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September 11, 2012

Chair Ann Ravel and Commissioners
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

RE: Agenda Item 18; Regulation 18706 ("Reasonably Foreseeable")

Dear Chair Ravel and Commissioners:

As chair of the League of California Cities City Attorneys Department FPPC Committee, I submit this letter for comment on the above-referenced agenda item. While members of the committee have discussed this regulation on a number of occasions, committee member schedules did not allow for a quorum to meet and discuss the final proposal submitted by staff for your consideration. Therefore, this letter contains comments and recommendations from me as an individual that are informed by previous discussions with the committee, but without their formal approval.

As stated in my letter sent in advance of your August meeting, I agree with staff that the current regulation's definition of "reasonably foreseeable" as "substantially likely" is inconsistent with the purposes of the Act. I believe this definition sets a degree of probability that a material financial effect will result from a government decision that is too high. Moreover, as a result of the discussion at the August meeting, I can appreciate staff's concern with the use of the term "substantial possibility" as proposed in my August letter. In general, I support the staff's revised "realistic possibility" standard as presented to you in the materials for your September 13 meeting.

While I generally support the standard contained in the draft before you, I do have some minor suggested revisions that I believe would make the proposed regulation tighter and easier to understand and apply. These suggestions are as follows:

Caption to Section 18706(a) [page 1, line 8]

Subsection (a) establishes a presumption that under the circumstances described a material financial effect will be deemed reasonably foreseeable. The text begins with the caption "Economic Interest Explicitly Involved:." This caption is unnecessary, and

potentially confusing. The use of the term "Explicitly Involved" in the caption suggests to the reader that this is a term of art the reader will need to understand to apply the regulation, and one that will be defined somewhere in the regulations. It is not used within the regulation, and is not defined anywhere else. The language that follows the caption clearly states the circumstances giving rise to the presumption. The caption adds nothing useful to the regulation, and I would recommend that it be deleted.

Section 18706(a): Is the presumption conclusive or rebuttable?

While the text of the proposed regulation establishes a presumption under the circumstances described, there is no indication to the reader whether this presumption is conclusive, or rebuttable? This should be made clear so that officials and their advisors will know the FPPC's position on this question.

Caption to Section 18706(b) [page 1, line 15]

As stated above, the use of captions to these subsections is unnecessary. I would suggest replacing the caption "Economic Interest Not Explicitly Involved in Decision:" with the sentence, "If the circumstances giving rise to a presumption under subsection (a) are not present, the following standards apply."

Removal of Sentence from 18706(b) [page 1, lines 18-19]

Subsection (b) sets forth the standard for determining when the occurrence of a financial effect as a result of a decision will be considered reasonably foreseeable. The first sentence indicates that occurrence of the effect need not be likely, and the second sentence establishes the "realistic possibility" standard. I found the third sentence to be confusing and unnecessary. The sentence contains a double, double negative that makes it hard to follow. When these negatives are converted to positive statements the sentence would read, "If the financial result can be expected under ordinary circumstances subject to the official's control, it is reasonably foreseeable." This seems to be so obvious as to not need to be included.

Removal of subsection 18706(b)(4) [page 2, lines 22-23 through page 3, lines 1-2]

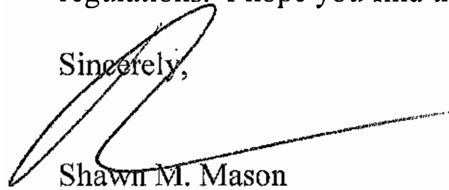
Subsections (b) (1) through (6) are intended to list factors the reader should consider in determining whether a financial effect will be considered reasonably foreseeable. The language contain in subsection (4) is too general. Essentially, this provision says that an effect is reasonably foreseeable if "a reasonable inference can be made that...the effects of the governmental decision... could compromise the ...official's ability to act in... the best interests of the public." While this language provides insight into the rationale for requiring disqualification of a public official form certain governmental decisions, in really doesn't add any meaningful guidance in identifying the factual circumstances that support such a "reasonable inference."

Removal of subsection 18706(b)(6) [page 3, lines 7-9]

I would also recommend that this subsection be deleted. The language used is very general, and the concepts that it appears to address have already been described in more specific terms in subsection (b)(3).

In conclusion, I would like to thank the Commission and your staff for your continued efforts in the important work of simplifying and clarifying the conflict of interest regulations. I hope you find these comments helpful in your deliberations on this matter.

Sincerely,



Shawn M. Mason
City Attorney of San Mateo
Chair, League of California Cities City Attorneys Department FPPC Committee

cc: Zackery P. Morazzini, General Counsel

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Chair Ann Ravel and Commissioners
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

RE: Agenda Item 19; Regulation 18730.1 (Reporting Gifts)

Dear Chair Ravel and Commissioners:

As chair of the League of California Cities City Attorneys Department FPPC Committee, I submit this letter for comment on the above-referenced agenda item. Committee member schedules did not allow for a quorum to meet and discuss the final proposal submitted by staff for your consideration. This letter contains comments and recommendations from me as an individual that are informed by discussions with the some members of the committee, but without the formal approval of the full committee.

The Political Reform Act requires state and local government agencies to adopt conflict of interest codes. These agency codes must designate those employees whose job duties involve decisions that may impact their private financial interests. These codes must not only identify those employees, but must also establish the scope of those financial interests that must be disclosed by the designated employees. Court cases interpreting the Act have made clear that in defining the scope of disclosure that designated employees must make, agency codes must be tailored to avoid unlawful intrusion into the privacy interests of the affected employees.

FPPC staff is concerned that many agency conflict of interest codes are not sufficiently tailored to require the disclosure of only those financial interests that might be impacted by the activities of the designated employees. The proposed regulation would address this problem by limiting the legal effect of agency codes with respect to the requirement for the disclosure of the source of gifts.

The members of our committee who discussed this proposal support the policy goals staff seeks to achieve. An overbroad conflict of interest code unnecessarily and illegally intrudes into the privacy of those employed by cities. Moreover, the adoption of an

overbroad conflicts code could subject a city to litigation. This being said, I do have some concerns with the language used to achieve staff's purpose.

The first sentence of the proposed regulation reads, in part, that, "[n]othing contained in an agency's conflict of interest code *shall be interpreted* to require the reporting of gifts from outside the agency's jurisdiction..." (Emphasis added.) The problem with this language is that it does not really describe what is intended. If a city's conflict of interest code unambiguously requires the disclosure of all sources of gifts no matter their location, the regulation is not intended to interpret the offending disclosure requirement; it is intended to render the requirement unenforceable. Interpretation involves the explanation of ambiguous terms. What staff intends is that the proposed regulation nullifies the legal effect of a provision of a local code that, by its terms, requires overbroad disclosure.

I am also concerned about the language used to describe the exception to the general rule stated in the proposed regulation. After stating the general rule (that disclosure shall be limited to sources located in the jurisdiction), the proposed regulation goes on to say that sources outside the jurisdiction must still be reported if the source engages "...in activities that have some connection with or bearing upon the functions or duties of the position for which the reporting is required." Thus, to fall within the exception requiring disclosure, the source must be "engaged" in some "activity." I am concerned that this language is too restrictive.

For example, imagine that a city planner is working on a proposal for the development of real property located within the jurisdiction on its boundary with a neighboring city. If the planner received a gift from a person who owned a home in the neighboring jurisdiction, the text of the proposed regulation would permit the planner to not disclose the source of the gift, even if the source's home was immediately adjacent to the site of the proposed development but on the other side of the city boundary. A fair reading of the proposed regulation would be that the source's mere ownership of the home is not "engaging in activities."

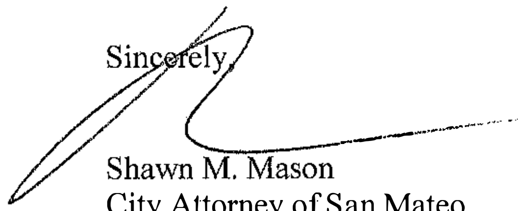
Last week I spoke to your staff about these concerns, and suggested alternative language that would address both of them. That proposal is as follows:

"Nothing contained in an agency's conflict of interest code to require the reporting of gifts from a source that is located outside of the agency's jurisdiction shall be enforceable, unless the source's financial interests may be affected by any action the designated employee may take when acting in their official capacity."

This language eliminates the "shall be interpreted" phrase and states staff's intention that the provisions of an agency code that requires overbroad disclosure "shall not be enforceable." In addition, the exception has been revised to make clear that a source must be disclosed if their financial interests could be affected by actions taken by the designated employee, even if the source is not "engaged in an activity."

I hope you find these comments helpful in your consideration of the proposed regulation.

Sincerely,



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