

Fair Political Practices Commission

Memorandum

To: Chair Ravel, Commissioners Casher, Eskovitz, Wasserman, and Wynne

From: Zackery P. Morazzini, General Counsel

Subject: Statement of Activities which are Deemed to be Inconsistent, Incompatible, or in Conflict with the Duties of its Officers and Employees

Date: August 22, 2013

Background and Process

Every state and local agency is required to adopt a statement of activities which are deemed inconsistent, incompatible, or in conflict with the duties of its officers and employees (the "Statement"). Section 19990 prohibits "state officers and employees ... from engaging in any activity or enterprise that is clearly inconsistent, incompatible, in conflict with, or inimical to their duties as state officers or employees. Each state agency is required to develop, subject to the approval of the [California Department of Human Resources], a statement of incompatible activities for its officers and employees."¹ This Statement creates responsibilities that are in addition to those in the Political Reform Act (the "Act").²

Last year, in light of the numerous changes to the gift rules, staff determined that the existing Statement was in need of an update.³ In order to revise the Statement, regulations require the Commission to:

- (1) Publish the proposed statement or revision and a supporting statement of rationale for review and written comment by affected employees for at least 30 calendar days.⁴
- (2) Respond in writing to concerns expressed by affected employees and their representatives about the statement during the review period by either making changes to the statement that are responsive to their concerns or informing them why such changes are not being made.

¹ "Conflicts of Interest" (2010) published by the Office of the Attorney General, page 91.

² The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

³ The Commission's current Statement was approved by the Commission in October 2001.

⁴ Please note that this proposed Statement does not apply to the members of the Commission. The Commission has approved a Statement explicitly applicable to the Commissioners that was provided to each Commissioner when they were appointed to the Commission.

(3) File with the California Department of Human Resources for approval a copy of the statement, the statement of rationale, a summary of the process followed in developing or revising the statement, a summary of the written comments received from employees and their representatives and the Commission's response to the comments.

Consistent with the regulatory requirements, staff performed the following tasks:

- On April 24, 2012, staff posted a revised Statement with an explanation of changes on the Commission's Intranet and notified all staff concerning the availability of the draft revisions for comment. The material was also sent to the unions that represent employees at the agency.
- As of May 31, 2012, we had received numerous comments from staff, but no comments from the unions. We closed the comment period on that date.
- On June 25, 2012, the revised Statement was modified in light of employee comments.
- On August 8, 2012, the Statement was submitted to CalHR for tentative approval. After several follow up emails with CalHR, CalHR assigned an attorney to review the Statement. Several drafts were exchanged with CalHR and circulated among Executive Staff.
- On April 24, 2013, CalHR approved the revised Statement, but suggested in light of the significant rewrite that occurred during the review process that the Statement be renoticed to staff and the unions.
- On May 1, 2013, the Statement was once again posted on the intranet and staff was notified of the availability of the draft. The material was also sent to the unions that represent employees at the agency.
- The second comment period closed June 1, 2013. Only one substantive comment was received from staff, none from the unions. Staff was concern with the preapproval rule for travel received from persons outside the agency. As drafted, they believed the proposed language imposed too great a burden on employees. The section was revised to resolve this issue.

Content of the New Statement

All the new language (with one exception discussed below) was reviewed by an Assistant Chief Counsel at CalHR. CalHR's comments and suggestions were invaluable and the primary reason for rewriting and updating much of the older language. At Attachment 1 is a comparison chart showing new language by subdivision next to the existing language of the Statement for ease of comparison. Below we explain the substantive changes to each subdivision in the Statement.

- Sub (a)** This subdivision has no independent legal effect. The language has been clarified and shortened. The last paragraph has been removed and relocated into the “interpretation” section, subdivision (e).
- Sub (b)** This subdivision contains the definitions used in the Statement. Revision of the Statement was necessitated by a series of amendments to the gift regulations in 2011. The existing statement explicitly repeated language from the gift statute and from the then-existing gift regulations. Since the regulations have been substantively amended, the existing language in the Statement needed to be amended so as not to be misleading
- In order to prevent the need to pursue future amendments of the Statement every time a regulation is amended, we have attempted to cross-reference to the statutory definitions in the Act. We have also added a general statement in the preamble of the section that states that where a term is not defined, the definitions in the Act control.
- Sub (c)** Subdivision (c) contains the general prohibitions required by statute (Section 19990.) Any changes were clarifying in nature.
- Sub (d)** Subdivision (d) contains the specific provisions that are tailored to the function of the Commission. These sections are divided into 5 parts.
- Sub (d)(1)** *Travel Rules:* The existing provision essentially prohibited gifts of travel where otherwise prohibited by law. The provision would permit payment for travel in connection with making speeches, but not for training. It was not clear why the original language focused on these fact-specific occurrences.
- In order to provide greater guidance to staff, the new provisions provide a chain of command for the approval of third-part travel payments.
- Sub (d)(2)** *Public Comments:* The existing language prohibited staff from purporting to speak on behalf of the agency to state administrators and legislative personnel. While this section was rewritten at the suggestion of CalHR, we believe the new version is more precise and provides better notice to the employee of what is prohibited.
- The language has been clarified to prohibit purporting to be speaking on behalf of the agency in all cases unless authorized to do so. The new provision also clarifies the same prohibition on purporting to speak on behalf of the agency in writing. The requirements were not substantively changed.
- Sub (d)(3)** *Outside Employment:* Two provisions have been inserted into this subdivision. They were removed from subdivision (d)(5). Both of these provisions concern compensated activity in campaigns or lobbying which appeared to fit better in the “outside employment” section. Also new is a provision requiring notice to the Executive Director if employees are taking outside employment. Finally, new (G) simply conforms the subdivision with any conflicting contract provisions now

existing or agreed to in the future.

Sub (d)(4) *Gifts*: This section has been significantly reduced. The original version attempted to list and paraphrase some (not all) of the relevant exceptions to the gift rules in the Act. The new draft, rather than including a laundry list, explicitly defers to the actual regulations of the Commission.

As noted previously, the gift regulations were rewritten in 2011 to make them more user friendly for the regulated public and rather than incorporate every revised regulation into the Statement, we are including them as an attachment to the Statement.

Sub (d)(5) *Political Activity*: The primary change to this provision was to move two sections (existing (C) and (D)) into the outside employment section. Both of these provisions concern compensated activity in campaigns or lobbying which appeared to fit better in the outside employment section. With the advice of CalHR, we reworded the disqualification provision to make sure that the rule complies with current law regarding political activity.

Sub (e) New subdivision (e) (formerly subdivision (f)) provides the method to seek an interpretation of the Statement and a method to appeal from the Statement's requirements. These concepts were originally placed in the third paragraph of subdivision (a) and in subdivision (f). We have combined them into new subdivision (e).

Sub (f) Subdivision (f) sets out the potential penalties that were formerly described in subdivision (e). The language has been streamlined with a cross reference to the statutes dealing with personnel actions at the suggestion of CalHR.

Attach Finally, as an alternative to quoting statutes in the Statement, we will attach the pertinent statute and regulations to the Statement. These will be easily updated as the law changes.

Recommendation

Staff recommends the Commission approve the revised Statement.

Attachments

1. Comparison chart existing/new language.
2. Approved revised Statement.
(including Sections 82004, 82028, 82047, Regulation 18942.)
3. Strikeout version of existing Statement showing amendments.