



MEMORANDUM

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

From: Zackery P. Morazzini, General Counsel

Subject: Regulation 18740: Legally Prohibited Disclosure: Statement of Economic Interests

Date: January 5, 2015

Summary

The Political Reform Act (Act) requires elected and appointed public officials and candidates to file a statement disclosing certain economic interests, including investments, real property, income, and other potential sources of a conflict of interest. (See Government Code section 87200 *et seq.*) This information is reported on a Form 700 Statement of Economic Interests. When reporting a source of income that is a business entity under the Act's disclosure provisions, Section 87207(b) requires the disclosure of the "name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from that person was equal to or greater than ten thousand dollars (\$10,000) during the calendar year." Current Regulation 18740 creates a narrow exception to this statutory disclosure rule if the disclosure would violate a legally recognized privilege under California Law. The proposed amendments would allow us to apply Regulation 18740 to consider claims of prohibited disclosure under other California and Federal laws, not limited to evidentiary privileges.

Background

Regulation 18740 was originally adopted in 1976 to provide a mechanism to permit the Commission to grant exceptions for officials and candidates who file Form 700s where disclosure could violate one of three statutory privileges under the California Evidence Code.¹ The original 1976 regulation set out the basic rule, essentially stating that any person required to report income who believes the disclosure of the name of a source of income would violate a legally recognized privilege may withhold that information, pending determination by the Commission.²

¹ The August 1, 1975 staff memorandum explicitly identified eleven privileges, three of which were pertinent to financial disclosure under the Act: (1) lawyer-client, (2) physician-patient, and (3) psychotherapist-patient.

² The exception in Regulation 18740 was not enacted to protect the filer, but was intended to protect the privacy rights of persons associated with the filer (persons who generally have not voluntarily placed themselves in the public eye). The holder of the recognized privileges in the Evidence Code, for example, is the client or patient, not the person filing the Form 700.

The proposed amendments seek to correct two problems identified by staff over the years: (1) the current nondisclosure exemption is too narrow; and (2) the process for an official or candidate to request nondisclosure is inefficient. Each issue is discussed below.

Current Limitation to California Privileges

Staff has been confronted with several scenarios that did not fit into the strict language of Regulation 18740, but where the law nevertheless prohibited disclosure. For example, staff has considered the effect of federal privacy laws on disclosure. Specifically, the Commission has recently permitted nondisclosure where such disclosure would violate federal securities laws. Staff has also issued advice that disclosure is not required if it is prohibited by the federal Health Insurance Portability and Accountability Act. In both cases, staff relied primarily on the preemptive effect of federal law.

In the above examples, the issue was analyzed under the procedure set forth in Regulation 18740, however, the basis for the exemptions granted did not fit cleanly into the explicit language of the regulation. The proposed amendments would allow us to apply Regulation 18740 to consider claims of prohibited disclosure under other California and Federal laws, not limited to evidentiary privileges.

Complexity of the Existing Procedure

The current set of amendments was developed with the additional goal of simplifying the procedure, such that the filer and the public can receive a determination of disclosure or nondisclosure in a reasonably timely manner, while minimizing the burden on staff and the Commission.

The current regulation requires a burdensome procedure with redundant steps. The two most recent requests considered under the current regulation took three and eight months, respectively, to process. During that period, no disclosure was made and neither the public nor the official knew if the nondisclosure was proper.

The Proposed Amendments

The proposed amendments, while keeping the basic structure of the current regulation, provide a broader range of legal justifications for nondisclosure and a more simplified process.

First, the amended regulation allows a filer to request the exemption based on California or Federal law. The General Counsel, rather than the Executive Director (who may or may not be an attorney), makes an initial determination after examining the law and facts in question. If the General Counsel determines that disclosure is required, the filer may appeal to the Commission.

If the General Counsel grants the exemption, the conclusion and reasoning for the granting of the exemption will be presented to the Chair of the Commission who may approve the determination or request review by the full Commission. If the Chair does not request full Commission consideration, the General Counsel's order is final. If the Chair brings the matter to the Commission, the Commission's order becomes the final determination.

Staff Recommendation

The proposed revised regulation is more streamlined and more flexible, allowing staff to deal with various legitimate privacy issues that may arise, and in a timely manner. The new amendments also maintain Commission oversight and public access to exemption determinations. Staff recommends the Commission adopt the amendments to Regulation 18740.