Fair Political Practices Commission
MEMORANDUM

TO: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

FROM: Luisa Menchaca, General Counsel; Steven Russo, Chief, Enforcement Division; Carla Wardlow, Chief, Technical Assistance Division

DATE: November 25, 2003

SUBJECT: Conflict of Interest Codes – Placement of Positions / Classifications in Appropriate Disclosure Categories (Project A-5)

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EXECUTIVE SUMMARY

This project was commenced as part of the Commission's goals and objectives for 2002. It examines whether there are effective procedures or guidelines for filing officers on how to identify designated employees who are required to file Statements of Economic Interests ("SEIs"), notify them of their filing requirement and set forth a timeline for accomplishing both of those tasks. Commission staff lacks consensus on a single approach for accomplishing these procedures. The Enforcement Division prefers a statutory approach which would provide clear authority for imposing the responsibilities, while the Technical Assistance and Legal Divisions prefer the Commission adopt general guidelines instead.

INTRODUCTION

Public officials who make or participate in the making of governmental decisions are required to file Statements of Economic Interest ("SEIs"). Pursuant to section 82019, a position must be designated for inclusion in an agency's conflict of interest code when "the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." Regulation 18730, subdivision (b)(2) provides that for those persons declared to be designated employees in a conflict of interest code, "[i]t has been determined that these persons make or participate in the making of decisions which may foreseeably have a material effect on financial interests." The legal departments of most agencies make the actual determinations as to which positions should be designated. This project was commenced as part of the Commission's goals and objectives for 2002. It examines whether there are effective procedures or guidelines for filing officers on how to identify designated employees, notify them of their filing requirement and set forth a timeline for accomplishing both of those tasks.

As part of this project, in 2002, staff conducted a survey of state agencies and presented its findings to the Commission in July 2002. The staff concluded and the Commission affirmed that it was appropriate to continue to permit state agencies to implement their own methods for identifying their designated employees. The staff next turned to analyzing whether the Commission should establish procedures or guidelines for filing officers regarding the timely notification to employees of their filing obligations. At that time, it was determined that even if the Commission were to disseminate guidelines, certain areas may require implementation by statutory amendment or regulatory change. Staff was directed to do further research regarding the viability of each of these approaches.

This staff memorandum discusses the four approaches and staff's further survey findings. Staff also makes recommendations for future action (page 11).

The work has been done primarily by a subcommittee comprised of Lynda Cassady and Dixie Howard of the Technical Assistance Division, Jeff Sly of the Enforcement Division, and Scott Tocher of the Legal Division. The subcommittee began its work with a survey of filing officers, summarized first and then discussed more fully below.

SURVEY SUMMARY

Based on the responses received, the general consensus is that most filing officers do not support a legislative or regulatory approach, but are supportive of Commission approved notification procedures for annual statements. They are not supportive of any notification procedures that would subject their position and agency to an enforcement proceeding. Another reality, given the budget difficulties faced by most agencies, is that shrinking resources may reduce their ability to meet any notification deadlines.

In 1999, the Commission adopted as part of the streamlined enforcement programs; the SEI expedited procedures program for late-filers/non-filers of statements of economic interests. The Enforcement Division has seen numerous cases where the designated employee/non-filer was not notified of his or her filing obligation prior to the filing deadline, and was raising that as a defense to an enforcement action. While there are no provisions within the Political Reform Act ("Act") that provide a waiver or extension, of the statutory deadline for filing a statement of economic interests, where a non-filer has not been notified of the obligation to file, the Enforcement Division has experienced some difficulty in prosecuting non-filers who were not notified. Therefore, staff felt it appropriate to consider whether notification guidelines should be imposed upon an agency to further compliance with the statutory filing obligations and deadlines. As a result of the subcommittee's review of that issue, the subcommittee has identified the following options for the commission to consider as a way to address the problems experienced by the Enforcement Division.

SURVEY OF FILING OFFICERS

The subcommittee felt it was important to solicit input on the proposed guidelines from a representative sampling of various filing officers. It was anticipated that their responses would assist the subcommittee in fine-tuning the language ultimately submitted to the full committee prior to presentation before the Commission. Therefore, a memo and copy of the proposed language was provided to city clerks, county filing officers, and state agency filing officers in larger state agencies.

The draft SEI Notification Guidelines (or Legislative Proposal) language proposed by the subcommittee set forth time frames for the following types of notifications:

- Notifications prior to filing deadlines
- First and second non-filer notification deadlines
- Enforcement referral deadlines

Our first opportunity to receive public comment on the proposed guidelines was at the City Clerks' New Law Seminar on December 12, 2002, with over 300 city clerks in attendance. The city clerks were presented with the proposed guidelines, and were asked to provide feedback regarding the proposed time frames. Of the over 100 responses received from city clerks, most were opposed to a legislative or regulatory notification approach which would impose agency liability for not providing timely notification. Approximately five responses were received that provided input into appropriate notification time frames.

The draft SEI Notification Guidelines were given to John McKibben of the Los Angeles County Board of Supervisors office, who in turn forwarded the proposed guidelines to the County Clerks of California through their association network. The sub-committee received 13 responses from various county clerks.

The subcommittee also contacted six of the largest state agencies to solicit input from their filing officers on the proposed guidelines. Three state agencies responded to the request, and provided the requested feedback.

RESULTS OF THE SURVEY

I. Small Agencies

A. Notifications Prior to Filing Deadlines

Assuming and Leaving Office Statements

A recurring comment from most filing officers was that it is difficult to provide always timely notification to assuming and leaving office filers because of the sheer logistics of discovering when filers assume and leave office. For example, many state agencies have several field offices throughout the state, so the filing officer has to rely on liaisons in the field offices which, despite good intentions, sometimes fail to provide

filing officers with the information they need to make timely notifications. The most common comment is that personnel officials often do not inform the filing officer when an individual is hired, appointed, or leaves the position so timely notifications can be made. Therefore, most state and local filing officers responding to the survey do not support any notification deadlines pertaining to assuming and leaving office statements.

Annual Statements

Most filing officers for small agencies responded that deadlines for providing notifications prior to annual filing deadlines were workable. From the responses received, the majority of filing officers indicated that they would be able to provide notification of annual filers 30 days before the filing deadline.

B. First and Second Non-filer Notification Deadlines

Assuming and Leaving Office Statements

Filing officers did not support first and second non-filer notification deadlines for assuming and leaving office statements based on the reasons stated above.

Annual Statements

Responses received for providing the first non-filer notification averaged 30 days after the deadline. The time frames for providing the second non-filer notice for most agencies was 30 days after the first notice was sent.

C. Enforcement Referrals

Most filing officers responded that enforcement referrals could be made 30 days after the second notice for the annual filing was sent.

D. Time Table for Notices

The following table demonstrates an example of the annual notice time frames based on the solicited responses:

Pre Notice	**First Non-filer Notice**	**Second Non-filer Notice**	**Enforcement Referral**
March 1 or earlier	30 days after annual deadline	30 days after first non-filer notice is sent	30 days after second non-filer notice is sent

II. Large Agencies

The Fair Political Practices Commission finds itself in a unique situation in that it serves as the filing officer for over 22,000 statements each year. Because the Commission serves as the filing officer for such a large volume of statements, it is extremely important to apprise staff and the Commission of notification and staffing issues arising from mandatory notification deadlines.

A. Notifications Prior to Filing Deadlines

The Commission currently is only required to provide notification of assuming and leaving office deadlines to its own staff members and legislative staff. All other filers are provided notification prior to filing deadlines by filing officials within their own agencies. Current procedures allow us to provide notification to new and leaving office FPPC designated employees so they meet the 30-day filing deadlines. However, since the Commission does not always receive timely notification from the Legislature, the FPPC often is not aware of when new employees are hired and when employees leave.

The Commission sends annual statement notifications to FPPC staff, legislative staff and retired judges. We have the ability to send annual statement notifications at least 30 days before the annual statement deadline. Generally, our annual statement notices are distributed at least 45 days before the March 1 deadline for retired judges and at least 60 days before the April 1 deadline for FPPC staff and legislative staff.

B. First and Second Non-filer Notification Deadlines

Assuming and Leaving Office Statements

The Commission is required to send non-filer notices to all filers who file statements with our agency, including Commission staff, legislative staff, and state and local officials. The Commission is dependent upon intermediaries (filing officials) for information related to sending these non-filer notices. In November each year, staff sends each filing official a list of the names and positions of filers whose statements are forwarded to the Commission. The filing official provides the Commission with updated information on this Article II notice. Often this process is how Commission staff discovers a new filer or that a filer has left the position earlier in the year.

Therefore, months often elapse before the Commission is notified that a filer has assumed or left office. For example, if a planning commissioner assumed office in May and the filing officer failed to notify the filer of his or her filing obligation, the Commission would not have knowledge of this filer until the filer's name appeared on the Article II notice returned to the Commission. Consequently, the letter from Commission staff to the non-filer who needed to file an assuming or leaving office statement would not be sent to the filer until December or January at the earliest. This year, Commission staff followed up on over 2,000 assuming and leaving office statements for filers who appeared on the Article II notices.

Annual Statements and Staffing Issues

Because most annual filers file statements directly with local and state agencies which are then forwarded to the Commission, we receive the bulk of the annual filings during the month of April. Before we can send the first non-filer notice, all statements have to be logged into our database system in order to generate a report verifying the names of non-filers. This year the staff person at the Commission whose primary duty is to log statements was out of the office on an extended leave during the months when the logging was heaviest, so logging the statements was absorbed by other staff members. Another staff member who monitored the legislative staffer filings left employment with the Commission to work for another state agency in May. Because of the hiring freeze and budget situation, we were unable to replace or hire temporary staff to handle these unforeseen circumstances which lengthened the time in which notices could be sent. This situation is not unique to the Commission, and we hear similar stories from other large agencies.

Consequently, this year the time frame to send all the first non-filer letters was delayed by approximately one month. When the subcommittee commenced work on the notification project, we estimated, based on our experience in past years that the first non-filer letters would be sent within 90 days after the filing deadline. However, despite a great teamwork effort on the part of staff to meet the 90-day time frame, we were able to meet the deadline for most but not all filers, so the remainder of the first non-filer letters were sent 120 days after the annual filing deadline. The first non-filer letter requires statements to be filed within 30 days of the date of the letter. To allow time for follow-up with filing officials and mailing statements, the second non-filer letter is sent out within 60 days of the date of the first non-filer letter.

C. Enforcement Referrals

The second non-filer letter requires filers to file their statements directly with the Commission within 10 days of the date of the letter; therefore, to allow time for mailing of the statement and enforcement referral processing, the enforcement referral is made within 45 days after the second non-filer letter is sent.

Of the other larger agencies who responded to our request for input, agencies having the largest number of filers varied from approximately 5,000 – 8,000 total filers. They also face unique challenges in providing notifications, such as relying on computer systems which do not always provide necessary data in a manner conducive to providing timely notification and relying on staff in field offices to provide notices on their behalf. Some agencies also experience a great amount of turnover in the staff required to perform the notification duties which further diminishes their ability to provide timely notifications. Therefore, we think it is crucial that agencies with a large amount of filers be granted additional time to provide non-filer notifications for annual statements, because it is not feasible for all agencies to meet the same mandated deadlines.

In conclusion, large agencies (similar to small agencies) recommend no mandatory notification or enforcement referral deadlines for assuming or leaving office statements. It appears large agencies would not oppose notification guidelines for annual statements, but need a period of time longer than the 30 days smaller agencies are able to work with.

D. Time Table for Notices

Pre Notice	**First Non-filer Notice**	**Second Non-filer Notice**	**Enforcement Referral**
30 days before filing deadline	120 days after annual deadline	60 days after first non-filer notice is sent	45 days after second non-filer notice is sent

III. Telephone Notification

Many of the filing officers and filing officials who responded to the survey already provide courtesy telephone notifications to filers, both prior to, and after the filing deadlines. However, larger agency filing officers generally felt that requiring telephone contacts during the non-filer notification stage would be overly burdensome.

OPTIONS FOR COMMISSION CONSIDERATION

The subcommittee has identified four options the Commission may consider to address the filing officer notification issues previously identified. Each is not necessarily exclusive, and the Commission may combine one or more options as it approaches the problem. Each option is addressed below:

1. Regulatory Approach:

The Commission may decide to adopt a regulation embodying the policies governing filing officer responsibilities. Please note that on November 17, 2003, the Governor issued Executive Order S-2-03 delaying action on proposed regulations and directing agencies of the Executive Branch to reassess various aspects of the State's rulemaking process. Promulgation of any regulations discussed in this memorandum may be delayed pending a determination of the impact of the order, if any, on the Fair Political Practices Commission, an independent agency subject to the 1974 Administrative Procedure Act.

Adoption of a regulation may be an integral part of a dual legislative/regulatory strategy. By its nature, a regulatory approach provides much greater detail than a solely legislative one. The purpose of the regulation would be to provide as much guidance as is necessary to agencies, filing officers and public officials about the responsibilities of filers and filing officers. Thus, the language of a regulation would detail step-by-step guidance (with options on the timeline aspects) on how to comply with the Act. The

regulation would provide explicit instructions for the filing officer, requiring him or her to provide documents, follow-up notices, maintain records and notify enforcement agencies of noncompliance – all within prescribed timelines.

A threshold issue exists, however, as the authority for the Commission to adopt such a regulation absent a concomitant statutory amendment along the lines suggested in the discussion of legislative proposals. Whether authority exists for the Commission to adopt such a regulation based on existing statutes is a matter on which staff has not reached consensus.

The argument in favor of authority for such a regulation rests with the existing language of section 81010, which provides:

> **"§ 81010. Duties of the Filing Officer.**
> With respect to reports and statements filed with him pursuant to this title, the filing officer shall:
> (a) Supply the necessary forms and manuals prescribed by the Commission;
> (b) Determine whether required documents have been filed and, if so, whether they conform on their face with the requirements of this title;
> (c) Notify promptly all persons and known committees who have failed to file a report or statement in the form and at the time required by this title;
> (d) Report apparent violations of this title to the appropriate agencies; and
> (e) Compile and maintain a current list of all reports and statements filed with this office."

The issue is whether the specified requirements of the regulation imposing specific duties on an agency's filing officer can be based on the language above. The electorate granted the FPPC broad powers under the Political Reform Act. The FPPC has "primary responsibility for the impartial, effective administration and implementation" of the Act. (Gov. Code § 83111.) The Commission has extensive regulatory powers: "the powers to adopt, amend and rescind rules and regulations to carry out the purposes" of the Act. (Gov Code § 83112.) The courts of appeal have recognized that "the FPPC's interpretation of statutes and regulations in the area of its expertise must be given great weight in [judicial] analysis." (*Brown v. Fair Political Practices Com.* (2000) 84 Cal.App.4th 137, 150; *Californians for Political Reform Foundation v. Fair Political Practices Com*. (1998) 61 Cal.App.4th 472, 484 (holding that the FPPC's expertise requires that its view of a statute or regulation it enforces "is entitled to great weight unless clearly erroneous or unauthorized").) Examples of extensive Commission interpretation include the mass mailing regulation (18901), advertising regulations (18450.1-18450.11) and termination of committee regulations (18404-18404.2). Indeed, the few words of section 87100 that prohibit conflicts of interest have spawned nearly 30 regulations imposing a complex framework of thresholds and steps for public officials

and creation of different rules based on geographic distances from the subject of the governmental decision (though no such differing standard is set forth in the statute).

It may be argued that each provision of the amended regulation implements a given subsection above. For instance, the regulation would require the filing officer provide notice to individuals of their filing obligations and provide forms for doing so, as required by the statute in subdivisions (a) and (c). The filing officer also must report violations in accordance with subdivision (d) of the statute. In addition, the filing officer must maintain copies of reports and determine facially whether the documents are complete. To be sure, the regulation would provide greater detail on what is expected of filing officers, going so far as to identify the specific wording of respective notices and follow-up letters. Such requirements, however, are not foreign to the Commission's regulatory schemes in general. (See, e.g., notice requirements of reg. 18427.1.)

On the other hand, some staff are concerned that creating a new filing officer duty, for which a non-complying filing officer may be fined, requires legislative action. In support of this view, it is notable that section 81010 contains a very specific listing of the duties of a filing officer. That listing does not contain any express duty to notify individuals of their filing requirements prior to a filing deadline, even though it contains an express duty to notify the appropriate agencies after a filing deadline has been missed. Under the fundamental statutory construction principle of "*expressio unius est exclusio alterius*," when the Legislature has chosen to expressly include certain things in a statute, it is deemed to have meant to exclude those things it has not mentioned. (*People v. Sanchez* 52 Cal. App. 4th 997 at 1001; *People v. Brun* (1989) 212 Cal. App. 3d 951, 954-955.) As such, the adoption of a regulation that imposes upon filing officers a duty to notify individuals of their filing requirements according to specified timelines, and imposes upon those filing officers monetary liability if they fail to provide timely notification, may be argued to be in excess of the Commission's administrative authority.

Pros: Essentially the opposite of the "cons" to the legislative approach. The Commission has greater control over the end language and can act more expeditiously than the legislative approach.

Cons: Question of authority for adoption without legislation lacks staff consensus. Also, as in the statutory context, filing officers providing feedback have generally opposed the proposal on the grounds that it imposes liability on the filing officers for these additional duties.

2. Statutory Approach:

Staff has considered two statutory approaches that provide explicit statutory authority for the delineation of filing officer responsibilities.

One option, the simpler approach, amends section 81010 to include two new subdivisions. Section 81010 sets forth filing officer duties regarding the forms and statements to be filed with them pursuant to the requirements of the Act. Thus, section

81010 is a logical place to include these specific provisions. The new language would provide the Commission the ability to create a regulation requiring notice to filers and establishes liability for failing to do so.

A second option, a more explicit approach, would add a new statute, section 81010.1. This statute would specifically identify the authority to require notice and liability for failing to provide notice. For instance, the statute might require the filing officer provide the forms and notify the official of the duty to file prior to the filing deadline. If the filing officer does not receive the required statement, the officer must notify the official that the document has not been received. The officer must then notify the FPPC (and any other appropriate agency) that the statement has not been received. Detailed records must be maintained and the agency is responsible for compliance (the statute would not assign liability expressly with any particular individual).

Pros: The benefit of a statute-focused approach is that it combines both the clear authority of a statute while preserving the flexibility of a regulation down the line to flesh out the particulars. By channeling the authority through an express statutory provision, questions of Commission interpretation are less problematic (as opposed to a solely regulatory approach).

Cons: The legislative process is, to a certain extent, uncertain. The Commission's proposal may be amended significantly during the process as legislative committees and interested groups weigh in on the merits of the proposal. In the end, the final legislation may not be in a form the Commission deems desirable. Also, the legislative process usually takes more time than the regulatory adoption process. Legislation amending the Act requires a 2/3 vote of the Legislature and approval, of course, of the Governor. Finally, filing officers providing feedback have generally opposed the proposal on the grounds that it imposes liability on the filing officers for these additional duties.

3. Guidelines:

Should the Commission determine that either the statutory or regulatory approaches are undesirable, the Commission may take a different approach by utilizing the regulatory language as a model on which to base advice to agencies and filing officers in the future. The Commission publishes a filing officer handbook which could be amended to include notification guidelines for small and large agencies. This widely used handbook could be the first step to ensure that notification is made.

Pros: The primary quality of guidelines is that they can be adapted almost instantly for differently sized agencies. Unlike the more stringent one-size-fits-all approach of a regulation, guidelines may be tailored as the circumstances warrant. Also, guidelines lack penalties that engender opposition to the plan.

Cons: The lack of penalties also means a lack of enforceability. Guidelines in no way assure uniform application of the law nor do they assure compliance. Guidelines

preserve much of the status quo which depends largely in the individual motivations of a given filing officer.

4. No Action:

The Commission may determine that no action is preferable at this time. The Commission may choose to direct the staff to continue monitoring the situation and update the Commission in one year with further information.

Pros: Taking no action likely would elicit the least discomfort from those filing officers most ardently opposed to a regulatory or statutory approach that would impose "new" duties and penalties on filing officers. This approach avoids the potentially challenging task of persuading the public and filing officers that the duties and responsibilities incumbent under either of the first approaches are necessary and doable.

Cons: Taking no action, obviously, does little to identify for filing officers ways for them to accomplish their duties under the Act. At the very least, it would seem that filing officers are not opposed to guidelines, especially since such an approach would provide guidance without risk.

RECOMMENDATIONS

The subcommittee did not reach consensus on the recommendation of any one option over the others as the best course of action for the Commission to consider. The needs of Technical Assistance and the Enforcement Divisions differ, and as such the recommendations that each of those divisions believes the Commission should follow are equally important to each, and not necessarily mutually exclusive.

The Technical Assistance and Legal Division recommend that the Commission approve Option 3 (Guidelines) because many agencies, such as the FPPC, will be unable to fully comply with mandated deadlines due to circumstances outside the agency's control. It is believed that educational efforts, such as recommended guidelines, provide clear guidance and flexibility for filing officers and should be the first approach to this issue. It is anticipated that TAD could bring draft guidelines forward for Commission consideration by late 2004.

The Enforcement Division recommends that the Commission approve Option 2 (Statutory Approach). The only way to ensure uniform compliance and equality of enforcement of filing officer notification duties is to have express statutory authority for the duties imposed upon filing officers, and authority to impose penalties for non-compliance. Guidelines, while informative, do not provide a method to enforce non-compliance, and a regulation without clear statutory authority (as to what duties may be imposed on filing officers beyond supplying forms) invites judicial challenge.

None of the divisions recommend Option 4, taking no action.