

January 15, 2019

**VIA E-MAIL**

Chair Alice Germond  
Commissioner Allison Hayward  
Commissioner Brian Hatch  
Commissioner Frank Cardenas  
Fair Political Practices Commission  
1102 Q Street, Suite 3000  
Sacramento, CA 95811

**Re:            January 17, 2019 Commission Meeting, Agenda Item #29**  
**Adoption of Regulations 18360.1 and 18360.2**

Dear Chair Germond and Commissioners:

We are writing as Chair of the Commission's Enforcement Review Task Force and Chair of the Task Force's Subcommittee on Streamline Process/Warning Letters, and as attorneys who collectively represent a substantial number of candidates, elected officials and committees regulated by the Political Reform Act ("Act"), to express our concerns regarding the current version of the Streamline Enforcement and Warning Letter Regulations that have been presented to you for approval. While we – and the Task Force – have been generally supportive of the proposed regulations, we can no longer support the adoption of these regulations in light of changes that were recently made following the Commission's pre-notice discussion on December 20, 2018.

The proposed regulations were intended to codify and expand the Commission's current streamline program "in response to the Commissioners' concerns over a lack of codification of Enforcement Division's Streamline Program, and to add additional minor violations identified by Enforcement staff and others that do not currently qualify for a streamline penalty but are consistent with the purpose of the streamline program." (See January 11, 2018 Staff Memorandum accompanying Agenda Item #29.) As a result of the recent changes, the proposed regulations will actually have the effect of removing certain minor violations that are already being handled with warning letters or streamlined penalties under the Commission's current program, and treating them instead as mainline enforcement penalties – thereby increasing the number of mainline enforcement cases that come before the Commission for approval and undermining the very purpose behind these regulations.

When this effort was commenced, the Task Force identified three characteristics that, when combined, should qualify a case for a warning letter/streamlined enforcement – namely, cases where (1) the harm to the public was minimal; (2) there was no intent to violate the Act; and (3) based on the overall activity of the filer, the matter not reported/late reported was not significant in the overall context of the filer's activities. Again, this is what framed the Task Force's concepts about which cases should be appropriate for expedited resolution. Some of the recent changes to Regulation 18360.1 move away from these concepts.

Specifically, our concerns are directed to provisions in Regulation 18360.1 that seek to exclude filers from the program if they fail to file campaign reports at least seven days before the election. The relevant provisions are as follows:

**Page 4, Lines 15-16:** “No late statement or report, other than a Form 470, was due prior to a relevant election and not filed at least seven days before the election.”

**Page 5, Lines 15-16:** “A 24-Hour Report due during the last 16 days before the election and not filed at least seven days before the election.”

**Page 5, Lines 17-18:** “Any 24-Hour Report not filed before the election if the information was not reported on another report or statement filed by the committee at least seven days before the election.”

The first provision is listed as a mitigating factor, which is intended to allow a filer to receive a warning letter in lieu of a penalty – streamline or otherwise. However, by including this language, this “mitigating” factor has actually become punitive – effectively precluding any filer who fails to report a contribution by the seventh day prior to an election from receiving a warning letter, even if there is no public harm, the contribution represents a small portion of the committee’s overall activity, or the contribution was timely reported by the filer on another campaign statement, such as a pre-election report.

Even more egregiously, the other two provisions on page 5 appear in the section excluding filers from the streamline program altogether. This means that any filer who fails to file a report at least seven days before an election will be penalized under the Commission’s mainline enforcement process – no matter how large or how small the contribution, and no matter what kind of public harm exists. In other words, for example, if a \$20 million gubernatorial campaign inadvertently fails to file a 24-hour report for a \$1,000 contribution received from an individual donor of no particular noteworthy significance during the last 6 days of a campaign, the committee is not only precluded from receiving a warning letter, it will be excluded entirely from the streamline program and penalized with a mainline enforcement stipulation and penalty.

While this example might seem extreme, it should not be considered unusual. In the rush of a campaign, particularly in the closing days of a campaign, mistakes can happen – even with the most sophisticated operation. In fact, the Commission approved five (5) enforcement matters involving nineteen (19) 24-hour reporting violations at its December meeting that would be excluded from the new streamline program under the Commission’s proposed regulation.

We initially expressed our support for a regulation that distinguished serious violations from minor technical violations by providing for the issuance of warning letters and streamlined penalties in circumstances where the violation is inadvertent, there is little to no public harm, and the unreported activity is insignificant in the context of the overall campaign. We believed such a structure benefitted both the regulated community and the Enforcement Division. These proposed provisions now threaten

to undermine the original goal of the regulation by converting minor technical violations that are currently prosecuted under the Commission's existing streamline program into mainline violations.

We therefore ask the Commission to delete these three provisions from the proposed regulation. The regulation contains built-in protections to ensure that reporting violations exceeding a certain amount (as set forth in the population numbers contained in the exclusions section), those resulting from intentional conduct, or those which result in more than minimal public harm are precluded from the program as set forth in other exclusions. Thus, the regulation provides assurance that serious violations of the Act will be penalized accordingly.

Moreover, proposed Regulation 18360.2 includes increased penalties for unreported contributions and expenditures that are not filed at least 7-days prior to the relevant election. Thus, the regulations already provide an enhanced penalty for violations that occur during, or which are not remedied by, the 7-day period before an election. As a consequence, these three restrictive provisions are unnecessary.<sup>1</sup>

The Enforcement Review Task Force conceptually endorsed the original version of the proposed regulations believing they fulfilled the objectives of providing clarity to the regulated community and prioritizing the Commission's enforcement resources on serious violations of the Act. The full Task Force has not had an opportunity to weigh in on the latest version of the regulations, as many of the key changes were only made public last week. Nonetheless, as Chair of the Task Force and Chair of the Subcommittee, it is our opinion that the provisions cited in this letter undermine the entire purpose behind the streamlined program, and should be removed from the final version of the regulation.

We thank you for your consideration of the issues raised in this letter, and we look forward to discussing them further at the January 17 Commission meeting.

Very truly yours,



Stephen J. Kaufman  
Chair, Enforcement Review Task Force



Brian Hildreth  
Subcommittee Chair

cc: Galena West, Director of Enforcement  
Dave Bainbridge, General Counsel  
Ryan P. O'Connor, Counsel, Legal Division

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<sup>1</sup> We question the necessity of including enhanced penalty provisions in Regulation 18630.2 for reports that are filed later than seven days before an election if filers who fail to file reports at least seven days before the election are excluded from the streamline program anyway.