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# MEMORANDUM

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## EXECUTIVE SUMMARY

Legislators and policymakers must navigate increasingly complex technological and scientific issues, a full understanding of which requires a level of technical expertise and scientific perspective that may be absent from government offices. Rapid access to such expertise can help policymakers make well-informed, evidence-based decisions about policy surrounding a host of emerging and evolving issues.

A well-established program in California, which receives financial support from outside of government, presents one model for making such expertise available to state legislators and policymakers. The Science and Technology Policy Fellows program (http://fellows.ccst.us/) (the "Fellows Program") of the California Council on Science and Technology[1] ("CCST") places highly trained scientists in California state offices to provide policymakers with immediate access to advanced scientific expertise and perspective relevant to policy development.

This arrangement raises questions for current and prospective funders of such a program, including (among others) private foundations, corporations, and individuals, about the implications under federal tax, state lobby disclosure, and government ethics rules of providing support for the program.

Based on our review of the history and purpose of CCST in general, and of the Fellows Program in particular, we believe that the Fellows Program is a viable model for the

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[1] California's leading public education institutions, at the urging of the State Legislature, established CCST to give California's policymakers access to immediately available scientific and technological expertise and a scientist's perspective to enhance decision-making.

establishment of similar programs in other jurisdictions. However, proponents of the model should consider a number of issues before seeking to emulate it in other jurisdictions.

Specifically, our review of CCST suggests the following key considerations:

1. Proponents should consider housing the Fellows Program in a separate legal entity that qualifies for exemption under Internal Revenue Code Section 501(c)(3). If a suitable home does not already exist, proponents may consider creating a new entity for this purpose.

2. Before working to create an entity like CCST by legislative action, prospective funders should determine whether such work itself constitutes lobbying, and, if so, whether any exception may apply.[2]

3. If possible, proponents should advocate for a legislative record that documents the Legislature's desire that the new entity provide technical assistance to government bodies. This record will help secure funding for the program, particularly from private foundations.

4. When considering an opportunity to fund a similar program in another jurisdiction, prospective funders should determine whether their grants will trigger lobby disclosure obligations in the relevant jurisdiction.

5. When establishing a similar fellowship program in another jurisdiction, proponents should confirm that such an arrangement is legally permissible in the relevant jurisdiction.

## INTRODUCTION

The Adler & Colvin and Nielsen Merksamer law firms collaborated on this memorandum summarizing the legal framework surrounding support by various types of funders for a program similar to the CCST Fellows Program.

More specifically, in this Memorandum, we describe the legislative history of CCST and the Fellows Program, and highlight key considerations for proponents of similar programs in other jurisdictions. We then provide a more detailed description of CCST, as an illustrative case study.

This Memorandum provides a high-level view of some of the legal circumstances surrounding a specific program in a single state (California). It does not attempt to address all

[2] One potentially powerful exception, available for private foundations only, excludes from the definition of "lobbying" certain communications related to a "jointly funded project," defined to include, among other things, "a new program which may be jointly funded by the foundation and the government." Treas. Reg. Sec. 53.4945-2(a)(3).

legal issues that might arise in connection with CCST's activities, or with those of any similar fellows program in any other jurisdiction.[3] The portions of this Memorandum that discuss matters of California law as applied to CCST's specific facts will not be directly relevant to any other entity, or in any other jurisdiction.

This Memorandum does not constitute legal advice to any user of this document.

## CONSIDERATIONS FOR SIMILAR PROGRAMS IN OTHER JURISDICTIONS

CCST's history, structure, and programs, described more fully in the Case Study below, possess characteristics that reduce the risk to private foundations, individuals, corporations or other entities interested in funding CCST's efforts. Fellowship programs designed differently may not offer the same protections to prospective funders, so parties interested in supporting a similar program in another jurisdiction should consider the implications of any differences in program design and implementation for their ability to fund the program.

*Federal Tax Law Considerations for Donors*

1. Proponents should consider housing the fellowship program in a separate legal entity that qualifies for exemption under Section 501(c)(3).

CCST was formed as a separate, publicly supported charity that can receive contributions from individuals, private foundations, corporations, and government entities. This approach maximizes the opportunities for fundraising, since some prospective donors, particularly private foundations and individuals seeking a tax deduction, will be less likely to give to an entity with a different tax status. It also affords foundation supporters, in particular, the ability to use favorable rules governing the treatment of grants, including certain exceptions to the relevant tax law definition of "lobbying."

2. Before working to create an entity like CCST, prospective funders should determine whether such work itself constitutes lobbying, and, if so, whether any exception may apply.

Efforts by a private foundation or other tax-exempt organization to promote the creation by a legislature (at any level of government) of an entity like CCST may constitute lobbying, unless an exception applies. If a foundation will help fund the entity, then an exception for communications related to projects "jointly funded" by the private foundation and government may apply. Otherwise, the foundation should explore the possibility of getting a

[3] Although CCST has not to date placed Fellows in judicial branch offices, we understand that some funders may be interested in supporting judicial placements through CCST or similar programs elsewhere. Our analysis applies equally to such placements. We are not aware of any additional rules or regulations that would apply to judicial fellows, although potential funders should confirm that such placements are legally permissibly in the relevant jurisdiction.

written request for technical assistance from the relevant legislature (which, in the case of a bicameral legislature, might entail more than one request) so it can communicate with legislators about the proposed program. In any event, a private foundation or other tax-exempt organization seeking to duplicate the CCST model in another jurisdiction should consult knowledgeable counsel to ensure compliance with applicable federal tax rules.

3. If possible, proponents should advocate for a legislative record that documents the Legislature's desire for technical assistance from the new entity.

For federal tax purposes, the issue of greatest concern to donors, whether private foundations, corporations, or individuals, is likely to be ensuring that any grant made to support a similar program in another jurisdiction will not be considered earmarked for lobbying. The challenge that this desire poses is that in the CCST model, Fellows are placed directly in legislative and other government offices and therefore may actively participate in the formulation of legislation. Consequently, grants (other than general support grants) supporting such a fellows program where the fellows are formulating legislation (as opposed to, for example, providing nonpartisan research and analysis on legislation formulated by others) likely involve expenditures for the purpose of influencing legislation.

However, if a charity receives a written request for technical assistance from a government body, then its communications with that body in response to the written request are, for federal tax purposes, not lobbying. As a result, grants or contributions made to the charity to fund those communications are not lobbying expenditures. This is important for private foundation funders because it means their support for such communications will not generate tax. It is also important for individual donors, because, as noted above, federal law prohibits an individual donor from claiming a deduction for a contribution that is earmarked for lobbying.[4] A contribution from an individual donor that is earmarked for activities covered by an exception to the lobbying definitions, such as the technical assistance exception, is not earmarked for lobbying, and therefore remains deductible by the donor.[5]

The legislative history of CCST's creation and implementation provides a clear record supporting the view that the California Legislature created CCST, a publicly supported charity, *specifically* to provide the Legislature and other government agencies with ongoing technical assistance on the scientific and technological issues that frequently arise in policymaking. This history, at the very least, signals to funders, their counsel, and the IRS that the Legislature wants, for itself and other government agencies, the benefit of the knowledge and skills that Fellows can provide.

[4] Rev. Rul. 80-275.
[5] Each individual donor should consult his or her personal tax advisor to determine whether, and to what extent, a given contribution may be deductible.

To emulate the CCST model most closely, projects in other jurisdictions should establish a similar legislative record to reinforce the view that the entity is the target of an ongoing written request for technical assistance.

*Lobby Disclosure and Government Ethics Considerations*

4. When considering an opportunity to fund a similar fellowship program in another jurisdiction, prospective funders must determine whether their grants will trigger lobby disclosure obligations in the relevant jurisdiction.

Each state and many local jurisdictions have enacted their own lobby disclosure requirements. No two laws are identical. Some jurisdictions require disclosure of lobby expenditures related to both executive and legislative actions; some jurisdictions focus only on legislative action. Jurisdictions define lobby activities and lobby expenditures differently. If a fellowship program is developed similar to the Fellows Program such that the donors are not involved in the selection of legislative or administrative issues in which the Fellows will be involved, we believe it would be unlikely that grants to such a fellowship program will trigger lobby disclosure requirements on the part of the foundation, corporate or individual donors. Nonetheless, it is important to confirm this conclusion with the relevant ethics agency of the jurisdiction in which the fellowship program will be active.

5. When establishing a similar fellowship program in another jurisdiction, proponents should confirm that such an arrangement is legally permissible in the relevant jurisdiction.

Whether the program focuses on legislative branch or executive branch fellows, or both, it is critical to determine at the outset that applicable government ethics rules permit government officials to accept the services of the fellows for the intended purpose. Depending on the relevant jurisdiction's government ethics laws, various issues may arise concerning regulation of gifts or other benefits. The ethics laws of a particular jurisdiction could prohibit legislative or executive officials from accepting the services of fellows, or could prohibit the fellows from providing the services to the state or other governmental jurisdiction while being compensated by a third party. In addition, it is possible that such arrangements, while legal, nonetheless need to be documented or reported in a certain way. The ethics laws of each jurisdiction are likely to be unique to that jurisdiction. Proponents of any such fellowship program should work with the benefiting government agencies to resolve these issues at the outset, to structure the program to address any ethics concerns.

## CASE STUDY: CCST AND THE FELLOWS PROGRAM

### BACKGROUND

In 1988, the California Legislature approved Assembly Concurrent Resolution No. 162, urging the President of the University of California, in collaboration with other educational leaders in the State, to create CCST ("ACR 162"). ACR 162 articulated several reasons for this request, including the significance of science and technology to California's economy and, of particular interest for purposes of this Memorandum, the need for access by California's policymakers to immediately available scientific and technological expertise and a scientist's perspective to enhance decision-making.

Specifically, ACR 162 urged CCST, once created, to "respond appropriately to the Governor, the Legislature, and other relevant entities on public policy issues significantly related to science and technology." In keeping with this charge, CCST has advised the California Legislature (among others) on scientific and technical matters for over 20 years.

In August 2009, the California Legislature noted that CCST "was uniquely established at the request of the Legislature for the specific purpose of offering expert advice to state government on public policy issues significantly related to science and technology," and that "[t]he establishment of the California Science and Technology Policy Fellowships as a professional development program is consistent with the Legislature's intent in requesting the creation of the council and is expressly designed to fulfill the council's mission of assisting state policymakers as they face increasingly complex decisions related to science and technology challenges confronting the state in the 21st century."[6]

Beginning in 2009, with support from the Gordon and Betty Moore Foundation, Bechtel Foundation, Heising-Simons Foundation, Kingfisher Foundation, TOSA Foundation and the GenProbe Corporation, CCST began the Fellows Program, through which CCST recruits and trains approximately 10 qualified Ph.D.-level scientists each year via a highly competitive application and review process, to serve as "Fellows." CCST assigns them for a year to the Legislature to work in the offices of state legislators or legislative committees, as determined by the Legislature. According to CCST's website, a primary purpose of these placements, in keeping with the charge set forth in ACR 162, is to "provide legislators and their staffs with clear and unbiased advice, answers to technical questions, and clarification of policy options for issues with science and technology related attributes . . . ."[7]

CCST offers to the Legislature the services of the Fellows for its use and direction, upon request from the Legislature. In recent years, demand for placements has far exceeded the 10 Fellows that CCST currently has available each year. As a result and because

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[6] Gov't Code § 8924.5. This statute, which became effective in August 2009 and primarily dealt with ethics concerns related to the compensation of CCST Fellows, is discussed more fully below.
[7] http://fellows.ccst.us/what.php, accessed on September 27, 2015.

the Program's specific funding sources are also time-limited, CCST is seeking additional resources to expand the Program so it can provide technical assistance to more government offices than its current funding allows. This may also include the offices of state executive agencies. Funders of the Fellows Program have included and may additionally include in the future other private foundations, individual donors, corporations, and/or other non-profit organizations.

**PRIVATE FOUNDATION SUPPORT FOR CCST'S FELLOWSHIP PROGRAM COMPLIES WITH REQUIREMENTS OF FEDERAL TAX LAW**

*Brief Summary of Federal Tax Law Rules Governing Lobbying Expenditures by a Private Foundation*

The IRS has recognized several of the Fellows Program's funders as exempt from federal income tax under Section 501(c)(3) of the Code, and as "private foundations" under Section 509 of the Code. It is anticipated that other private foundations may become funders of the Fellows Program.

Section 4945 of the Code imposes an excise tax on certain private foundation expenditures, including any expenditure for the purpose of influencing legislation. Under Section 4945, a private foundation will be subject to tax if it spends resources directly on efforts to influence legislation, or if it makes a grant to another organization that is "earmarked" for such efforts.

Regulations implementing Section 4945 provide extensive details about what constitutes "influencing legislation," including exceptions for certain communications that would otherwise fit within the definition.[8] One exception excludes from treatment as a taxable expenditure "amounts paid or incurred in connection with providing *technical advice or assistance* to a governmental body, a governmental committee, or a subdivision of either of the foregoing, in response to a written request by such body, committee, or subdivision . . . ."[9]

This "technical assistance exception" permits a private foundation to respond directly to a written request that the private foundation receives from a government body (such as a legislative house or committee, or an executive branch office) about substantive matters of policy within the scope of the request, without concern that the expenses the private foundation incurs in doing so will be subject to the excise tax set forth in Section 4945.

[8] A full discussion of these rules is beyond the scope of this Memorandum. Adler & Colvin can provide additional details upon request.
[9] Treas. Reg. 53.4945-2(d)(2) (emphasis added).

Importantly for the purpose of this Memorandum, the exception also extends to a grant that a private foundation makes to a publicly supported charity,[10] earmarked to support communications the *grantee* makes in response to a written request for technical assistance that the grantee has received from a government body.

*Technical Assistance Exception Likely Covers Private Foundation Grants to CCST* [11]

ACR 162 and Government Code Section 8924.5 combine to make a compelling (though untested) case that CCST is the recipient of a permanent, ongoing, written request for technical assistance from the California Legislature. As noted above, ACR 162 made clear that the Legislature intended CCST to provide policymakers across state government with technical assistance on matters of science and technology, and created it specifically for that purpose. Furthermore, by adopting Government Code Section 8924.5, the Legislature explicitly embraced the Fellows Program as a mechanism for providing the technical assistance that the Legislature requested in ACR 162.

We believe the IRS would probably interpret these legislative pronouncements to mean that any communication conveying information related to science and technology that CCST provides to state government officials,[12] both generally and through the Fellows Program in particular, should be treated, for federal tax purposes, as a response to a written request by the Legislature for technical assistance. As a result, such a communication would not be a lobbying communication, and a private foundation grant earmarked to support such communications would not constitute a taxable expenditure by the private foundation.

We are not aware of any guidance from the IRS specifically addressing the application of the technical assistance exception under facts similar to those presented by CCST's history, structure, and activities, so it is possible that the IRS would disagree with our

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[10] An organization that is exempt under Section 501(c)(3) of the Code can avoid classification as a private foundation if it demonstrates that is has sufficient "public support." Although the Code does not use the term, such an organization is commonly referred to as a "publicly supported charity." A discussion of the test for determining whether a given entity is a publicly supported charity, rather than a private foundation, is beyond the scope of this Memorandum.

[11] We understand that there may be several other possible bases for concluding that support for CCST will not constitute a taxable expenditure by a private foundation. We have not independently reviewed those conclusions, and do not discuss them further here.

[12] The case for applying the technical assistance exception to Fellows placed in non-legislative offices is a bit weaker, because the regulations apply to "a response" to a request from a given body. Technically, the Legislature has made a request (through adoption of ACR 162 and Gov't Code Section 8924.5), but no similar "request" had been made by an Executive Branch agency. Nonetheless, we think that the explicit reference in ACR 162 to the Governor and "other relevant entities," as well as the Legislature, and the broad reference to "state government" in Gov't. Code Section 8924.5 make plain that the Legislature intended for CCST to provide technical assistance as needed throughout state government. Under these circumstances, we think the IRS would be hard-pressed to rule that placement of a Fellow in an Executive Branch office (where the Fellow's work is less likely to be directed toward influencing legislation) should be treated more harshly for tax purposes than placement of a Fellow in a legislative office (where virtually all of the Fellow's work is likely directed toward influencing legislation).

analysis. However, we think it likely under these circumstances that a private foundation's grant to support the Fellows Program will not constitute a taxable expenditure under Section 4945 of the Code.

**CONTRIBUTIONS FROM CORPORATE AND INDIVIDUAL DONORS TO SUPPORT THE FELLOWS PROGRAM ARE LIKELY DEDUCTIBLE AS CHARITABLE CONTRIBUTIONS**

As a general rule, and subject to certain limits, a contribution from a corporate or individual donor to an entity that, like CCST, has been recognized by the IRS as tax-exempt under Section 501(c)(3) of the Code is deductible from the donor's taxable income as a charitable contribution.[13] However, a contribution earmarked by the donor for lobbying is not deductible.[14]

As explained above, we believe that none of the Fellows Program's activities are lobbying activities because the Fellows Program as a whole constitutes CCST's response to an ongoing written request for technical assistance from a government body. Congress has established an exception to the federal tax law definition of "lobbying" for communications made in response to such a request, to ensure that government officials have access to information from charities, if they so desire.[15]

Accordingly, we believe that the IRS is more likely than not to determine that contributions to support the Fellows Program from individual and corporate donors are not "earmarked" for lobbying, and that the relevant prohibitions on deduction of earmarked contributions do not apply. As a result, we believe that the IRS will likely consider individual and corporate contributions to CCST to support the Fellows Program to be deductible as charitable contributions, to the extent otherwise permitted by law.[16]

**FINANCIAL SUPPORT FOR THE FELLOWS PROGRAM DOES NOT TRIGGER CALIFORNIA'S LOBBY DISCLOSURE REQUIREMENTS**

California's Political Reform Act of 1974 (Cal. Gov't Code §§ 81000 et seq.) establishes a comprehensive scheme of lobby disclosure, which is triggered by the expenditure of money for the purpose of influencing legislative and/or administrative action.

Specifically, Government Code Sections 86113, 86114, and 86115 impose lobby disclosure requirements on "lobbyists," "lobby firms," "lobbyist employers," and "any person

[13] See Sections 162 and 170.
[14] See Sections 162(e) and 170(f)(9).
[15] Although a full explanation of the relevant federal law rules on lobbying is beyond the scope of this Memorandum, many of the Program's activities likely would not constitute lobbying for federal tax purposes even *without* the technical assistance exception, because they do not involve communications that possess all of the elements of a lobbying communication.
[16] Individual and corporate donors should consult their tax advisors to determine the extent to which a given contribution to CCST to support the Fellows Program is deductible as a charitable contribution.

who directly or indirectly makes payments to influence legislative or administrative action of . . . $5,000 or more in a calendar quarter." In order to trigger lobby disclosure requirements, each of these types of potential filers must either spend or receive economic consideration (at or above specified amounts) "*for the purpose of influencing legislative or administrative action.*" Under California's lobby disclosure law, unless an expenditure is made for the purpose of influencing specific legislative or administrative action, no lobby disclosure is triggered. (*See Blessing* Advice Letter, FPPC Advice Letter No. A-01-068 (April 19, 2001) ("'Other payments to influence' includes: 'Payments of any other expense which would not have been incurred but for the filer's activities to influence or attempt to influence legislative or administrative action . . . .'"); *see also* FPPC Lobbying Manual, Chapter 5.23, rev. 6/2015.)

Grants made to CCST by private foundations or other entities (including individuals and corporations) for the purposes of funding the Fellows Program are made for the general purpose of enhancing the level of evidence-based decision-making and improving the quality of science and technology-related legislation (and, possibly, science and technology-related agency actions). The grants are *not* made with the purpose of influencing specific legislation (or agency regulations, for that matter). In fact, the grants are made without regard to or mention of any specific legislative or administrative action. This is necessarily the case for multiple practical and legal reasons.

The grants are made to fund the Fellows Program at the program level, and not to fund a specific Fellow or to place a Fellow with a specific legislator. All funds are made public in CCST's annual report. At the time a grant is made to CCST, it is not known which applicants will be chosen to become Fellows or which Fellows will be placed in what specific offices. In fact, CCST is only able to place Fellows in a small portion (approximately 1/3) of the offices that apply. Moreover, grantors and donors do not participate in any way in the process of selecting Fellows. Therefore, the grantor or donor cannot possibly know in which legislative (or administrative) offices the Fellows will serve, or on which legislative (or administrative) issues the Fellows will become actively involved. And, as discussed below, it is the Legislature (or the state agency) – and not CCST or its funders – that must determine where to place the Fellows, and on which matters the Fellows will work.

Therefore, in making such grants to the Fellows Program, there can be no intent on behalf of grantors/donors to influence specific legislative or administrative action with such funds. It follows then that grants to the Fellows Program are not made "*for the purpose of influencing legislative or administrative action.*" As such, no lobby disclosure is triggered under California law on behalf of the private foundations or other corporate or individual donors to the Fellows Program. (*See Blessing* Advice Letter, FPPC Advice Letter No. A-01-068 (April 19, 2001).)

Moreover, the Fair Political Practices Commission ("FPPC"), the agency empowered with the interpretation and enforcement of the Political Reform Act, previously considered a scenario quite similar to the Fellows Program. In the *Gould* Advice Letter, FPPC

No. I-95-320 (October 31, 1995), the California Veterinary Medical Association asked whether a payment to one of its member veterinarians for a one-year fellowship to perform legislative staff work for a member of the California Legislature would constitute a gift to the legislator, and hence be reportable on the Association's lobby reports as an activity expense. The FPPC concluded that no gift to the legislator would result provided that the legislator complied with the Commission's regulation for accepting a "Gift to Agency" (discussed more fully, below).

Unfortunately, in the *Gould* Advice Letter, the FPPC analyzed the issue *only* as a gift issue, and did not specifically address whether such payments are or are not lobby reportable payments. However, generally speaking, if the FPPC believes the activity addressed in an advice letter will, or may, trigger reporting obligations beyond those inquired about, they will make note of this fact (or possibility). We conclude that the FPPC's failure in the *Gould* Advice Letter to make mention that such a payment could constitute a lobby reportable payment further supports our conclusion that such payments are <u>not</u> lobby-reportable payments.

More recently, the FPPC was asked specifically whether the Fellows Program was "prohibited or restricted" by any provisions of the Political Reform Act. (*Garamendi* Advice Letter, FPPC No. I-08-089 (July 16, 2008).) The FPPC concluded that there was no provision of the Political Reform Act prohibiting the Fellows Program. The Commission did point out "two issues that arise under the Political Reform Act" – and then discussed a gift issue (discussed below) and a "behested payment" issue (applicable to the officials, not to CCST). Notably, the FPPC did *not* address whether the payments funding the Fellows Program constitute lobby reportable payments. Again we conclude that the Commission's failure in the *Garamendi* Advice Letter to make mention that such a payment could constitute a lobby reportable payment further supports our conclusion that such payments are <u>not</u> lobby reportable payments. The FPPC thus had not one, but two opportunities to raise this issue, and declined to do so. Additionally, we emphasize that our conclusion that no lobby disclosure is triggered under California law on behalf of the private foundations or other corporate or individual donors to the Fellows Program applies with respect to the placement of Fellows in both legislative and administrative agency offices.

*We Recommend that CCST Provide the Fellows' Services as a "Gift to Agency"*

Although we conclude that the payments by private foundations and other entities (including corporations and individuals) to fund the Program do not constitute lobby reportable payments for the donors, we recommend that CCST, when providing the services of the Fellows to the Legislature (or to a State agency), treat this activity as a so-called "Gift to Agency."

Generally speaking, an expense or payment that benefits an official or employee of a state agency (including the Legislature) is disclosable on lobby reports as an "activity expense." (Gov't Code § 86111.) The most common type of activity expense is gifts. Under certain circumstances, however, a benefit is considered to be given to an *agency* rather than an

*individual* – referred to as a "Gift to Agency" – in which case the gift is *not* a reportable activity expense.

As discussed above, the FPPC previously considered a scenario quite similar to the Fellows Program in the *Gould* Advice Letter. The FPPC considered whether the California Veterinary Medical Association's payment to one of its member veterinarians for a one-year fellowship to perform legislative staff work for a member of the California Legislature would constitute a reportable gift to the legislator. The FPPC concluded that the Association could avoid making a gift to an individual by structuring the fellowship to meet the requirements of then-FPPC Regulation 18944.2 for a "Gift to Agency."[17]

The "Gift to Agency" regulation has subsequently been renumbered as FPPC Regulation 18944, and provides that a payment that is made to a state (or local) agency is not a gift to an official of that agency provided that: (1) the payment is used for official agency business; (2) the agency head controls the agency's use of the payment, including the selection of the agency official(s) who will use the payment; and (3) the agency publicly discloses the receipt of the payment on a form prescribed by the FPPC.

Our understanding is that CCST follows this approach by documenting the provision of the Fellows' services to the State, and additionally confirms that neither CCST nor any of its private foundation or other donors is making a reportable gift.

Specifically, it is our understanding that CCST structures the Fellows Program such that it complies with all elements of the "Gift to Agency" regulation, as follows. First, CCST does and will clearly state in documents granting the services of the Fellows to the Legislature (or state Executive Branch agencies) that the services of the Fellows are being donated to the Legislature (or the specific agency) for its use and control, and that the Legislature (or agency) maintains sole discretion to determine which legislator(s) or official(s) receive the services of Fellows. Second, CCST does and will state in such documents that the services of the Fellows are provided solely for the purpose of performing official duties similar to those of other legislative (or agency) staff, and are to be used for no other purposes. And third, as a condition of the grant, CCST requires and will continue to require that the Legislature (or agency), as the grantee, memorialize its receipt of the services as required in FPPC Regulation 18944.

[17] In the *Garamendi* Advice Letter, the FPPC specifically considered the Fellows Program and concluded that it does <u>not</u> confer any personal benefit to any member of the Legislature, and therefore did not result in a gift to any individual legislator. It is arguable, but not entirely clear, that the FPPC also concluded that the provision of the services of Fellows does not constitute a gift to the Legislature. However, given this uncertainty, and the fact that the FPPC clearly found a "gift to agency" in the similar factual context contained in the *Gould* Advice Letter, we recommend this approach as both prudent and transparent.

**THE FELLOWS PROGRAM, INCLUDING PRIVATE FOUNDATION SUPPORT FOR THE PROGRAM, COMPLIES WITH RELEVANT CALIFORNIA GOVERNMENT ETHICS RULES**

We have also analyzed whether the Fellows Program, including the funding of the Program, complies with relevant California government ethics rules.

Specifically, we have analyzed two provisions contained in California's Legislative Code of Ethics, which apply to Members of the Legislature and their "employees." First, Government Code Section 8920(b)(4) provides in relevant part,

> No *Member of the Legislature* shall . . . [r]eceive or agree to receive, directly or indirectly, any compensation, reward, or gift from any source except the State of California for any service, advice, assistance or other matter related to the legislative process, except fees for speeches or published works on legislative subjects and except, in connection therewith, reimbursement of expenses for actual expenditures for travel and reasonable subsistence for which no payment or reimbursement is made by the State of California.

(*Id*. (emphasis added).)

On its face, this section does not appear to apply to the Fellows Program. Under the Fellows Program, no Member of the Legislature would receive any "compensation, reward or gift" from CCST. While the Code of Ethics does not define those terms, they are used throughout the Political Reform Act and embody a component of personal benefit to the Member. The FPPC has already expressly advised, under the Political Reform Act, that the CCST grant of the services of Fellows to the Legislature would contain no element of "personal benefit" to individual legislators. (*Garamendi* Advice Letter, FPPC No. I-08-089 (July 16, 2008).) We see nothing in the Code of Ethics that suggests any reason for interpreting these words differently from their use in the Political Reform Act and their plain meaning, to include payments or services rendered to the Legislature itself.[18]

Second, Government Code Section 8924(a) provides,

> No *employee* of either house of the Legislature shall, during the time he is so employed, commit any act or engage in any activity prohibited by any provision of this article. The provisions of this article and Article 3 (commencing with Section 8940) which are applicable to a Member of the Legislature are also applicable to any employee of either house of the Legislature.

[18] *Cf*. 67 Ops. Cal. Atty. Gen. 7, 1984 Cal. AG LEXIS 91, *4 (Jan. 4, 1984) ("The starting point in conflicts of interest analysis is sections 87100-87103 of the Government Code which are found in the Political Reform Act of 1974 (PRA). This is so since that act prevails over any conflicting legislation. However, additional requirements may be imposed upon public officials so long as those requirements do not prevent the person from complying with the PRA. (Gov. Code, § 81013.)").

(*Id*. (emphasis added).)

If one concludes that the CCST Fellows will be "employees" of the Legislature, then Government Code Sections 8920(b)(4) and 8924(a) *would* seem to combine to prohibit the payment of the Fellows by CCST and its funders. However, the structure of the Fellows Program makes it clear that the Fellows are *not* employees of the Legislature. Although the Fellows serve a "staff member" function, they serve as independent contractors *of CCST* and not as employees or contractors of the Legislature. CCST engages the Fellows and then makes a "gift" of the Fellows' services to the Legislature, to be used in its discretion. Fellows receive direct compensation, health insurance reimbursements, and relocation and travel allowances from CCST, not from the Legislature. The Fellows' services are made available "*at no cost to the Legislature*." *(Garamendi* Advice Letter, at *3 (emphasis added).)

Moreover, in order to eliminate any uncertainty with respect to this issue, in 2009 the Legislature amended the Legislative Code of Ethics to make clear that the CCST Fellows are not legislative employees subject to the Legislative Code of Ethics (*see*, specifically, subsection (c), below). The Legislature enacted Government Code Section 8924.5, which provides as follows:

> (a) The Legislature finds and declares that the California Council on Science and Technology was organized as a nonprofit corporation pursuant to Section 501(c)(3) of the Internal Revenue Code in response to Assembly Concurrent Resolution No. 162 (Resolution Chapter 148 of the Statutes of 1988). The council was uniquely established at the request of the Legislature for the specific purpose of offering expert advice to state government on public policy issues significantly related to science and technology. The establishment of the California Science and Technology Policy Fellowships as a professional development program is consistent with the Legislature's intent in requesting the creation of the council and is expressly designed to fulfill the council's mission of assisting state policymakers as they face increasingly complex decisions related to science and technology challenges confronting the state in the 21st century.
>
> (b) The services of a California Science and Technology Policy Fellow provided by the California Council on Science and Technology and duly authorized by the Senate Committee on Rules, the Assembly Committee on Rules, or the Joint Committee on Rules are not compensation, a reward, or a gift to a Member of the Legislature for purposes of paragraph (4) of subdivision (b) of Section 8920.
>
> (c) A California Science and Technology Policy Fellow provided by the California Council on Science and Technology and duly authorized by the Senate Committee on Rules, the Assembly Committee on Rules, or the Joint Committee

> on Rules *is not an employee* of either house of the Legislature for purposes of this article.
>
> (d) For purposes of this section, a California Science and Technology Policy Fellow is "duly authorized by the Senate Committee on Rules, the Assembly Committee on Rules, or the Joint Committee on Rules" only if both of the following requirements are satisfied:
>
> > (1) The California Science and Technology Policy Fellow has been selected according to criteria, and pursuant to a process, approved by the Senate Committee on Rules, the Assembly Committee on Rules, or the Joint Committee on Rules.
> >
> > (2) The California Council on Science and Technology has executed an agreement with the Senate Committee on Rules, the Assembly Committee on Rules, or the Joint Committee on Rules whereby the California Science and Technology Policy Fellow is bound to abide by standards of conduct, economic interest disclosure requisites, and other requirements specified by the Senate Committee on Rules, the Assembly Committee on Rules, or the Joint Committee on Rules.

(Emphasis added.)

Based upon the foregoing, we conclude that the Fellows Program, including the funding of the Program, complies with California's Legislative Code of Ethics.

California's Executive Branch is not subject to a similar ethics provision. It is possible that individual agencies may promulgate their own ethics rules or guidelines. It would therefore be important that, in providing the services of Fellows to State administrative agencies, CCST confirm with the specific agency that the agency is permitted to accept the gift of the services of Fellows.