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To: Chair Miadich, Commissioners Baker, Gómez, Wilson, and Wood

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Proposed Amendments to: Regulations 18624 & 18625; and Adoption of Regulation 18626

Date: November 7, 2022

Executive Summary

Staff submits draft language for adoption regarding amendments to Regulations 18624 and 18625 as well as for proposed Regulation 18626. Current Regulation 18624 defines when a lobbyist "arranges" for the making of a gift within the meaning of Section 86203. The proposed amendments would clarify that when a lobbyist solely makes recommendations and provides information to the lobbyist's employer in connection with a gift to a public official, the lobbyist does *not* "arrange" for the making of a gift under Section 86203 as determined by the Commission in a 1982 opinion.

Current Regulation 18625 concerns when a lobbyist or lobbying firm places an official under personal obligation within the meaning of Section 86205(a) and the proposed amendments would clarify the application of that statute to situations where a lobbyist or lobbying firm fails to make sufficient efforts to collect debt from an official.

Lastly, proposed Regulation 18626 concerns the contingency fee prohibition under Section 86205(f). The proposed regulation would define the statutory phrase "any payment in any way contingent" and provide that a contract for lobbying services does not, in itself, violate the contingency fee prohibition if it contains the expressly agreed upon terms of all compensation and does not make the compensation dependent to any degree, directly or indirectly, on a specific outcome of the legislative or administrative action.

The proposed amendments were provided for prenotice at the September meeting. The only changes made since their presentation to the Commission in September regard the proposed safe harbor provision for Regulation 18625 and non-substantive changes to the language in subdivision (b) of proposed Regulation 18626, as discussed below.

Reason for Proposed Regulatory Action

The Commission is charged with adopting rules and regulations to carry out the purposes and provisions of the Act (Section 83112), including the express purpose of regulating the activities of lobbyists so that improper influences are not directed at public officials (Section

81002). The prohibitions pertaining to lobbyists and lobbying firms in Sections 86203 and 86205 have been provisions in the Act, without substantive change, from the time the Act was adopted as an initiative by California voters in 1974. Despite their importance, there have been few regulations adopted to implement and interpret these provisions.

Over the years, the Commission's Enforcement Division has applied these sections by reading the plain language of the prohibitions without clarification as to their application. For example, while the term "any payment in any way contingent" in Section 86205(f) suggests that the prohibition is broad, the Enforcement Division has never had the benefit of a definition for that term to confirm all of the different types of payments, such as bonusses or performance compensation, that are potentially included within the prohibition. Having regulations that provide more detailed examples of what those terms mean would help the Enforcement Division and the regulated community have a mutual understanding of these provisions.

Therefore, staff proposes amendments to Regulations 18624 and 18625, and adoption of Regulation 18626, to further clarify the meaning and scope of the prohibitions pertaining to lobbyists and lobbying firms in Sections 86203 and 86205. These recommended improvements will provide additional guidance concerning the specified provisions and facilitate compliance with, and enforcement of, the Act.

Background

The laws regulating California state lobbyists are found in Sections 86100 through 86300 of the Act,[1] which was adopted by the voters as Proposition 9 in June 1974. As mentioned, the express purpose of regulating lobbyists is that "[t]he activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials." (Section 81002(b).)

Relevant to the proposed regulatory changes, Sections 86201 through 86206 address prohibitions applicable to lobbyists and lobbying firms. "Gift" is defined in Section 86201 for purposes of the prohibition in Section 86203, which makes it unlawful for a lobbyist or lobbying firm to make a gift of more than $10 in a calendar month, *or arranging* to make a gift, to "any state candidate, elected state officer, or legislative official, or to an agency official of any agency" the lobbyist or lobbying firm is registered to lobby. (Sections 86201 & 86203.) In addition, a lobbyist or lobbying firm is prohibited from placing officials under personal obligation and accepting any payment contingent upon a specific outcome of any legislative or administrative action. (Section 86205(a) & (f).)

Regulation 18624 implements the provisions of Section 86203. In a 1982 opinion, the Commission considered several factual scenarios, most involving a lobbyist making recommendations and providing information to the lobbyist's employer concerning gifts (luncheon/dinner) to public officials, to determine whether the hypothetical activities fell within the criteria the Commission established for when a lobbyist arranges the making of a gift by another. The opinion concluded those activities did not fall within the established criteria. In

[1] The Act's regulations on lobbying are located in Regulation 18109 through 18997.

1985, the Commission adopted Regulation 18624 and changed the criteria set forth in the 1982 opinion by defining when a lobbyist arranges for the making of a gift to include six specific activities that all involve communication by a lobbyist with the recipient of the gift. The proposed amendments to Regulation 18624 would simply clarify the hypothetical activities that the opinion concluded did not constitute a lobbyist arranging for the making of a gift under the opinion's criteria would likewise not fall within the current definition set forth in Regulation 18624.

Section 86205(a) prohibits a lobbyist or lobbying firm from placing officials under personal obligation which, under current Regulation 18265, includes providing loans to state or legislative officials. The prohibition helps to avoid the perception that through such activity, the official actions of state or legislative officials can be controlled. In a prior Enforcement matter, a lobbyist was alleged to have violated Section 86205(a) after he provided consulting services to candidates for the State Legislature who failed to pay the full contractually agreed upon amount. The lobbyist, who was registered to lobby the Legislature, was alleged to have placed the officials under personal obligation by not sufficiently attempting to collect the money owed after they were successfully elected. The respondent in the matter ultimately acknowledged that his conduct violated the prohibition. The proposed amendments to Regulation 18625 would clarify the application of Section 86205(a) to debt owed by an official to a lobbyist or lobbying firm.

Lastly, Section 86205(f) prohibits a lobbyist or lobbying firm from accepting or agreeing to accept "any payment in any way contingent" on a specific outcome of any legislative or administrative action.[2] While there has never been a regulation interpreting this provision, the proposed regulation would provide a definition for the quoted phrase to clarify the broad application of the statutory prohibition. In addition, Section 86205(f) applies to a lobbying contract itself in that it prohibits a lobbyist or firm from *agreeing* to accept contingency fees in return for their lobbying services. Therefore, the proposed regulation would provide that a contract for lobbying services does not, in itself, violate the contingency fee prohibition if it contains the expressly agreed upon terms of all compensation to be accepted and does not make the agreed upon compensation dependent to any degree on a specific outcome of the legislative or administrative action.

Proposed Regulations

Regulation 18624 Lobbyist Arranging Gifts

Section 86203 prohibits a lobbyist or lobbying firm from making or arranging for the making of gifts totaling more than $10 in a calendar month to any state candidate, elected state officer, legislative official, or agency official.

[2] The United States Supreme Court has stated the rationale for prohibiting contingency fees is that such a fee arrangement may tempt lobbyists to exert undue influence over public officials, who should be acting on the merits of an issue in the public's interest. (See e.g., See *Hazelton v. Sheckels*, 202 U.S. 71, 79 (1906) [finding that a contingency fee lobbying contract tends to invite the possibility of improper solicitation from the moment of its inception and must be struck down regardless of the intention underlying the agreement].)

In a 1982 opinion, the Commission considered various factual situations involving lobbyists and gifts to public officials – specifically, a dinner or luncheon that would be hosted and paid for by the lobbyist's employer – to clarify when a lobbyist arranges for the making of a gift by another person, and therefore in violation of Section 86203. (*In re Institute for Governmental Advocates* ("*IGA*") (1982) 7 FPPC Ops. 1.)[3] The hypotheticals mainly concerned whether a lobbyist could make recommendations or provide information to the lobbyist's employer, including information obtained from a third party for that purpose, under the gift restriction.[4]

The opinion established a definition for when a lobbyist "arranges for the making of a gift" by another, concluding it occurs when the lobbyist 1) "[t]akes any action involving contact with a third party which facilitates the making of a gift" or 2) [h]as any contact with the public official who is to be the recipient of the gift which facilitates the making of the gift." (*In re IGA*, *supra* at p. 2.)

Applying that definition, the opinion concluded that a lobbyist making recommendations or providing information to the lobbyist's employer, including information obtained from a third party for that purpose, would not be arranging for the making of a gift as prohibited under Section 86203. That conclusion was based, in part, on caselaw holding that the communication between a lobbyist and the lobbyist's employer is protected speech under both the federal and state constitutions. (*Ibid.*, at p. 2 citing *Institute of Governmental Advocates v. Younger* (1977) 70 Cal.App.3d 878.)[5] The opinion notes, however, that certain activities go beyond making recommendations or providing information to the lobbyist's employer concerning a gift to a public official. For example, while a lobbyist may provide the lobbyist's employer with the names and addresses of public officials for the purpose of enabling the employer to send them invitations, the lobbyist may not contact the officials, or their agents and employees, for the information. In addition, while a lobbyist may communicate with a restaurant about such things as available dates and potential costs, the lobbyist may not make a reservation.[6]

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[3] According to the opinion, "[t]he limitations imposed by Section 86203, on a lobbyist giving gifts, or on his or her acting as an agent in, or arranging for, the giving of gifts by another are designed to prevent a lobbyist from currying favor with public officials through such activities. The drafters of the Act believed that the recipients of gifts from lobbyists might become more receptive to the arguments of such lobbyists and not consider them purely on their merits." (*In re IGA*, *supra* at p. 2.)

[4] For example, the requestor asked whether a lobbyist may recommend to his or her employer that the employer host and pay for a dinner or luncheon; whether a lobbyist may provide the employer with the names and addresses of public officials so the employer could send them invitations; and whether a lobbyist could communicate with restaurants for the sole purpose of obtaining information for the employer as to available dates and costs to be incurred for food and beverages. (*In re IGA*, *supra*, at p. 1.)

[5] That case concerned Section 86202 which deals with the making of contributions as opposed to gifts, and states that "[i]t shall be unlawful for a lobbyist to make a contribution, or to act as an agent or intermediary in the making of any contribution, or to arrange for the making of any contribution by himself or any other person."

[6] Merely gathering information does not constitute a specific act which "facilitates the making of a gift." (*In re IGA*, *supra*, at p. 3.)

Finally, the opinion finds that so long as Section 86203 has not been violated, such as where the lobbyist has simply made a recommendation to the employer, then the lobbyist may attend the relevant luncheon or dinner without violating the Act. In that situation, however, the lobbyist's employer must also attend – otherwise, the lobbyist would facilitate the making of the employer's gift by attending in violation of Section 86203.

In 1985, subsequent to the *In re IGA* opinion, the Commission adopted Regulation 18624 to change the definition of "arranging for the making of a gift," set forth in *In re IGA*, by defining what constitutes "arranging" a gift to specific activities that all involve communication between the lobbyist and gift recipient.[7]

While Regulation 18624 changed the definition used in the *In re IGA* opinion as to when a lobbyist arranges for the making of a gift, the new definition does not change the opinion's conclusion that the gift restriction is not violated when a lobbyist is merely making recommendations or providing information to the lobbyist's employer, including information obtained from a third party for that purpose. Therefore, the proposed amendments to Regulation 18624 would clarify that under the current definition in Regulation 18624, a lobbyist does not arrange for the making of a gift to another by making recommendations or providing information to the lobbyist's employer concerning a gift to a public official:

> A lobbyist does not "arrange for the making of a gift" if the lobbyist, either directly or through an agent, solely makes recommendations or provides information to the lobbyist's employer, including information obtained from a third party for that purpose, concerning gifts to a public official.

(Proposed Regulation 18624, subdivision (b).)

Regulation 18625 Placing Official Under Personal Obligation

As mentioned, a central purpose of the Act is the regulation of lobbyists and disclosure of lobbyists' finances so that improper influences will not be directed at public officials. (Section 81002, subd. (b).) To that end, Section 86205(a) provides, in full, that:

> No lobbyist or lobbying firm shall:
>
> (a) Do anything with the purpose of placing any elected state officer, legislative official, agency official, or state candidate under

[7] The adoption memorandum explains the changes to the *In re IGA* opinion's definition were being recommended for three reasons: 1) it was too restrictive (and difficult to enforce) in that it prohibits contact with a third party (e.g., lobbyist makes luncheon reservation at a restaurant for the lobbyist's employer and lunch recipient); 2) it was unreasonable in that, for example, if a legislator approached a lobbyist to have the lobbyist relay acceptance of a lunch invitation to the lobbyist's employer, the lobbyist who did not initiate the contact was forced to choose between violating the law or refusing the request; and 3) it was unreasonable that a lobbyist could not accompany an official to an event where transportation is provided by the lobbyist's employer who is the donor and will be present at the event. (See Memorandum, Proposed Lobbyist Gift Regulations – 18624, dated October 25, 1985.)

> personal obligation to the lobbyist, the lobbying firm, or the lobbyist's or the firm's employer.

The Act does not define the phrase "placing … under personal obligation" as it applies to lobbyists and lobbying firms. However, current Regulation 18625(a) clarifies the application of Section 86205, subdivision (a), to include a prohibition against lobbyists and lobbying firms from "arranging or making a loan whether secured or unsecured, to [an] elected state officer, legislative official, agency official or state candidate, either directly or through an agent."

In the 1989 Memorandum proposing adoption of Regulation 18625, staff stated it was evident from the Act's express purpose of prohibiting lobbyists from improperly influencing public officials (Section 81002, subd. (b)), coupled with the lobbyist prohibitions set forth in Sections 86203 through 86205, that the drafters of the Act "were attempting to avoid the perception that lobbyists or lobbying firms, by means of gifts or otherwise, can control the actions of elected state officers." (FPPC Memorandum (1989), Adopt Regulation 18625, p. 2.) Therefore, Regulation 18625 was ultimately adopted because allowing lobbyists to provide loans to state or legislative officials would foster that perception due to the personal obligation created by the arrangement.

The proposed amendments to Regulation 18625 would similarly clarify the application of Section 86205, subdivision (a), to include a prohibition against lobbyists and lobbying firms from failing to make sufficient efforts to collect debt owed for services provided to state or legislative officials they are registered to lobby. Similar to lobbyists providing loans to such officials, allowing debt owed to go uncollected creates the same perception of control over officials the Act seeks to prevent due to the personal obligation that arises from the arrangement.

The proposed regulation is informed by a prior Enforcement matter in which the respondent was a lobbyist who also operated a political consulting business that provided campaign consulting services to candidates for state and local offices. The respondent had lobbied the State Legislature, Governor's Office, and State agencies on behalf of a variety of clients for several years while also providing campaign consulting services to candidates for the State Legislature. On occasion, the respondent's two businesses resulted in him lobbying, on behalf of clients of his lobbying practice, elected officials who had been clients of his political consulting business.

According to the facts in the negotiated stipulation:

> Respondent's contracts with legislative candidates typically called for compensation in the form of monthly payments over a set period of months. In many cases, the contract provided that most, or even all of the consulting fees, would only be owed to Respondent if the candidate won the election. These "win bonuses" ranged in amount from tens of thousands of dollars to over one hundred thousand dollars. A win bonus would typically be payable in equal monthly payments over a number of months beginning after the election. Generally, Respondent sent monthly invoices to

> the successful candidates whom owed him a win bonus. As discussed below, on two occasions, Respondent failed to send invoices and the elected officials failed to pay Respondent the full amount owed per the parties' contract. There were numerous other instances where Respondent did, however, continue to send bills on a monthly basis to state legislators with similar arrangements, and the vast majority of such clients paid Respondent in full.

The two separate counts in the matter alleged respondent violated Section 86205(a) "by contracting with candidates for the State Legislature to provide consulting services for which the candidates agreed to pay, resulting in debts owed to Respondent that Respondent did not sufficiently attempt to collect from those legislators who failed to pay him the full amount owed after getting elected."[8]

As mentioned, the proposed amendments to Regulation 18625 would prohibit lobbyists and lobbying firms from failing to make sufficient efforts to collect debt owed to them from officials they are registered to lobby. Currently, subdivision (a) contains the prohibition against lobbyists and lobbying firms from placing state or legislative officials under personal obligation by arranging or making loans to them. The proposed amendments would add a prohibition against failing to make sufficient efforts to collect debt owed from state or legislative officials. (Proposed Regulation 18625(a)(2).) Current subdivision (b) clarifying how a lobbyist or lobbying firm "arranges" a loan for purposes of subdivision (a) would remain unchanged.

In the Enforcement matter above, the two contracts set forth that the win bonusses would be paid in a set number of "equal monthly installments" to begin on a specified date after the election. Both contracts included a provision to add a 10% charge for late payments. To collect, the respondent would generally send monthly invoices to the successful candidates who owed him a win bonus. In those two matters, however, while the respondent sent invoices to his clients during certain months, in other months he failed to send invoices and the clients failed to pay. In both instances, the respondent allowed the past due debts to go without collection efforts for more than four months. He also failed to charge the clients the 10% penalty for late payments as required under the contract. Therefore, proposed subdivision (c) would provide that a lobbyist or lobbying firm "fails to make sufficient efforts to collect debt" from state or legislative officials if the lobbyist or firm does not follow the "collection processes or procedures provided for in the contract" with the state or legislative official. (Proposed subdivision (c)(1).)

As mentioned, the respondent would generally send monthly invoices to the successful candidates who owed him a win bonus. Despite failing to send monthly invoices in the two matters above, there were numerous other instances where the respondent did continue to send invoices on a monthly basis to state legislators with similar arrangements, and the vast majority of such clients paid Respondent in full. Therefore, proposed subdivision (c) would provide that a lobbyist or lobbying firm "fails to make sufficient efforts to collect debt" from state or legislative officials if the lobbyist or firm does not "[f]ollow the collection processes or procedures employed by the lobbyist or lobbying firm during its regular course of business in similar circumstances." (Proposed subdivision (c)(2).)

[8] See Stipulation, FPPC 14/353

Proposed subdivision (c) would provide that a lobbyist or lobbying firm "fails to make sufficient efforts to collect debt" from state or legislative officials if the lobbyist or firm does not "[a]ttempt in good faith and use best efforts to collect the past due debt." (Proposed subdivision (c)(3).) This provision would be useful in those situations where the "collection processes and procedures" contemplated by proposed subdivisions (c)(1) and (c)(2) may not exist, or in any matter to analyze all of the relevant facts in order to make a determination as to whether sufficient efforts were made to collect debt.

Safe Harbor Provision

Staff recognizes that there may be cases where lobbyists do not use the best practices to collect the debt, did not intend to give away free services, realize at some point the official is not paying, and want to ensure they do not violate the Act. The safe harbor provision under proposed subdivision (d) would provide a bright-line rule of what would need to be done to cure the fact that best practices to collect debt were not used. Specifically, it would require a lobbyist to initiate and pursue legal action within a specified period of time in an effort to collect the past due debt.[9] At the September meeting, the Commissioners had suggestions for improving the provision, so staff made revisions to reflect those suggestions and to further clarify the proposed requirements.

The Demand for Payment

The September version of the safe harbor proposed by staff had a requirement that a lobbyist make a demand for payment *and* pursue legal action. At the meeting, there appeared to be some confusion about the requirements concerning timing and content of the demand for payment. After the meeting, staff considered the issue and decided that requiring a lobbyist to make a demand for payment is unnecessary because it can be assumed that a lobbyist who pursues legal action to collect past due debt would likely have made a demand for payment prior to doing so. And even if a demand for payment is not made, that should not preclude a lobbyist who has actually taken the step of pursuing legal action from receiving the benefit of the safe harbor provision. Therefore, the current version of the safe harbor provision proposed by staff requires a lobbyist to pursue legal action but eliminates the requirement that the lobbyist also make a demand for payment.

Pursue Legal Action

With respect to the safe harbor provision's requirement that a lobbyist pursue legal action, the version proposed in September qualified the term "legal action" to include filing a civil complaint. However, based on concerns that filing a lawsuit might not make economic sense in every situation, it was suggested that the term should be broadened to include

[9] We note that everything a lobbyist does with respect to pursuing the debt is considered in examining whether the lobbyist followed processes or procedures in the contract or in similar circumstances, and whether best efforts were used pursuant to proposed subdivision (c)(1)-(3). In this regard, pursuing a legal action after 6 months or not pursuing a legal action for small debts does not mean the lobbyist did not meet the requirements of those proposed provisions.

compelling a formal arbitration process. Apart from being a potentially less costly and more efficient option, the fact that many contracts for services contain an arbitration clause in the event of contractual disputes is good reason to include it within the term "legal action." Therefore, under the current version, a lobbyist who compels binding arbitration would satisfy the requirement that the lobbyist initiate and pursue legal action to collect past due debt.

Six-Month Timeframe

Finally, the current version of the safe harbor provision attempts to better clarify when the six-month timeframe to initiate and pursue legal action begins. The version proposed in September required that it begin within six months of: (1) the last day of the month in which the services are provided; or (2) the date of a candidate's election to office, for services related to the election with a payment contingent on the candidate being elected. (September proposed subdivision (d)(1)&(2).) The rationale for using these two timeframes was informed by the prior Enforcement matter in which the lobbyist sometimes employed a "win bonus" payment arrangement in consulting contracts that required consulting fees to be paid *only* if the candidate won the election.

In the September version, staff intended that proposed subdivision (d)(1) would apply to contracts without a "win bonus" provision to start the six-month timeframe on the last day of the month in which the *unpaid* services were provided. However, that was not made clear from the language used as there appeared to be some understanding that the timeframe would begin only after all of the services under the contract had been provided. Therefore, the word "unpaid" is now used in the current version of proposed subdivision (d)(1) to clarify that the six-month timeframe to initiate and pursue legal action is triggered at the end of any month where consulting services were provided but the lobbyist has not paid for those services.

The six-month timeframe in proposed subdivision (d)(1) does not work for situations where the contract has an arrangement where payment is only required if the candidate wins the election. For example, when a lobbyist performs services in the months prior to an election, payment is not due during those months, and may never be due depending on the outcome of the election. Therefore, where payment is contingent on the outcome of an election, staff thinks it is appropriate to have a separate six-month timeframe that is triggered on the date of the candidate's election to office. (Proposed subdivision (d)(2).)

Regulation 18626 Contingency Fees Prohibition

Section 86205(f) prohibits a lobbyist[10] or lobbying firm from accepting or agreeing to accept "any payment in any way contingent upon the defeat, enactment, or outcome of any proposed legislative or administrative action."[11] The phrasing of this sentence shows the intent of

[10] Note that the prohibition is intended to apply to contract lobbyists with lobbying firms as well as in-house lobbyists.

[11] As an example, a prior enforcement case alleging a Section 86205(f) violation involved a contract between the California State Bar and respondent lobbyist that agreed to pay the lobbyist a flat rate annually for two years as well as a $75,000 bonus if the lobbyist secured enactment of a multi-year funding bill for the State Bar. (FPPC No. 97/125.) This contractual arrangement was an obvious violation of Section 86205(f), and the matter

the electorate is that the prohibition be construed in a broad manner. To clarify the broad application of the prohibition, staff proposes a regulation that defines the phrase "any payment in any way contingent." The proposed regulation would also provide that a contract for lobbying services does not, in itself, violate the contingency fee prohibition if it contains the expressly agreed upon terms of all compensation to be received and does not make the agreed upon payment dependent to any degree, directly or indirectly, on a specific outcome.[12]

As mentioned, the plain language of the statute suggests an intent by the electorate that the prohibition be construed broadly. "When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls. [Citation.]" (*Voices of Wetlands v. State Water Resources Control Bd*. (2011) 52 Cal.4th 499, 519.)[13] In addition, "[w]hen attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 720 [interpreting statutory language in accordance with its usual and ordinary meaning].)

Webster's defines the term "any," in part, as "to any extent or degree: at all." (See https://www.merriam-webster.com/dictionary/any.) Moreover, the California Supreme Court stated that the term "any" means "without limit and no matter what kind." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) "From the earliest days of statehood [the court has] interpreted 'any' to be broad, general and all embracing." (*California State Auto. Ass'n. Inter–Ins. Bureau v. Warwick* (1976) 17 Cal.3d 190, 195 citing *Davidson v. Dallas* (1857) 8 Cal. 227, 239 [the "word 'any' means every…"]; accord, *Department of California Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 736 [use of "the word 'any' ... in a statute unambiguously reflects a legislative intent for that statute to have a broad application"].)

Here, the plain meaning of the phrase "any payment in any way contingent" as used in the Section 86205(f) is clear and unambiguous – the prohibition applies to all payments accepted, or to be accepted by lobbyists and lobbying firms that are dependent to any degree on a specific outcome of legislative or administrative action. The prohibition is intended to be all-encompassing with no exceptions. This broad application of the statute is consistent with the express purposes of the Act to ensure that activities of lobbyists are regulated, and their finances disclosed in order that improper influences will not be directed at public officials (Section 81002), and to liberally construe its provisions to accomplish its purposes (Section 81003).

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resolved by way of a negotiated settlement with the respondent. The State Bar was charged with the same violation on the theory that it "purposefully or negligently" caused another person to violate the Act pursuant to Section 83116.5.

[12] As mentioned, staff made minor technical changes to the language in proposed subdivision (b) to better clarify the intent of the provision, not to change its substance.

[13] Rules of statutory construction are applicable to both legislative enactments and statutory initiatives. (*People v. Bustamante* (1997) 57 Cal.App.4th 693, 699.)

Proposed subdivision (a) proposes to define the phrase "any payment in any way contingent:"

> For purposes of Section 86205, subdivision (f), the phrase "any payment in any way contingent" means every type of payment, including payment of a fee, salary, bonus, commission or any other form of compensation, which payment is dependent to any degree on the defeat, enactment, or outcome of any proposed legislative or administrative action.

The proposed definition would identify the more common types of potential payments[14] while clarifying that the prohibition applies to all payments, not only payments a lobbyist or lobbying firm has agreed to accept in a contract for lobbying services.[15]

As mentioned, Section 86205(f) prohibits a lobbyist or lobbying firm from accepting or *agreeing* to accept any payment that is contingent on a specific outcome of legislative or administrative action. By its terms, Section 86205(f) applies to the lobbying contract itself in that it prohibits a lobbyist or firm from agreeing to accept payment contingent upon the outcome of any legislative or administrative action. Therefore, proposed subdivision (b) would provide that contract for lobbying services does not, in itself, violate the contingency fee prohibition if it contains the expressly agreed upon terms of all compensation to be received and does not make the agreed upon payment dependent to any degree, directly or indirectly, on a specific outcome of the legislative or administrative action.

Summary of Public Comment & Responses

The proposed amendments to Regulations 18624, 18625 and 18626 were presented to the Commission for prenotice discussion at the September 15, 2022 meeting, as well as an Interested Persons meeting on October 17, 2022.

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[14] Under Section 82044, "payment" is defined to mean a "payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible."

[15] As an example, year-end bonuses given to salaried lobbyists was the subject of an opinion from the Connecticut Office of State Ethics. (See OSE Advisory Opinion No. 1993-19.) Similar to California, Connecticut has a contingency fee prohibition that states no person "shall be employed as a lobbyist for compensation which is contingent upon the outcome of any administrative or legislative action." (Conn.Gen.Stat., § 1-97(b).) Based on the prohibition, the opinion concludes:

> Thus, bonuses given to communicator lobbyists based on the outcome of their lobbying activities (e.g., because a particular bill is passed or "killed"), whether given by a corporate employer, a lobbying firm employer or a lobbying client, are prohibited. If, however, a corporate employer or lobbying firm employer customarily gives its salaried employees a year-end bonus (such as a $100 gift certificate, or a standard bonus based on a percentage of each individual's total yearly salary), then a lobbyist/employee may also receive the bonus.

After the September meeting, General Counsel for the Institute of Governmental Advocates ("IGA"), Thomas Hiltachk, sent a letter dated September 19, 2022, stating the IGA supports all of the proposed regulatory changes.

In addition, at the Interested Persons meeting Lacey Keys of Keys Law Corporation asked for clarification concerning application of the contingency fee ban under proposed Regulation 18626 to contingency fees for lobbying services unrelated to California. In particular, she stated there are instances where a lobbyist has a single contract to perform lobbying services for the same employer in multiple states, some of which do not have a contingency fee ban. Ms. Keys wanted to ensure the broad application of the contingency fee ban definition in proposed Regulation 18626 does not preclude contingency fees for lobbying services not related to California.

The lobbying provisions of the Act only regulate lobbying activities intended to influence legislative or administrative actions of California state government. The Act does not regulate contractual arrangements for lobbying services that are intended to influence legislative or administrative actions of other states or the federal government. Accordingly, a single contract to perform lobbying services for the same employer in multiple states, including California, may include a contingency fee for lobbying services intended to influence legislative or administrative actions in states other than California without violating the Act so long as the contract does not provide for contingency fees for lobbying services intended to influence legislative or administrative actions of California state government.

Education/Outreach Efforts

Commission staff will distribute the amended and adopted regulations to interested parties via the Newly Adopted, Amended or Repealed Regulations email list, update the "Newly Adopted, Amended or Repealed Regulations" page on the Commission's website, and make necessary updates to training and educational materials resulting from the regulatory changes.

Conclusion

The proposed amendments to Regulation 18624 codifying the general conclusions concerning the hypotheticals posed in the *In re IGA* opinion will serve to clarify that a lobbyist does *not* arrange for the making of a gift to another, under the current definition in Regulation 18624, by making recommendations or providing information to the lobbyist's employer, including information obtained from a third party, concerning a gift to a public official. In addition, the proposed amendments to Regulation 18625 will clarify the application of Section 86205(a) to lobbyists and lobbying firms who fail to make sufficient efforts to collect past due debt from public officials they are registered to lobby. Lastly, proposed Regulation 18626 is meant to clarify the broad application of Section 86205(f) by defining the phrase "any payment in any way contingent." These recommended improvements will provide additional guidance concerning the nature and scope of the specified provisions, and facilitate compliance with, and enforcement of, the Act.