

California Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery and Rotunda

From: Sukhi K Brar, Commission Counsel
Gary S. Winuk, Chief of Enforcement

Re: Proposed Amendment of Regulations 18360, 18361 and 18361.4 and Adoption of Regulations 18361.11 and 18316.6

Date: October 31, 2011

I. Proposed Commission Action and Staff Recommendation

Staff recommends that the Commission approve the adoption and amendment of the regulations discussed below.

II. Background and Reasons for Proposed Regulatory Action

After holding Interested Persons meetings and gathering input from the public, staff has identified several areas of improvement with regard to the regulations governing enforcement matters. The areas of improvement that staff and the public have identified include revising procedures for hearing probable cause proceedings, procedures for default decisions, allowing potential respondents the ability to communicate with the FPPC before a determination to investigate an enforcement matter is made, allowing discovery before a probable cause proceeding for respondents, and treasurer liability for committee violations in limited situations. We discuss each proposal below.

III. Regulatory Proposals

A. Authority to Hear Probable Cause Proceedings (Regulation 18361)

Currently, Regulation 18361 provides that the Executive Director may conduct probable cause conferences. The Executive Director has this authority, in addition to having the authority to determine whether to open an investigation under Regulation 18360 and Government Code Section 83115.5. Currently, Regulation 18361 also gives the Executive Director the authority to delegate the hearing of probable cause conferences to an attorney in the Legal Division. In the interests of due process, these two roles for the Executive Director have been separated. The current practice of the FPPC staff is to have the Executive Director delegate his authority to conduct probable cause conferences to a member of the Legal Division staff to avoid any appearance of unfairness to respondents. Members of the public have requested that this procedure be codified by Regulation.

Amend 2 Cal. Code Regs. Section 18361: This proposed regulation codifies current practice in the interest of due process for respondents by requiring the Executive Director to delegate his authority to the General Counsel, a member of the Legal Division, or to an Administrative Law

Judge.

The proposed amendment breaks Regulation 18361 into two subdivisions. Subdivision (a) contains the language from the original version of Regulations 18361, minus the sections related to probable cause hearings contained in 18361.4. Subdivision (b) states explicitly that the General Counsel or an attorney in the Legal Division will hear probable cause proceedings. There is also a provision that remains in the regulation that a probable cause proceeding can be heard by an Administrative Law Judge, this is meant to be in cases where all attorneys have a conflict in presiding over the hearing. This would be under very rare circumstances. The purpose of this proposal is to resolve any due process issues related to having the same individual decide to open an investigation and make findings of probable cause.

B. Default Decisions (Proposed Regulation 18361.11)

The Political Reform Act (the “Act”), provides for the administrative enforcement of violations of its provisions. Section 83116 makes the Administrative Procedures Act (APA) applicable to the enforcement of violations pursued by the Commission, thus persons subject to enforcement actions are afforded due process both by the Act and by the APA. Respondents in enforcement actions are afforded the right to an administrative hearing, if they provide a notice of defense within 15 days of personal service of the notice of defense. If no notice of defense is submitted within the 15-day period, the APA allows the Enforcement Division to seek a default finding by the administrative adjudicator in the case. (Section 11520.)

Neither the APA nor the Act, provide a timeline for notice to parties of a default decision. Additionally, the APA and the Act leave room for additional provisions as to the procedure to be followed for seeking to have the Commission vacate a default once entered.

Requests were received from members of the public at an Interested Persons meeting held by staff earlier this year for additional procedures to be instituted with regard to default proceedings. Establishment of notice provisions both before entry of a default and after a default has been entered, and clarification of post-default processes would provide greater clarity to the Commission, the public, the Enforcement Division and respondents.

Amend 2 Cal. Code Regs. Section 18361.11: The proposed regulation addresses the issues raised by proposing additional default procedures to those currently in the Act and in the APA without contradicting them. Specifically, the regulation adds the following provisions:

Subdivision (a) adds a requirement that the respondent be notified of the default by the Enforcement Division within 15 days of the date of the hearing at which the default will be heard. The APA does not require such notice. It is currently the Enforcement Division practice to provide such notice, and this just codifies current practice.

Subdivision (b) requires the Enforcement Division to provide a Default Decision and Order and Exhibit to the Commission within 10 days of the hearing at which the default is scheduled to be heard. This conforms with current practice of the posting of public notice of the agenda 10 days ahead of the hearing as required by State open meeting laws, and the transmission of the agenda packets to Commissioners.

Subdivision (c) allows respondents to provide the Commission and Enforcement Division with a response brief and any materials they wish to present to the Commission at least five days before the hearing. This is a new requirement. It will allow the Commission time to properly review all materials and give the Enforcement Division adequate time to review and respond. However, it still allows the Commission the flexibility to accept any materials at the hearing, if desired.

Subdivision (d) restates the provision of the APA that allows the Commission to review and consider any evidence it wishes at the default hearing.

Subdivision (e) clarifies the method of service for both the default judgment once entered and for any motion to vacate by the respondent to be by first class mail. This codifies existing Enforcement Division practices.

C. Complaints (Regulation 18360)

The Act and its Regulations provide persons accused of violating the Act certain procedural protections. Among them is the requirement that the Commission provide notice to the complainant within fourteen days after the receipt of the complaint of the course of action the Commission has chosen to take, if any. (Section 83115, Regulation 18360). This notice is commonly referred to as the "14-Day Letter." Regulation 18360 provides that the Executive Director inform the complainant if the Commission will take any of the following actions:

“(A) Investigate the allegations of the complaint, in which case the response shall inform the complainant the commencement of an investigation only indicates the complaint alleges a violation of the Act, and the culpability of the person complained against, if any, has not been determined.

“(B) Refer the complaint to another governmental agency.

“(C) Take no action on the complaint because, on the basis of the information provided, the Commission does not appear to have jurisdiction to investigate, but the complainant may provide additional information.

“(D) Take no action on the complaint because the allegations of the complaint, absent the Commission receiving additional information, do not warrant the Commission’s further action for the reason stated.

“(E) Take additional time to evaluate the complaint to determine whether an investigation should ensue and provide an appropriate explanation for the delay. This information shall be provided within successive intervals of no more than 14 days per interval until the Commission notifies the complainant it has acted on the complaint under subparagraphs (A) through (D).”

It is current practice that a determination of whether or not to commence an investigation is made within the 14 days after a complaint is received and before the 14-Day Letter is sent out. At an Interested Persons meeting held earlier this year, members of the public requested that potential enforcement respondents be given time and opportunity to communicate with the FPPC by submitting evidence on their behalf before a decision is made to go forward with an investigation. It

has been common practice to allow respondents to submit evidence on their behalf at any time during the enforcement process, though no regulation requires this.

With regard to sworn complaints, Regulation 18360 requires that the subject of the sworn complaint receive a copy of the complaint within three business days of the time the Commission receives the complaint. There is no regulation in place that requires the Commission to send notice with the copy of the complaint to inform the respondent that a decision to investigate will be made within 14 days of the sworn complaint or that the respondent may have an opportunity to respond to the allegations in the complaint before the Executive Director makes a decision on whether or not to investigate the complaint. It is current Enforcement Division practice to allow such opportunity.

With regard to pro-active complaints, which encompass all complaints other than sworn complaints, Regulation 18360 provides that the Executive Director inform the subject of an alleged violation not later than the time such information is provided to the Commissioners. There is no regulation that currently requires that the Commission provide a respondent 10 days to respond prior to the time an investigation begins. Current practice of the Enforcement Division, however, is to provide notification of the pro-active (non-sworn) complaints to the subject of those complaints and provide ten days to respond before an investigation is commenced.

At an Interested Persons Meeting held earlier this year, members of the public requested that respondents be given an opportunity to respond before a decision to investigate a matter is made and that this opportunity be codified in a Regulation. Establishment of regulatory provisions requiring notice to respondents of their opportunity to respond before a decision to investigate is made would allow additional due process protections for respondents.

Amend 2 Cal. Code Regs. Section 18360: The proposed amendments add a requirement to Regulation 18360 subdivision (f)(2) that the three day notification letter also advise the subject of the complaint that a decision on whether or not to open an investigation will be made within fourteen days from the date of the sworn complaint and of the subject's opportunity to provide evidence in their defense prior to the time a decision is made.

Additionally, the proposed amendment deletes the current language requiring the notification of the subject of a pro-active complaint that there is an investigation not later than the time the Commission is notified. Instead, language that requires the subject of pro-active complaints to be notified of the allegations and be given ten days to respond before an investigation is commenced is added.

These proposed amendments codify existing Enforcement Division practice and provide additional due process protections to the subjects of complaints.

D. Discovery in Probable Cause Proceedings (Regulation 18361.4)

The Act and its Regulations provide persons accused of violating the Act certain procedural protections. Among them are the requirements that respondents be permitted a probable cause conference. The Enforcement Division must provide evidence sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed a violation at the probable cause conference in order for the FPPC to make a finding of probable cause against a respondent. (Section 83115.5, Regulation 18361.4 (e).)

Currently, there are no formal provisions in the Act or Regulations to provide for discovery of any type to respondents before a probable cause hearing. Requests were made at an Interested Persons meeting from the public for an allowance of discovery prior to a probable cause hearing.

Amend 2 Cal. Code Regs. Section 18361.4: In the interest of due process, this regulation will provide for a limited right of discovery for respondents in probable cause proceedings so they may receive evidence relied upon by the Enforcement Division sufficient to establish probable cause, along with any exculpatory or mitigating evidence.

The proposed amendment breaks subsection (c) of Regulation 18361.4 into three subdivisions. Subdivision (a)(2) contains new language providing respondents with a limited right to discovery. The standard proposed for discovery is that of evidence relied upon by the Enforcement Division sufficient to meet the standard of proof required for a probable cause hearing, namely that the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a proposed respondent committed or caused a violation.

The proposed amendment also “tolls” the time period for the filing of response until 21 days after the respondent receives the discovery. Currently, the regulation provides respondents 21 days to file a written response from the date of receipt of the probable cause report.

The amendment requires respondents to request discovery, rather than have it sent automatically with a probable cause report. This was drafted in recognition that most respondents do not request a probable cause hearing, and the administrative burden of providing the oftentimes voluminous documents in case files would be overly burdensome to the Enforcement Division, as well as potentially expensive for the respondents for costs of duplication of documents.

Because Regulation 18361 is also a part of this package and the proposed changes to that Regulation would require that either the General Counsel or an attorney in the Legal Division preside over a probable cause hearing rather than the Executive Director, proposed amendments to Regulation 18361.4 also change the term Executive Director to either Commission Assistant or Hearing Officer when appropriate. The Commission Assistant would become the person with whom documents in relation to probable cause hearings would be filed and the commission assistant would also be responsible for scheduling hearing dates and times.

E. Treasurer Liability (Proposed Regulation 18316.6)

Section 84100 of the Political Reform Act (the “Act”), provides:

“Every committee shall have a treasurer. No expenditure shall be made by or on behalf of a committee without the authorization of the treasurer or that of his or her designated agents. No contribution or expenditure shall be accepted or made by or on behalf of a committee at a time when there is a vacancy in the office of treasurer.”

Section 82013 defines the term “committee” to include:

1. Recipient committees, committees which receive contributions of \$1,000 or more

in a calendar year

2. Independent expenditure committees, committees which make independent expenditures of \$1,000 or more in a calendar year, and
3. Major donor committees, committees which make contributions of \$1,000 or more in a calendar year.

Recipient committees have ongoing filing obligations under the Act.

Section 84104 further provides that it is the duty of a committee's treasurer to verify that to the best of his or her knowledge the committee's campaign statements are true and complete, and to use all reasonable diligence in the preparation of such statements. Regulation 18427, subdivision (a), specifies the duties of a committee's treasurer with respect to the receipt and expenditure of funds and the reporting of those funds. It provides a treasurer shall:

“(1) Establish a system of record keeping sufficient to ensure that receipts and expenditures are recorded promptly and accurately, and sufficient to comply with regulations established by the Commission related to record keeping.

“(2) Either maintain the records personally or monitor such record keeping by others.

“(3) Take steps to ensure compliance with all requirements of the Act concerning the receipt and expenditure of funds and the reporting of funds.

“(4) Either prepare campaign statements personally, or review with care the campaign statements and underlying records prepared by others.

“(5) Correct inaccuracies or omissions in campaign statements of which the treasurer knows, and cause to be checked, and, if necessary, corrected, information in campaign statements a person of reasonable prudence would question based on all the surrounding circumstances of which the treasurer is aware or should be aware by reason of his or her duties under this regulation and the Act.”

Under Section 83116, the Commission may assess an administrative penalty of up to \$5,000 for a violation of the Act by any person who violates its provisions. A person is potentially liable under the Act if he or she: 1. has filing or reporting obligations under the Act, 2. is compensated for services involving the Act, 3. causes another to violate the Act, or 4. aids and abets another to violate the Act. However, as specified in Section 83116.5, aiding and abetting does not constitute an additional violation under Chapter 11 of the Act commencing with Section 91000.

Section 91006 provides that if two or more persons are responsible for any violation, they shall be jointly and severally liable. Therefore, for example, a committee's treasurer may be

held jointly and severally liable, along with the committee, for any reporting violations committed by the committee. (Sections 83116.5 and 91006.)¹

At an Interested Persons Meeting held earlier this year, members of the public expressed concern over the liability of treasurers for committee violations when the treasurer has not been responsible for such violations. This raises two issues:

Issue 1: Treasurer Liability Where Duty is on Candidate.

Pursuant to Section 84100, a treasurer is responsible for actions of a campaign committee, including a candidate controlled committee, as defined in Section 82016. In most instances a candidate, his or her controlled committee, and the committee's treasurer are jointly liable for a violation of the Act's campaign provisions. This is because many of the campaign provisions of the Act apply to elected officers, candidates, and committees. (See, for example, Section 84200.) Some provisions, however, are applicable only to a candidate or other person, raising questions about whether a treasurer may be held responsible for all violations of a candidate. In some instances no candidate controlled committee exists. For example, Section 85201, subdivision (h), applies to an "individual" who raises or spends less than \$1,000, and therefore he or she does not qualify as a committee under Section 82013. Also, Section 84206 allows a candidate or officeholder who does not intend to raise \$1,000 or more in contributions or make expenditures totaling \$1,000 or more during a calendar year to file a single short form campaign statement (Form 470) in lieu of filing semiannual and preelection statements.

Under the provisions of Sections 83116.5, 84100, and 91006, it appears there is no discretion to exclude a treasurer from liability when the violation applies to a committee, including a candidate controlled committee. However, where there is no controlled committee, and a provision of the Act applies to a candidate or officeholder only, the staff believes there is statutory authority to permit Enforcement Division staff to propose to the Commission that a treasurer be excluded as a respondent. This is because there is no committee to come under the purview of Section 84100, which is the general statute applicable to treasurers. Therefore, this regulatory proposal provides, at subdivision (c), that the Enforcement Division may propose to the Commission that a treasurer be excluded from liability where no committee exists, but only where the treasurer did not cause or aid and abet in the violation.

Issue 2: Treasurer Liability Where Duty is on Committee and Treasurer.

Sections 83116.5 and 91006 impose joint and several liability on persons responsible for a violation. This applies to any committee, as defined in Section 82013, which include recipient committees, independent expenditure committees, and major donor committees. All persons responsible for the actions of a committee, including candidates and treasurers, are usually the named respondents.

¹ Under the current provisions of Section 83116.5, a treasurer or other person with filing obligations cannot be held separately liable for the same violation.

A member of the regulated community raised a charging issue with respect to major donor committees at an Interested Persons Meeting held earlier this year. Because a major donor committee is a person who makes contributions of \$10,000 or more, under the provisions of Section 82013, subdivision (c), many of these committees are corporations which hire paid professional treasurers to comply with the campaign provisions of the Act. In these instances, sometimes the professional treasurers wish to assume all responsibility for a violation of the Act, as their clients rely on them exclusively to comply with its provisions.

The issue is whether the Enforcement Division has discretion under the provisions of Section 83116.5 and 91006 to hold only a treasurer responsible for failing to comply with a campaign reporting duty imposed upon a committee. The statutes can be read to apply to one person. This is because Section 91006 applies where two or more persons are “responsible” for a violation.

Adopt 2 Cal. Code Regs. Section 18316.6: The regulatory proposal is intended to give the Enforcement Division the discretion to hold the party who violated the Act in limited circumstances solely accountable, notably in the case of a major donor committee because often major donor committees can be one-time committees that make a single contribution and rely on paid treasurers to do their filing. Proposed Regulation 18316.6 would provide the following:

- Subdivisions (a) and (b). These subdivisions restate the general rules regarding treasurer duties and liability under Sections 83116.5, 84100, and 84104, and Regulation 18427.
- Subdivision (c). This subdivision provides that while a treasurer may be held liable for a violation of the Act for failing to abide by his or her duties concerning the filing of campaign statements, the Enforcement Division has the discretion to recommend to the Commission that a treasurer not be held responsible for a violation of a duty imposed only upon a candidate, if the candidate does not have a controlled committee, the treasurer did not cause the violation, and the treasurer did not aid and abet the candidate in the violation.
- Subdivision (d). This subdivision defines who is a responsible person within meaning of Section 91006, for the specified narrow circumstance involving major donor committees and their paid professional treasurers. The subdivision provides that where a professional treasurer of a committee is compensated to perform any duty specified in Regulation 18427 applicable to a major donor committee, and there is a showing that he or she caused that committee to violate the Act, the Enforcement Division has discretion to recommend that a treasurer be held solely responsible for the violation. This language is drafted narrowly to address a concern raised by a professional treasurer while not discouraging volunteers from serving as treasurers. This would occur, for example, if the language was too broad as to encompass recipient committees, as defined in Section 82013, subdivision (a).

The staff believes the regulatory language is consistent with the provisions of Section 91006, which requires two or more persons who violate a provision of the Act to be held jointly and severally liable. The language provides guidance to the Enforcement Division as to narrow

circumstances where a paid professional treasurer may be determined to be the only person responsible for a violation.

The proposed regulation will provide clarity on the issues raised and provide the ability to relieve treasurers of liability under the Act in narrow circumstances to provide efficient administration of the enforcement provisions.

IV. Costs for Compliance

This regulation is not likely to increase costs for compliance.