

August 27, 2013

John St. Croix
Executive Director
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Your Request for Informal Assistance
Our File No. I-13-107

Dear Mr. St. Croix:

This letter responds to your request for advice regarding the reporting provisions of the Political Reform Act (the "Act").¹ Because your questions seek general guidance and do not reference any specific proceedings, we are treating your request as one for informal assistance.² Additionally, Regulation 18329, copy enclosed, provides that the Commission may decline to provide advice where the request is submitted by a third party about another person's duties under the Act.

QUESTIONS

1. Does Section 91013 apply to the Behested Payment Form, 803?
2. If so, what are the duties and responsibilities of the San Francisco Ethics Commission should such a form be untimely filed?

CONCLUSIONS

1. Yes. Section 91013 applies to statements and reports in the Act that impose a statutory deadline, such as Form 803.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

2. You have posed various questions related to the San Francisco Ethics Commission's responsibilities. See below for answers to each.

FACTS

You are the Executive Director for the San Francisco Ethics Commission (the "Ethics Commission"). The Ethics Commission is the filing officer for a variety of local agencies and entities. For most forms the Ethics Commission accepts, it serves as the filing officer. Among the reports the Ethics Commission receives is the Form 803, reporting behested payments. For this form, the elected officer files the behested payments report with the officer's own agency, and then the agency forwards a copy of the reports to the Ethics Commission. You have presented hypothetical situations regarding filing the Form 803 and what the Ethics Commission's responsibilities are regarding filing, timing for filing, and imposing fines.

ANALYSIS

Behested payments, under the Act, refer to payments that are made "under the control, or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the elected officer . . . or his or her agent." (Regulation 18215.3(a).) Section 82015(b)(2)(B)(iii) requires that once an elected officer determines that there is a reportable behested payment (a payment made on her behalf that equals or exceeds \$5,000 from a single source in a calendar year), the officer must file a Form 803 with specified information. In addition, within 30 days of the threshold being reached or the payment being received, "[t]he report shall be filed by the elected officer with the elected officer's agency and shall be a public record subject to inspection and copying pursuant to subdivision (a) of Section 81008." (Section 82015(b)(2)(B)(iii).)

Following this filing, the elected officer's agency, within 30 days of receiving the report, forwards a copy to the Fair Political Practices Commission if for a state agency, or the "officer with whom elected officers of that agency file their campaign statements" if for a local agency. Thus, for purposes of the Form 803, the filing officer is the elected officer's own agency, rather than the agency that receives the copy.

Section 91013 applies to any forms that must be filed under the Act that include a statutory deadline. Section 91013(a) specifies a filing officer's authority with respect to assessing late filing penalties and waiving fines for statements that are filed after filing deadlines:

"(a) If any person files an original statement or report after any deadline imposed by this act, he or she shall, in addition to any other penalties or remedies established by this act, be liable in the amount of ten dollars (\$10) per day after the deadline until the statement or report is filed, to the officer with whom the statement or report is required to be filed. *Liability need not be enforced by the filing officer if on an impartial basis he or she determines that the late filing was*

not willful and that enforcement of the liability will not further the purposes of the act, except that no liability shall be waived if a statement or report is not filed within 30 days for a statement of economic interest, other than a candidate's statement filed pursuant to Section 87201, five days for a campaign statement required to be filed 12 days before an election, and 10 days for all other statements or reports, after the filing officer has sent specific written notice of the filing requirement.” (Emphasis added.)

A separate provision specifies the duties and authority of an agency with which a person is required to file a copy of a statement or report:

“(b) If any person files a copy of a statement or report after any deadline imposed by this act, he or she shall, in addition to any other penalties or remedies established by this chapter, be liable in the amount of ten dollars (\$10) per day, starting 10 days, or five days in the case of a campaign statement required to be filed 12 days before an election, after the officer has sent specific written notice of the filing requirement and until the statement is filed.

“(c) The officer shall deposit any funds received under this section into the general fund of the jurisdiction of which he or she is an officer. No liability under this section shall exceed the cumulative amount stated in the late statement or report, or one hundred dollars (\$100), whichever is greater.”
(*Id.* at 91013(b) and (c).)

Section 91013 provides discretion to filing officers with respect to assessing fines if the filing officer determines on an impartial basis that the late filing was not willful and assessing a fine would not further the purposes of the Act. (*In re Rundstrom*, 1 FPCC Ops. 188, 75-084.) The Commission has not adopted a clarifying regulation and thus, the implementation is left to the discretion of filing officers, so long as the implementation does not exceed the parameters of Section 91013. A filing officer with whom a person is required to file a copy of a statement or report can also impose a penalty of \$10 per day starting ten days after sending the elected officer “specific written notice” of the filing requirement. (Section 91013(b).)

1. *Does Section 91013 of the Political Reform Act require the imposition of late fees for the untimely filing of Form 803 statements? If not, why not?*

As discussed above, Section 91013 applies to statements and reports in the Act that impose a statutory deadline. The Behested Payment Report, Form 803, falls under this section. Imposing late fees, however, is discretionary, unless specific written notice of the filing requirement has been sent. Under Section 82015(b)(2)(B)(iii), an elected officer files a behested payments report with the elected officer's agency. Accordingly, the elected officer's agency is the filing officer and may impose fines under Section 91013(a) if an elected officer fails to file a behested payments report or files late.

2. If more than 30 days have elapsed since receipt of the payment before the behesting official files the Form 803 with his or her agency, what action, if any, should the agency pursue? Should the agency impose a late fee?

We understand this question to be requesting advice on behalf of the filing officer -- the elected officer's agency -- for purposes of the Form 803. Because the Ethics Commission is not the filing officer for this form, any advice would be third-party, and we do not provide third-party advice. (Regulation 18329(c)(4)(C).) As discussed above, however, we note that Section 91013 gives the elected officer's agency discretion to impose a fine.

3. If the official's agency fails to transmit the Form 803 to the Ethics Commission – the official's filing officer for original campaign statements – should the Ethics Commission impose late fees against the official or the official's agency?

The elected officer's agency has the ability to impose a fee under Section 91013(a) for late filing of a behested payments report. Section 91013(a) or (b) does not give the Ethics Commission authority to fine the elected officer's agency or to fine the elected officer if his or her agency fails to forward the Form 803 to the Ethics Commission. Steps the Ethics Commission can take to ensure that agencies forward elected officer's behested payments reports to the Commission in a timely manner are discussed in the response to question six below.

4. If an elected official is not aware that a payment has been made at his or her behest until more than 30 days have elapsed from receipt of the payment, what is the recommended course of action in such a situation?

Again, we understand this question to be requesting third-party advice. Generally, however, an official has a duty to be informed of payments made at his or her behest, and must make an effort to file required forms as soon as possible.

You have also presented the following two hypotheticals:

5. A behested payment is made and the Form 803 is due no later than May 1 with the official's agency. The form 803 is not filed with the official's agency until May 31. The agency forwards the Form 803 to the Ethics Commission on June 30, within 30 days of its receipt. Is this considered a timely or untimely filing? If any late filing fees are to be assessed, against whom should they be assessed?

In this hypothetical, the elected officer has filed a behested payments form late with the elected officer's filing officer – his or her agency. Section 91013 allows the filing officer to issue a fine assessed against the elected officer of \$10 per day, in the filing officer's discretion. The Ethics Commission, in receiving the forwarded behested payment report, does not have authority under Section 91013 to assess a fine in this hypothetical.

6. *A behested payment is made and the Form 803 is due no later than May 1 with the official's agency. The Form 803 is timely filed with the official's agency. The agency forwards the Form 803 to the Ethics Commission more than 30 days after its receipt. Is this considered a timely or untimely filing? If any late filing fees are to be assessed, against whom should they be assessed?*

In this hypothetical, the elected officer has filed a timely form with his or her agency and no fines are imposed under Section 91013. The elected official's agency, however, forwards the behested payment report to the Ethics Commission late. The Fair Political Practices Commission also receives forwarded copies of the Form 803 and the Form 700. If an agency is late in forwarding copies, the Commission informs the forwarding agency of the deadline. If the copies are forwarded late on an on-going basis, the matter is referred to the Commission's enforcement division for investigation. In most cases, however, the Commission's first outreach results in compliance. The FPPC also provides training to agencies and officials regarding their duties under the Act to any agency that requests such training. All of these options are also available to the Ethics Commission to get agencies to forward Form 803's on a timely basis. The Ethics Commission may not, however, impose a late fee with regard to forwarded behested payments reports under Section 91013.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl