



California Political Attorneys Association

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VIA ELECTRONIC MAIL

Mr. Richard Miadich, Chair
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811
E-Mail: CommAsst@fppc.ca.gov

Re: Comment Letter – May 18, 2023 FPPC Agenda Item 4.

Dear Chair Miadich:

The California Political Attorneys' Association ("CPAA") offers comments on Agenda Item No. 4. This Item is listed for purposes of discussion of a recent Advice Letter issued by the FPPC, the *Winuk* Advice Letter (2023) I-23-009. The *Winuk* Advice Letter addresses the Honoraria rules found in the Political Reform Act ("the Act"). Specifically, it considers whether the Honoraria ban found in Government Code Section 89501 should apply to a City Council Member who had a *bona fide*, long established business as an author and speaker whose speaking engagements are outside the jurisdiction of the City and paid for by entities that do not have business before the City.

Based on the advice provided in the *Winuk* Advice Letter, CPAA believes that the advice provided should be modified and the scope of the honorarium Regulations should be limited in two ways. First, the scope of honorarium should be limited to payments for speeches from those who do business in the public official's jurisdiction. This is consistent with other financial interest reporting and conflict of interest rules. It is also consistent with the documented legislative intent of the bill that extended the honorarium prohibitions to local government officials. Second, the definition of "speech given" should not extend to a *bona fide* business such as the one in the *Winuk* Advice Letter, where the speeches are part of a longstanding business and integral to the business activities.

The FPPC prohibits the receipt of "honorarium" by public officials. The term is defined in statute (Government Code Section 89501) as "any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering." The definition excludes "Earned income for personal services which are customarily provided in connection with the practice of a *bona fide* business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches."

The honorarium prohibition was made applicable to local government officials in 1995 through the passage and enactment of SB 701. In the Digest for the bill, the Legislature found specifically that “This bill would reorganize the gift limitation and honoraria prohibition provisions of the act so that the rules currently applicable to state officials and candidates are made equally applicable to local officials and candidates, meaning that **these provisions will only apply to local officials and candidates if a gift or honorarium received by the official or candidate is required to be reported on his or her statement of economic interests**” (emphasis added).

Despite the limiting language in the Digest, the FPPC adopted regulations in 1995 to interpret Section 89501 very broadly. First, it did not limit the prohibited honorarium only to those from persons or entities that would be reportable on the local government official’s Statement of Economic Interests (“SEI”). Instead, it has applied the ban to receipt of payment from anyone, regardless of whether they have any business in the public official’s jurisdiction. Second, the FPPC has over-broadly interpreted the term “speech given” to include *bona fide* businesses that have presentations as a component of the business, even if the presentations are completely unrelated to the public service of the official.

The *Winuk* Advice Letter provides an example of this. Palo Alto City Councilmember Julie Lythcott-Haims is a well-established author and educator. She has published three books, with her first book being published in 2015. Through her experience and her published works, she has become a consultant and expert on the topics covered by her books. Her books, promotional talks, workshops, articles and other paid activities are on topics completely unrelated to her service as a member of the City Council.

In the *Winuk* advice letter issued regarding Ms. Lythcott-Haims’ business activities, the Legal Division found that any speaking engagement she accepts as a part of her business will be a prohibited honorarium because it is included within the definition of “speech given” in FPPC Regulation 18931.1, and because her “speech-making” was a “predominant activity” of her business under FPPC Regulation 18932.3. Regulation 18932.3 considers the “predominant activity” of a business to be speech-making if more than 50 percent of either the time spent or the money earned in the preceding 12 months was from speech-making, regardless of the source of income or the type of speech given.

Situations such as Ms. Lythcott Haims demonstrate the need to refine the interpretation of the terms “speech given” and/or “predominant activity” to preserve the purpose of the honorarium ban – avoiding the potential for corruption by prohibiting payments to candidates and public officials by those who have business before their public entities – while preserving the rights of those to participate in government while earning a living.

Further, in the *Ashburn* Advice Letter (2007) A-07-119, FPPC staff expressed their position that the definition of “speech given” was too broad. It also states that FPPC staff had the same opinion about the overly-broad definition when the FPPC considered amendments to prior versions of the honorarium regulations.

CPAA respectfully requests the FPPC reconsider the advice provided in the *Winuk* Advice Letter. The FPPC could interpret the term “speech given” in FPPC Regulation 18931.1 to exclude the type of speeches given by Ms. Lythcott-Hains and other similarly situated officials. Alternatively, the FPPC could interpret either the term “speech given” under Regulation 18931.1 or “predominant activity” of a business under FPPC Regulation 18932.3 to exclude speeches paid for by persons or entities that have no business in the public official’s jurisdiction. If the FPPC does not choose to modify the Advice Letter, it could amend the Regulations to provide clarity to these interpretations.

CPAA appreciates your willingness to consider these comments. We welcome further discussion on these issues with Commission members and staff.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ashlee Titus", with a long horizontal flourish extending to the right.

Ashlee N. Titus,
CPAA President