong statements in favor of the strict construction of Section 8200230(b)(2), Regulation 18232, the *Gutierrez Advice Letter* or the *Dixon Advice Letter*, in December of 2003, nearly 15 months before the Commission's recent amendment to Regulation 18705.5 in 2005, the Commission again addressed the issue presented in the complaint against some of the council members serving on our Clients' city councils in the *Thorson Advice Letter*. In *Thorson*, the Commission provided the following analysis:

> If the city council for the City of Mission Viejo (the "city") appoints one of its members to serve as its representative on joint powers agencies for which the city is a member, *may the member who is being considered for the appointment participate in that decision*?
>
> Since a decision *to appoint* one of its members to a board or commission would increase only that member's salary, per diem or reimbursements from the appointing agency which is different from the salary, per diem or reimbursements paid to other members of the city council, the councilmember *who is the subject of the appointment may not participate in the decision.*
>
> The City of Mission Viejo is a member of numerous joint powers agencies. The city council appoints one of its own members to serve as their representative on each agency. The city council anticipates making several appointments at its January 5, 2004, meeting and is questioning whether a council member who is being considered for appointment to a specific agency may also participate in that decision.
>
> A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family, a.k.a. the "personal financial effects" rule. (Section 87103, regulation 18703.5.)
>
> The two possible economic interests that may be affected by making an appointment to the joint powers agency are: 1) a council member's stipend, per diem or reimbursements from the joint powers agency and, 2) his personal expenses, income, assets, or liabilities (or those of his immediate family).
>
> Salary, per diem and reimbursement for expenses from a state, federal, or local governmental agency are expressly *exempted* from the definition of "income" for purposes of the Act. (Section 82030(b)(2); regulation 18232.) *A joint powers agency is a local governmental agency. (Section 82041.) The salary, per diem or reimbursements paid by the joint powers agency to a city*

council member for services on the joint powers agency is therefore not potentially disqualifying "income" within the meaning of the Act's conflict-of-interest provisions. (Bordsen Advice Letter, No. A-95-347.)

Under the *"personal effects" rule*, a conflict of interest exists where a decision would foreseeably result in a public official's personal expenses, income, assets, or liabilities (or those of his or her immediate family) increasing or de-creasing by $250 or more, *regardless of the source of that increase or decrease.* (Section 87103; regulations 18703.5; 18704.5; 18705.5(a); *Beardsley Advice Letter*, No. I-99-003; *Daniels Advice Letter,* No. I-98-297.)

The personal effects test does not require disqualification if the decision affects only the salary, per diem, or reimbursement for expenses an official may receive from a local government agency, unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position. (Regulation 18705.5(b).)

For example, in the *Jordan Advice Letter*, No. I-00-119, a candidate for school board was advised that, if elected, he would be able to participate in contract negotiations for teachers' contracts even though his spouse was a teacher with the district. He was advised however, that a conflict of interest may still exist in decisions on the hiring, firing, promotion, demotion or discipline of his spouse, or setting a salary for his spouse which is different from salaries paid to other employees in the same job classification or position.

Applying this analysis to the question you pose, since a decision to appoint one of its members to a board or commission would increase only that member's salary, per diem or reimbursements which is different from the salary, per diem or reimbursements paid to other members of the city council, the exception in regulation 18705.5(b) applies and the councilmember who is the subject of the appointment may not participate in the decision. (Emphasis added.)

Under *Thorson*, like *Owen*, the Commission appears to have followed the same logic that it had squarely rejected in *Gutierrez*, relying on the language of three Commission-issued regulations (i.e., 18703.5, 18704.5, and 18705.5(a)) and less than a handful of Commission issued advice letters (e.g., *Beardsley Advice Letter*, No. I-99-003; *Daniels Advice Letter*, No. I-

98-297; and *Jordan Advice Letter*, No. I-00-119) to sanction an application of the "personal financial effects" rule in a fashion that undermined the "government salary exception" to the Act's definition of income in the context of appointments.

Houston Advice Letter, A-04-248

Nevertheless, in 2005, less than 120 days from the issuance of the *Thorson*, the Commission appeared to have (again) rejected any interpretation of the Act and its regulations to suggest that the "personal financial effects" rule had eviscerated the "government salary exception." In *Houston*, the Commission permitted a boardmember of the Orange County Water District to participate in "a decision" regarding whether the district should switch from a "privately run pension" plan to the California Public Employees Retirement System, which the boardmember was already a member, given his previous tenure as a council member in a city that participated in CalPERS. The Commission held that the boardmember had "no economic interest which would disqualify him from participating in the CalPERS decision" citing specifically the "government salary exception" under Section 82030(b)(2)) and *In re Moore*.

Importantly, the Commission stated as follows: "[p]lease note that, ... [the boardmember] may have an economic interest under the 'personal financial effects' rule. *However, because the exception of regulation 18705.5(b) applies, we do not further analyze this economic interest* [citing the previous language of Regulation 18705.5(b) without the term "appoint"] and went on to conclude "[b]ecause [the boardmember's] income and benefits are not included in the definition of income *and because regulation 18705.5(b) applies*, he has no economic interest which would disqualify him from participating in the CalPERS decision . . ." (Emphasis added.)

The *Houston Advice Letter* was dated March 14, 2005, almost one week *after* the Commission Staff's memorandum relating to amendments of Regulation 17505.5 which included the term "appoint" in the language of 18705.5, as outlined above. In other words, even while attempting to fix a "problem" relating to appointments, in the *Houston Advice Letter* the Commission appears to have emphatically rejected the notion, like *Gutierrez*, that the "personal financial effects" rules including 18705.5 in any way undermine the "government salary exception" to the Act's definition of income. If this analysis is deemed by the Commission not to be the case, the *Gutierrez Advice Letter*'s statement that the Commission has "not always been consistent in describing an official's obligations in this area" is even more relevant especially given the fact that any confusion created by the Commission in its regulations in direct contradiction to the Act's strict language creates fundamental due process issues in terms of compliance and enforcement matters.

Peak Advice Letter, No. I-05-065

On June 28, 2005, a week *after* the amended Regulation 18705.5 was "filed" but before it became "operative" (as of July 21, 2005), the Commission, in the *Peak Advice Letter*, concluded that a member of a city council can "vote on his or her own *appointment* to an unsalaried position on *a joint powers authority* where the *only payment* the official receives from the position *is a stipend* and the official *waives the stipend*" and that the appointed city councilmember would "be *prohibited* from participating in decisions relating to *reimbursement*

of expenses incurred by the councilmember during the course of his or her work for the joint powers authority" if "the amount of the reimbursement would total $250 or more in a 12-month period." (Emphasis added.) Relying on the *Thorson Advice Letter*, the Commission provided the following reasoning:

> Normally, this stipend would constitute an economic interest in the appointed official's personal finances and would be material if it amounted to $250 or more in any 12-month period. (*Thorson Advice Letter*, No. I-03-287.) However, if the stipend is waived by the official, and the official receives no remuneration for serving in the position, there will be no economic interest to trigger potential disqualification on the decision to appoint. Absent the economic interest, there is no conflict of interest presented.
>
> On the other hand, in the event *reimbursement decisions* come before the city council regarding expenses incurred by the appointed official in serving on the joint powers agency, *the "personal financial effects" rule* would prohibit him or her from participating in the decision if it is reasonably foreseeable that there would be a material financial effect, ($250 or more in any 12-month period), on the his or her personal finances as a result of the decision. (Section 87100, *Regulation 18705.5(a)*; *Thorson*, supra.) In that event, the public official would have a conflict of interest and may not participate in the governmental decision. (Emphasis added.)

The *Peak Advice Letter*'s conclusions relating to the "reimbursement decisions" were reached without any discussion of Section 82030(b)(2), Regulation 18232, *In re Moore*, or the *Gutierrez Advice Letter*, which was written in 2002 by the Commission's Associate General Counsel who subsequently became the Commission's General Counsel by the time the *Peak Advice Letter* was issued in 2005. Put simply, the *Peak Advice Letter* like the *Owen Advice Letter* sanctioned the application of the "personal financial effects" rule in a fashion that completely undermined the "government salary exception" to the Act's definition of income, without any analysis of the issues.

Humes Advice Letter, No. A-06-230

Even after the adoption of the amended Regulation 18705.5 adding the term "appoint," the Commission continued to provide inconsistent opinions in its advice letters. In *Humes Advice Letter*, No. A-06-230, the Commission advised that the Act's conflict-of-interest provisions did not "prohibit Attorney General-Elect Jerry Brown from appointing" his spouse (Anne Brown) to a "volunteer position" in the Department of Justice even though she would be entitled to "workers' compensation benefits" and "reimbursed for travel expenses" in accordance with the Department's policies. Remarkably, the Commission did not analyze whether the workers' compensation benefits could have a "personal financial effect" on Ms. Brown but merely concluded based upon the "government salary exception" contained in Section 82030(b)(2) and without any substantial analysis as follows:

> It is possible for volunteers to receive potentially disqualifying income from a governmental entity that may trigger disqualification on the basis of an official's personal financial effects. However, we have advised that certain payments received by volunteers are exempt governmental salary, not income. (Section 82030(b)(2).) For example, in the *Fisicaro* Advice Letter, No. A-94-178, we advised that where a volunteer firefighter was compensated for services on a per-call basis and was provided meals at the firehouse while on call, the payments were salary from a governmental entity. Therefore, there, the payments did not create a disqualifying conflict-of-interest.

Howard Advice Letter, No. I-07-109 and I-07-11; and Howard Advice Letter, No. A-07-182.

In a series of letters to the City Attorney of the City of Glendale, the Commission continued to conclude that in the context of decisions relating to appointments to serve on Appointed Boards, the "personal financial effects" rules (in essence) trump the statutory "government salary exception" as outlined in the *Gutierrez Advice Letter* (No. A-00-015) such that a city council member's decision who was nominated to be mayor to participate in the discussion relating to the position of mayor would lead to a conflict of interest under the "personal financial effects" rules. The Commission stated its rationale as follows: "[i]n contrast to Section 87103(c), which focused on the *source* of income, the personal financial effects rule focuses on the *stream* of the income to the official and effects on that stream resulting from the decision" although the Commission did not cite a single authority for this rationale. *Howard Advice Letter*, No. A-07-182. (Emphasis is in original.) The Commission also held that the mayor of the City of Glendale could not participate in the city council vote to support "appoint" himself to a local airport authority citing Regulation 18705.5(a). *Howard Advice Letter, No. I-07-109 and I-07-11.*

Aranda Advice Letter, No. I-11-059a

In other similar circumstances, i.e., the applicability of gifts rules and conflicts of interest provisions, the Commission recently advised as follows: "[f]ree meals provided by public-entity employers to board members at the public entity's board of directors meetings is not considered a gift if the member provided consideration of equal or greater value for payment. The payment for meals is not considered income under Section 82030(b)(2) since they are part of salary and per diem from a government agency." In *Aranda*, the California Special Districts Association ("CSDA") posed three "hypotheticals" which "[i]n each case, the recipient board member" was "participating as a board member *in CSDA board meetings*." (Emphasis added). While the advice letter did not discuss whether the board of directors of CSDA were appointed by their respective public-entity employers, the application of Section 82030(b)(2) to exempt payments to public officials serving in similar situations as those serving on Appointed Boards is again evidence that the Commission has taken a broader view of the exception created by Section 82030(b)(2).

EXHIBIT C

WOODRUFF, SPRADLIN & SMART
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November 10, 2011

VIA FACSIMILE AND FIRST CLASS MAIL

Gary S. Winuk
Chief, Enforcement Division
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, California 95814-2329

Re: Complaints Against City of Tustin Council Members; Appointments to Boards of Governmental Agencies that Provide a Salary or Stipend

Dear Mr. Winuk,

I serve as the City Attorney for the City of Tustin. This letter will serve as a response to the complaints received by Mayor Jerry Amante and Mayor Pro Tem John Nielsen submitted by Matthew Delaney pertaining to the City Council's appointments to outside agencies and boards. We are aware that many other council members from surrounding cities received the same complaint.

At its first meeting in December each year, the Tustin City Council considers the appointment of its members as representatives to outside agencies. Many of these agencies require that the City-appointed representatives must be members of the City's legislative body (e.g., its City Council). And some of the outside agencies provide a stipend to the appointed board members for attendance at their meetings, as authorized by law.

Mr. Delaney's complaints assert that Mr. Amante and Mr. Nielsen violated Government Code Section 87100. As demonstrated below, neither the Mayor nor the Mayor Pro Tem had a financial interest in the decision, so the Commission should determine the complaint to be without merit and reject it.

A. Government Code Section 87100 Only Prohibits Participation in Decisions in Which the Official Has A Financial Interest.

California Government Code Section 87100 prohibits public officials, such as the members of the Tustin City Council, from making, participating in making, or in any way attempting to influence a governmental decision in which he/she knows or has reason to know he/she has a financial interest.

B. Mr. Amante and Mr. Nielsen Had No Financial Interest in the Decisions to Appoint.

Government Code Section 87103 provides that a public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or on any of the following:

(a) a business entity in which the official has an investment of $2,000 or more;

(b) any real property in which the official has an interest worth $2,000 or more;

(c) any source of income, except gifts or loans by a commercial lending institution on terms available to the public, aggregating $500 or more in value within 12 months prior to the time when the decision is made;

(d) any business entity in which the public official is an officer or manager;

(e) any donor of any gift aggregating $250 or more (currently $420, indexed for inflation) from a single source within 12 months prior to the time when the decision is made.

The only financial implications of the decision to appoint Mayor Amante and Mayor Pro Tem Nielsen to their appointed positions with the outside agencies is the receipt by each of a legal and authorized salary stipend for each meeting. (Those payments are reported by those local agencies to the Internal Revenue Service in the form of W2s or 1099s issued to their appointed board members.)

However, those payments are expressly excluded from the definition of "income" for purposes of the Political Reform Act. Government Code Section 82030(b)(2) provides that the term "income" does not include salary and reimbursement for expenses paid by a state, local, or federal government agency. Specifically, Section 82030(b)(2) provides:

"(b) 'Income' also does not include:

(1) [omitted]

(2) Salary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

Cal. Gov't Code § 82030(b)(2) [emphasis added].

Thus, salary stipends provided by governmental agencies have been deliberately and expressly excluded from the definition of "income" in the Political Reform Act. Similarly, the payments do not fall within any of the other categories of "financial interest" delineated in Section 87103 that might otherwise give rise to a disqualifying conflict.

In short, straightforward statutory interpretation establishes that Mr. Amante and Mr. Nielsen receive no "income" from, and therefore have no financial interest in or resulting from, their appointments to the outside agencies.

C. FPPC Regulations and Informal Opinions May Not Contradict the Exemption

Notwithstanding the foregoing provisions of the Political Reform Act, we understand that FPPC Regulation 18705.5 purports to create an exception to Government Code Section 82030(b)(2) [apparently an "exception within an exception"] when a governmental decision is to appoint a public official to an agency that provides a salary or stipend. That regulation and FPPC opinions applying it[1] assume that a public official's personal finances will be affected by $250 or more – but that assumption and that approach defeat the purpose of the statutory exemption of public agency payments from "income".

What Government Code Section 82030(b)(2) giveth, FPPC Regulation 18705.5 taketh away. But in doing so, the FPPC Regulation exceeds the limits of its authority: California Government Code Section 83112 requires the Commission's regulations to be consistent with the Political Reform Act. By treating payments which are, by deliberate statutory design, exempt from the definition of "income" as nevertheless having the financial effect of income under the Act, the Regulation and the opinions applying it impermissibly contradict and rewrite Section 82030 of the Government Code.

Thus, we respectfully submit that Regulation 18705.5 should be construed and, if necessary, revised in a manner which honors the exemption of government agency payments from the definition of "income" consistent with Section 82030(b).

[1] 2007 Scott Howard Informal Opinion (FPPC File Nos. I-07-109 and I-07-117) and the 2011 Ariel Calonne Opinion (FPPC File No. I-11-172)

D. Prohibiting All Potential Nominees to Refrain From Attempting To Influence the Appointment Decisions is Infeasible.

It is worth mentioning that the position asserted by Mr. Delaney, if accepted by the FPPC's enforcement division, creates a practical and unworkable problem for many cities. Requiring a city council member nominee(s) to recuse themselves and to leave the room prior to deliberation and taking action on the appointment is contrary to fundamental open and transparent government principles and will undoubtedly serve to deprive members of the public from meaningful and active participation in the council's appointment process.

For example, requiring two city council member nominees to recuse themselves and to leave the room before any deliberation or action is taken on the appointment, will deprive other members of the city council the opportunity to question the nominees as to their interest level in the appointment, their qualifications, their background, and as well as their experience. Likewise, since the council's appointment process is fully noticed and agendized pursuant to the Ralph M. Brown Act, members of the public are legally entitled to address the city council before any action is taken on the appointment. Often times, this public participation includes members of the public asking similar questions as to the nominees' qualifications, experience, viewpoints, and interest in being appointed to serve on the board of another local agency. Such participation by both council members and members of the public alike often promotes spirited public participation and debate in compliance with basic open meeting laws, which laws would be thwarted if all council member nominees were required to leave the room.

As to the practical problems created by Regulation 18705.5 and the foregoing opinions, please provide cities guidance regarding the following situations, which city councils will most likely encounter if they must follow the interpretation of the Political Reform Act urged by Mr. Delaney:

- A Council member is willing to serve as appointee to a local joint powers authority board of directors that pays a stipend of $50 per meeting for monthly meetings. When would it be permissible for him/her to express his/her willingness to serve?

  (a) During a Council meeting?

  (b) In a private conversation with one other Council member?

  (c) In a private conversation with the City Clerk?

  If one concludes that the stipend is income that has a material financial effect, wouldn't *any* such expressions of willingness to be appointed be an impermissible

"attempt to influence the governmental decision"? What are the permissible means for finding out who is willing to serve on certain boards?

- Suppose there is an appointment available to a popular and prestigious board that meets monthly and provides a $50 per meeting stipend. All five council members want to be appointed to the board.

  (a) May a Council member nominate himself/herself and then leave the room, or is that impermissible participation in decision-making?

  (b) Three Council members are nominated for consideration and each leaves the room so there is no longer a quorum to take action; quorum is then defeated and the meeting cannot legally proceed. Will the City Clerk have to draw lots to ensure there are three council members present to vote?

  (c) Two Council members are nominated and they leave the room. Would it be impermissible participation in the decision-making if one of the remaining council members suggests that he/she would be better suited for the appointment and votes "no" on either nominee in an effort to force a second round of nominations and a hoped-for nomination for himself/herself?

My office, as well as my client the City of Tustin, continue to support all ethics rules promulgated pursuant to the Political Reform Act, as well as the related FPPC regulations; however, we necessarily require clarification and guidance regarding this issue. We look forward to hearing from you soon. If you have any questions or concerns, please feel free to contact me at (714) 415-1083.

Respectfully submitted,

WOODRUFF, SPRADLIN & SMART
A Professional Corporation

DAVID E. KENDIG
City Attorney, City of Tustin

cc: Mayor Jerry Amante
Mayor Pro Tem John Nielsen
City Council
City Manager Bill Huston

EXHIBIT B

REVISIONS TO 18705.5

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18705.5. Materiality Standard: Economic Interest in Personal Finances.

(a) A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least $250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.

(b) The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family is the only person in the job classification or position.

(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, 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.

Comment: Cross-references: For the definition of "immediate family" see Government Code section 82029.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5, 87102.6, 87102.8 and 87103, Government Code.

HISTORY

1. New section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).

2. Change without regulatory effect amending section heading filed 3-26-99 pursuant to section 100, title 1, California Code of Regulations (Register 99, No. 13).

3. Editorial correction of 1 (Register 2000, No. 25).

4. Amendment of section heading and section filed 1-17-2001; operative 2-1-2001. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil CO10924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2001, No. 3).

5. Amendment of subsection (a) filed 1-16-2002; operative 2-15-2002 (Register 2002, No. 3).

6. Amendment of subsection (b) filed 6-21-2005; operative 7-21-2005 (Register 2005, No. 25).

7. Amendment of subsection (a) filed 12-18-2006; operative 1-17-2007. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil CO10924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2006, No. 51).

EXHIBIT C

RUTAN
ATTORNEYS AT LAW

Ash Pirayou
Direct Dial: (650) 320-1515
E-mail: apirayou@rutan.com

December 20, 2011

VIA FACSIMILE (916) 322-0886 AND OVERNIGHT DELIVERY

Fair Political Practice Commission
Enforcement Division
Attn: Teri Rindahl, Political Reform Consultant
428 J Street, Suite 620
Sacramento, CA 95814-2329

Re: FPPC File No. 11/1041; Sworn Complaint against the Public Officials representing the City of Anaheim, City of Dana Point, City of Irvine, City of La Palma, City of Newport Beach, City of San Clemente, City of Villa Park, and City of Yorba Linda.

Dear Ms. Rindahl:

In response to your recent letter and its enclosures, dated December 15, 2011, regarding our above-listed City Clients and their Public Officials (See Exhibit A: "List Of Public Officials"), and, as per our discussion today with Mr. Gary S. Winuk, I write to confirm the following:

(1) for those Public Officials who received a warning letter, for a period of up to 30 days from today ending on *January 20, 2012*, the Enforcement Division (a) will not post any warning letters on the FPPC website, (b) will not require a response from these Public Officials within ten days of the warning letter as to whether the Public Official accepts the warning letter or requests a hearing, and (c) will not proceed with the prosecution of the matters against these Public Officials until the 30-day time period has ended; and

(2) for those impacted Public Officials who have been asked to provide "any explanations and/or advice from legal counsel" (per your letter) relating to the matters no later than December 30, 2011, the Enforcement Division will not require any response by these Public Officials by December 30, 2011 and will instead provide them an additional 30 days from today ending on *January 20, 2012* to present the requested information relating to explanations or advice so that the Enforcement Division can properly evaluate the complaint.

If my understanding is incorrect, I respectfully request you immediately contact me at (650) 320-1515.

Very Truly Yours,

RUTAN & TUCKER, LLP

Ash Pirayou

AP:jl
Attachment: Petition Letter Relating to Regulation 18705.5
cc: General Counsel's Office
City of Anaheim
City of Dana point
City of Irvine
City of La Palma
City of San Clemente
City of Villa Park
City of Yorba Linda
Philip D. Kohn, Rutan & Tucker, LLP
John Ramirez, Rutan & Tucker, LLP

EXHIBIT A

LIST OF PUBLIC OFFICIALS

First Name	Last Name	City
Gail	Eastman	Anaheim
Kristine (Kris)	Murray	Anaheim
Harry	Sidhu	Anaheim
Lisa	Bartlett	Dana Point
Larry	Agran	Irvine
Steve	Choi	Irvine
Jeffrey	Lalloway	Irvine
Ralph	Rodriguez	La Palma
Mark	Waldman	La Palma
Leslie	Daigle	Newport Beach
Rush	Hill	Newport Beach
Steven	Rosansky	Newport Beach
Tim	Brown	San Clemente
Jim	Dahl	San Clemente
Brad	Reese	Villa Park
John	Anderson	Yorba Linda
Nancy	Rikel	Yorba Linda
Mark	Schwing	Yorba Linda
Jim	Winder	Yorba Linda

EXHIBIT B

California Fair Political Practices Commission

Form 806 – Agency Report of Public Official Appointments Frequently Asked Questions

This fact sheet provides additional guidance and examples on how to report public official appointments. The Form 806 is used to report additional compensation that officials receive when appointing themselves to positions on committees, boards or commissions of a public agency, special district, or joint powers agency or authority. (FPPC Regulation 18705.5.)

This fact sheet cannot address all the different types of situations that may occur when officials receive additional compensation for appointing themselves to positions. Persons are encouraged to use the FPPC advice service for specific guidance.

The following FAQs address some common activities.

Frequently Asked Questions

1. Q. May an official recuse himself and leave the room while the other members of the council vote to appoint him to another agency position for which the official will receive a $300 a year stipend? If so, does a Form 806 need to be posted?

   A. Yes, an official may recuse himself and leave the room. If so, the Form 806 is not required. The Form 806 is only required if the official actually wants to participate in the vote for his appointment.

2. Q. May officials vote to appoint themselves to either an ad hoc committee or a non-governmental entity, such as League of California Cities or California State Association of Counties, if the stipend is at least $250 in a 12-month period?

   A. No. The official may not vote and must recuse himself/herself and leave the room. The provisions of FPPC Regulation 18705.5 may be applied only to appointments that are (1) required by state or local law (presumably appointment to an ad hoc committee would not be so required) and (2) to other committees, boards, or commissions of public agencies (which would not include a nongovernmental agency).

3. Q. May officials vote to appoint themselves to serve on another governmental entity if the stipend is waived or results in less than $250 in a 12-month period?

   A. Yes. A Form 806 is not required to be posted. The Form 806 must be posted if the stipend would be at least $250 in a 12-month period.

4. Q. At a city council meeting, city council members vote to appoint a member to the Transportation Commission. The Transportation Commission pays the officials' stipend. Which agency completes the Form 806?

A. The agency that conducts the vote must complete the Form 806. In the example above, the city posts the Form 806 even though the officials are paid by the Transportation Commission.

5. Q. A member of the County Board of Supervisors is appointed to a water district board of directors. The water district board will make an appointment to place a water district board member on the board of an irrigation district. As a board member of the irrigation district, the official will receive a stipend of at least $250 in a 12-month period. Which agency completes the Form 806?

A. The agency that conducts the vote must complete the Form 806. In the example above, the water district must complete the Form 806.

Statutory and Regulatory Authority

Government Code Sections: 87100, 87102.5, 87102.6, 87102.8, 87103
Regulations: 18705.5