

THE SUTTON LAW FIRM

August 20, 2013

VIA E-MAIL & OVERNIGHT DELIVERY

Chair Ann Ravel and Commissioners
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: Proposed Amendments to "Gift to an Agency" Regulation 18944 and "Travel" Regulations 18950 to 18950.4

Dear Chair Ravel and Commissioners:

We thank Commission staff for the thought and attention dedicated to developing these proposed amendments to the Gift to an Agency and Travel Regulations and believe that the proposed regulations more clearly lay out the instances in which travel and other payments for an official will not be considered a gift to the official.

While we applaud Commission staff for addressing these regulations, we must continue to urge that the Commission examine the definition of "personal benefit" at its core, instead of continuing to promulgate regulations in an effort to sidestep the issue. In essence, do items or services used by a public official in the course of his or her official governmental duties provide a "personal benefit" to the official? (See Cal. Govt. Code section 82028 [item is only deemed a gift if it "confers a personal benefit" on official].) Our answer (and the answer previously reached by Commission staff) is an emphatic "no." Instead of adopting this package of regulations today, we instead urge the Commission to consider the definition of "personal benefit" proposed by staff in 2011, and to not adopt the Gift to an Agency and Travel regulations until that time.

Simply put, travel, food and other items and services whose use relates solely and exclusively to the governmental duties of an official are not "personal" in nature. When an individual travels for work, eats a sandwich at an all-day training, or has a meal while on official business, he or she does not receive the "personal benefit" that he or she would traveling to visit family or having lunch with a friend. It is unreasonable to claim that officials attend business lunches or fly to meetings for the personal benefit they might gain in terms of consuming a meal or taking an airline flight; rather, they attend these events because it is required of their job. Nothing in the law says otherwise.

In fact, as you know, the FPPC took the initial steps toward adopting a regulation to define the term personal benefit in 2011. The staff memorandum and proposed regulatory language – which is arguably the only time that the FPPC has taken a comprehensive look at the scope of the term – agrees with our conclusion:

A more reasonable construction is that, for the purposes of the Act's regulation of gifts, the language was intended to separate business and pleasure, to create a distinction between someone's personal activities and the work you do as part of your official government duties. At a minimum, this interpretation would eliminate from the definition of gift payments an official receives in the course of performing his or her official duties that are no different from what the official's agency would provide or from what other participants would be provided under the same circumstances.

(Staff Memorandum (10/31/11) "Adoption of Proposed Amendments to the Gift and Travel Regulations," pg. 7.)

More specifically, the proposed definition of "personal benefit" would have exempted meals consumed and travel undertaken in relation to one's job duties:

A "personal benefit" means a payment that benefits an individual's private interests, activities, actions, comfort, or well being, financial or otherwise, including an individual's private business. A personal benefit does not include any benefit that the official receives in the performance of his or her public duties so long as the benefit is substantially similar to that which the official's agency would ordinarily provide to the official to carry out such duties or the benefit consists of a meal or overnight expense provided at an event in which all attending the event are entitled to receive at least same benefit.

(Proposed 2 Cal. Code of Regs. section 18940.1(g) from August 9, 2011, Interested Persons' Meeting.)

While the Commission declined to address this issue in 2011, we believe that the distinction between personal activities and professional duties put forth by the FPPC staff at that time is the best way to resolve the issue. The Commission should use such a definition to determine whether payments for travel or payments to an agency are gifts to an official, rather than adopting complicated regulations which effectively avoid this provision in the law.

Given this previous acknowledgment of the central role which the term “personal benefit” must play in any analysis of whether an item or service used by a public official is deemed a gift, the proposed amendments to the regulations are disappointing. In fact, the staff memorandum confirms this piece-meal approach: “Thus, we do not attempt to provide a broad definition of the “personal benefit” provision contained within the Act’s definition of “gift,” or attempt to cover every potential situation which may present itself. We instead take a far more practical approach.” (Staff Memorandum (8/12/13) “Proposed Amendments to Regulation 18944 and Travel Regulations 18950 through 18950.4,” pg. 2.) Unfortunately, this proposal to leave questions open “for future exploration and refinement through advice letters,” instead of adopting a definition of personal benefit now, will lead to more years of varying advice, wholesale confusion, and the unnecessary use of scarce Commission resources. Moreover, the regulations as drafted ignore that the law clearly states that an item or service is not a gift unless it confers a “personal” – as opposed to “professional” or “governmental” – benefit on the official.

For example, the proposed amendment to Regulation 18944 would now allow the head of an agency to designate himself or herself as the beneficiary of an item, so long as “the payment is for an item that provides for general use by agency officials and the agency head is one of those officials who will have access to such use.” (Proposed Reg. 18944(c)(2).) If someone donates a coffee machine, a chair for a meeting room, or other item which may be used by more than one person, the item will presumably fit within the amendment. But what if someone wants to donate an iPad, desk, computer or even a car to the agency to be used solely for agency business? Could the head of the agency use such donated item? Can another member of the staff use such item even though it will not provide general use? These questions should not be answered by analyzing whether the item fits within secondary regulations about gifts to an agency or travel, but rather under the simple rubric of personal versus professional use. Either way, the lack of clear guidance on whether an item used solely and exclusively for governmental purposes confers a “personal” benefit on the official would remain.

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We firmly believe that a clear line can be drawn between meals, travel and other items and services which are used in the course of official agency business, and those which benefit an individual personally. To continue to sidestep the issue instead of addressing this fundamental distinction only serves to "kick the can down the road." We therefore urge the Commission to revisit the definition of personal benefit put forward in 2011 instead of passing these amendments today.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jim Sutton".

James R. Sutton

EMB/dfm
#1000.01

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428 J Street, Suite 620
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RE: Proposed Amendments to Regulation 18950.3 "Payments in Connection with a Speech"

Dear Chair Ravel and Commissioners:

We would like to ask you to consider making one small change to proposed regulation 18950.3, "Payments in Connection with a Speech." In the current version of the regulation, "nominal non-cash" items given to an official in connection with a speech are not deemed gifts to the official: "A payment made for. . . nominal non-cash benefits provided to the official in connection with making the speech is not a "payment". . . and is not reportable. . ." (2 Cal. Code of Regs. section 18950.3(b).) This language allows an organization to present items such as t-shirts, chocolates, or other small tokens of appreciation to an official giving a speech.

However, the proposed amendment removes the language specifying "non-cash benefits." Though it provides an exception for "nominal items," it now limits such items to those given to all attendees of a conference or event: "For the purposes of this subdivision, nominal means an insignificant item typically purchased in large volume and provided for free as a means of advertisement at events, such as a pen, pencil, mouse pad, rubber duck, stress ball, note pad, or similar item." (Proposed Regulation 18950.3 (8/9/13).) This more limited definition would mean that an official who makes a speech to the California Avocado Commission, and receives a small bag of avocados in thanks, would be required to report those avocados as a gift, or an official who is presented with a "CPAA hat" for sitting on a panel at the California Political Attorneys Association conference would have to disclose the hat as a gift. As these items already must be of a nominal nature, and because they are given due to the official effectively providing consideration to the organization in the form of the speech or presentation, using the prior broader definition would seem consistent with the public policy objectives of the law and regulation.

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We therefore urge the Commission to use the definition of “nominal non-cash benefits” from the prior version of the regulation.

Thank you for your consideration and please contact me should you have any questions regarding these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Sutton". The signature is written in a cursive, slightly slanted style.

James R. Sutton

EMB/dfm
#1000.01