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To: Chair Remke and Commissioners Audero, Casher, Wasserman, and Wynne

From: Hyla Wagner, General Counsel
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Subject: Definition of Lobbyist – Adoption of Amendments to Regulation 18239

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I. Introduction

One of the central objectives of the Political Reform Act[1] is to prevent special interests from exerting improper influences over public officials to impact legislative and administrative actions.[2] Recognizing that wealthy individuals and organizations frequently spend large amounts of money to employ lobbyists to extend their influence, the Act regulates the activities and finances of lobbyists to help detect any improper influences being directed at public officials.[3]

However, this principal objective of the Act is undermined when qualifying individuals who are paid to directly communicate with and influence public officials fail to register as lobbyists. This "shadow lobbying" deprives the public of important and timely information about who is influencing its public officials and the amount of money being spent. Moreover, it denies the public the protection of rules designed to reign in improper influences by special interests.[4]

Shadow lobbying also creates an unequal playing field. On one hand, you have individuals who properly monitor their activity, register as lobbyists, comply with restrictions, and disclose payments to influence legislative or administrative actions. While others who exert the same amount of influence, if not more, avoid these reporting requirements and monetary restrictions by simply not registering. This disparity circumvents the intent of the Act, and undermines the public's confidence in the integrity of government.

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[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. FPPC regulations are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All further statutory and regulatory references are to these sources unless otherwise noted.

[2] Section 81001, subdivision (f).

[3] Section 81002, subdivision (b).

[4] The Act requires lobbyists, lobbyist employers and lobbying firms to register and file periodic reports disclosing money spent to influence legislative or administrative action (sections 86100-86118); prohibits lobbyists from making or arranging gifts in excess of $10 per month to specified public officials and government staff (sections 86201 & 86203); and prohibits a lobbyist from making a contribution if that lobbyist is registered to lobby the state governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer (section 85702);

To promote compliance and increase transparency, the proposed amendments to Regulation 18329 would create a rebuttable presumption that arises when determining whether an individual meets the statutory threshold of a *contract lobbyist* - i.e., receives $2,000 or more in a calendar month to communicate directly with a qualifying public official for the purpose of influencing legislative or administrative action. If certain basic facts are proven, it will be presumed that any payment an individual receives in a calendar month is for direct communication with officials unless and until the individual offers evidence to the contrary. The individual can rebut the presumption by testimony, records, bills, and receipts that establish the allocation of the individual's compensation for all other goods and services provided.

Rebuttable presumptions affecting the burden of producing evidence are based on sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity.[5] The proposed presumption would encourage individuals who are close to the threshold of qualifying as lobbyists to accurately monitor and track their lobbying activities. It also would provide an incentive for individuals who qualify as lobbyists to register and file disclosures, thus furthering the Act's goal of public transparency. In sum, the proposed amendments to Regulation 18329 would promote greater compliance with, and enforcement of, the lobbying provisions of the Act.

II. The Need for Accountability and Transparency

A. Problems under Current Law

Under the Act, an individual qualifies as a "lobbyist" if he or she communicates directly with an elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action *and* he or she either receives $2,000 or more in a calendar month (contract lobbyist), *or* it is his or her principal duties as an employee (in-house lobbyist), to conduct such direct communication. (Section 82039.) The proposed regulatory amendment is directed at establishing whether an individual meets the $2,000/month threshold to register as a contract lobbyist.

The FPPC has encountered issues with individuals who are not registered lobbyists but who appear to meet the basic statutory and regulatory thresholds of a contract lobbyist. Upon inquiry or investigation, these individuals may acknowledge that they were hired by a client and even that they had some direct communication with officials to influence legislation, but they argue they were also paid for "other services," e.g., research, strategic planning, public relations. However, they fail to produce records or other evidence that adequately tracks the amount of compensated time for direct communications with qualifying officials versus other services they may have provided, leaving their status as a lobbyist unsettled.

Published reports have detailed the evolution of lobbying techniques that have expanded in scope and sophistication. They often go beyond direct communication and include public

[5] *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 696 (no hardship to require opponent to produce some evidence of nonexistence of presumed fact).

relations, grass roots advocacy, and media consulting.[6] The net result is a number of individuals fall within a gray area where clients pay them for both traditional lobbying (direct communication with qualified officials) and the emerging "grassroots" methods to influence governmental decision makers. The multitude of lobbying-related activities makes it even more difficult to ascertain when an individual reaches the required legal threshold for lobbyist registration.

However, since the law requires individuals to register as a lobbyist when they hit the threshold of $2,000/month for direct communication, they *should be* legitimately tracking their payments and activities. But under the existing self-regulated scheme there is little incentive.

The current situation presents a structural obstacle to the Act's lobbyist provisions. To address this issue, staff proposes a procedural tool to discourage circumvention of and assist in vigorous enforcement of the Act.

B. A Rebuttable Presumption Affecting the Burden of Producing Evidence

Staff proposes amendments to Regulation 18239 that would specify situations giving rise to a rebuttable presumption that certain payments made to an individual were for direct communication with a qualifying official for the purpose of influencing legislative or administrative action. The "presumption affecting the burden of producing evidence is based on an underlying logical inference that the presumed fact very likely follows from the proved fact; … such a rebuttable presumption is designed to place the responsibility for establishing the nonexistence of certain facts on the party most able to do so."[7]

Under the proposal, the rebuttable presumption is triggered only after the following basic facts are proven:

- the individual receives or is entitled to receive compensation from a client for services that include direct communication with a qualifying public official to influence action,
- the compensation is $2,000 or more, and
- the compensation is for services in a calendar month.

Once the basic facts are proven, it would be presumed that the payment was for direct communication with public officials *unless and until* the individual offers evidence that the payment was for other services. If the individual offers sufficient evidence to rebut, the presumption is disregarded and the competing evidence must be weighed to make a factual finding on the issue.[8]

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[6] Laurel Rosenhall, *California Strategies Walks Line Between Lobbying and Public Affairs*, Sacramento Bee, October 6, 2013 (http://www.sacbee.com/news/politics-government/article2579039.html).

[7] F*isher v. City of Berkeley*, *supra*, 37 Cal.3d at p. 694.

[8] Evidence Code, § 604.

The California Law Revision Commission's comment to the relevant statutory provision explains that presumptions are designed to dispense with unnecessary proof of facts that are likely to be true *if* not disputed. "In some cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence."[9]

At the Interested Persons meeting, one commenter raised concerns that the proposed amendments would create a presumption shifting the burden of persuasion onto the respondent to prove he or she was not a lobbyist, therefore creating an impermissible violation of the respondent's Constitutional right to due process.[10] This argument is misplaced - the proposal is a rebuttable presumption affecting the burden of producing evidence, it would only apply in administrative and civil actions, and the Enforcement Division would maintain the initial burden of producing sufficient evidence and the ultimate burden of proof.

As a practical matter, the presumption would be a valuable tool to encourage individuals to properly monitor and track their activities, and then if necessary, to cooperate and produce relevant information during an inquiry or investigation. Assuming an individual had sufficient evidence of other services he or she performed for the client's payment, it would be unnecessary to bring an enforcement case and the presumption would not be invoked. Thus, the presumption should increase administrative efficiency by facilitating resolution of routine matters and non-meritorious complaints earlier in the process.

C. The Proposed Presumption is Narrowly Drafted

In response to questions at the Interested Persons meeting, staff has clarified that the proposed presumption utilizes a "compensation test" that applies only to contract lobbyists. Whether an employee qualifies as an in-house lobbyist for their employer is based on a "time test," requiring them to spend one-third or more of their time in a calendar month engaging in direct communication with public officials to trigger registration, which is not impacted by this proposal.[11]

Therefore, staff has made clarifying changes to the proposed amendments to reflect that the presumption applies only to individuals who receive compensation from a client, and not individuals who receive compensation from their employers.

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[9] California Law Revision Commission Comment, Deering's Evidence Code section 603.

[10] The Due Process Clause of the Fifth and Fourteenth Amendments require the prosecution in a criminal case bear the burden of proving every essential element of an offense. Any evidentiary presumption that has the effect of relieving the government of that burden is unconstitutional. (*County Court of Ulster County v. Allen*, (1979) 442 U.S. 140, 159.)

[11] Under the Act, an individual qualifies as an in-house lobbyist based on his or her "principal duties," which has been further defined as an individual "who spends one-third or more of the time, in any calendar month" engaging in direct communications. (Regulation 18239(c).)

III. Staff Recommendation

The proposed regulatory amendments will help foster compliance with, and lead to more vigorous enforcement of, the lobbying provisions of the Act. Staff recommends the Commission adopt proposed amendments to Regulation 18239.

Attachment:
Proposed Regulation 18239