



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 12, 2018

To: Colleagues on the California Fair Political Practices Commission
Erin Peth, Executive Director

Fr: Commissioner Allison Hayward
Commissioner Brian Hatch

Re: Report of the Ad Hoc Committee on FPPC Governance

Introduction

After several months of research, interviews, and deliberation, the Commission's Ad Hoc Committee on FPPC Governance is pleased to offer our observations and recommendations for the internal governance procedures followed by the Commission. These procedures were formalized in 2001,¹ have not been amended since that time, and deserve a reappraisal.

As you will see, we found that many of the Commission's governance challenges are persistent. The Commission has struggled with integrating the full commission, including part-time commissioners, into its oversight and management. The Commission's governance practices, even since these were adopted in writing by the full Commission, have not been consistently observed over time. Staff turnover means that practices may be lost or forgotten. Also, as Commissioners come and go, their energy and enthusiasm will vary, and some tasks may wane. As a result, we find there has been little consistency. Our work on this Ad Hoc Committee has convinced us that continuity in governance practice is important to ensure proper oversight, adequate transparency (for the Commission as well as the public) and fundamental fairness such that like situations are treated the same.

This Memorandum will first summarize the sources of power and duties set forth in the Political Reform Act (Act) and its implementing regulations, as well as the Statement of Governance

¹ See Agenda and document for January 12, 2001 Commission meeting, attached as exhibits to <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/AgendaDocuments/General%20Items/2017/October/31%20Memo%20re%20Statement%20of%20Governance.pdf>.

Principles adopted in 2001. It will then review what we found to be actual practice in the relevant areas. Finally, it will explain our proposed revisions to the Statement. A draft copy of our revised Statement is attached to this document.

Statutes and Regulations on Commission Governance

The Act establishes the Commission and lists its powers. The Commission, as an entity, is given responsibility for administration and implementation of the Act,² adoption of rules and regulations,³ publication of forms, reports, and manuals,⁴ issuance of opinions,⁵ establishment of investigations,⁶ issuance of subpoenas,⁷ conduct of hearings,⁸ and acceptance of grants, contributions and appropriations.⁹

Recognizing that the five individuals who comprise the Commission, four of whom serve part time, would need assistance with these duties, the Act provides the Commission authority to appoint an Executive Director, and appoint and discharge other officers, counsel and employees.¹⁰ It also provides the Commission the power to “delegate authority to the Chairman or the Executive Director to act in the name of the Commission between meetings of the Commission.”¹¹

The Act also imposes limits on the Commission and Commissioners. It prohibits certain political activity and allows for removal by the Governor with concurrence of the Senate,¹² specifies compensation,¹³ and makes Sacramento the Commission’s principal office location.¹⁴ It also specifies the Commission’s appropriation shall be \$1,000,000 (adjusted for inflation), as well as such additional amounts the Legislature may appropriate.¹⁵

The Commission has delegated some of its powers to specific individuals through regulations. Accordingly, the Chair may call special meetings (as may a vote of the Commission or a written

² Cal. Gov’t Code § 83111.

³ § 83112.

⁴ § 83113.

⁵ § 83114.

⁶ § 83115.

⁷ § 83118.

⁸ § 83116.

⁹ § 83117.

¹⁰ § 83107.

¹¹ § 83108.

¹² § 83105.

¹³ § 83106.

¹⁴ § 83110.

¹⁵ § 83122.

request from any two Commissioners)¹⁶ and the Chair may cancel or change a regular meeting for any reasonable cause.¹⁷ The Commission or Commission staff may schedule interested persons meetings, and schedule prenotice hearings on regulations.¹⁸ The Chair may change the effective date of a Commission opinion, subject to appeal to the full Commission.¹⁹ Regulations direct complaints to the Enforcement Division and the Chief of Enforcement, and specify how they should be handled.²⁰ They also specify how the Enforcement Division handles probable cause proceedings,²¹ defaults,²² and proposed ALJ decisions.²³

Any authority imposed on the Executive Director by regulation may be delegated in writing to any member of Commission staff or any Commission contractor.²⁴ What are those powers? The regulations specify that the Executive Director has the power to grant or deny opinion requests²⁵ subject to Commission review.²⁶ The Executive Director may also seek rehearing of a formal opinion (as may the requester or any Commissioner).²⁷ The Executive Director also has discretion on the issuing of administrative subpoenas,²⁸ recommending civil litigation,²⁹ referring legal questions to the Commission,³⁰ holding administrative hearings before an ALJ,³¹ or granting reconsideration of an ALJ decision.³² Until 2011, the regulations gave the Executive Director authority to conduct probable cause conferences – although the practice had been to

¹⁶ 2 CCR § 18310(b).

¹⁷ § 18310(d).

¹⁸ § 18312(b)(1) & (2). The Commission adopts regulations under the California Administrative Procedures Act as it stood in June 4, 1974. *FPPC v. OAL*, Sac. Super. Ct. No. 512795 (March 1991), *aff'd* Cal. Ct. App. No. C010924 (3rd Dist. Ap. 27, 1992). At its January 2003 meeting, the Commission adopted a staff proposal that would save money by not holding interested persons or prenotice hearings for all regulations, as had been the practice. See Minutes, January 17, 2003.

¹⁹ 2 CCR § 18324(b).

²⁰ § 18360. The Executive Director is given authority to review any requests for reconsideration of the Enforcement Division's planned action in response to a complaint. § 18360(d).

²¹ § 18361.4.

²² § 18361.11.

²³ § 18361.9.

²⁴ § 18319. The Executive Director may also delegate certain authority in enforcement to the General Counsel or an attorney from the legal division. See § 18361.

²⁵ 18320(d). The regulations also list criteria for denying opinion requests. See § 18320(f)(1)-(7).

²⁶ § 18321.

²⁷ § 18326.

²⁸ § 18361.1, see also 18361.7.

²⁹ § 18361.2.

³⁰ § 18361.3.

³¹ §§ 18361.5, 18361.6.

³² § 18361.9.

delegate that power to an attorney in the Legal Division to avoid potential conflicts.³³ An amendment in 2011 directed the General Counsel or an attorney from the Legal Division to conduct these hearings, codifying prior practice.

The Executive Director also determines whether portions of a decision should be deemed “precedential” subject to Commission review.³⁴ The Executive Director may also grant exemptions to the requirement that agencies adopt conflict of interest codes in certain situations, subject to review by the Commission.³⁵ The Executive Director also administers oaths on behalf of the Commission, and often swears in new Commissioners.³⁶

Statement of Governance Principles

In addition to the powers assigned in the Act and regulations, the Statement of Governance Principles further defines the division of authority within the Commission.

The Statement charges the Commission (as an entity) with ensuring that the Act is impartially and effectively administered and implemented (as the Act also requires, see above). Specifically, the Statement directs the Commission to adopt and monitor policies for the Commission, including approving annual goals and objectives, approving the annual budget, interpreting the Act through regulations and opinions, enforcing the Act, defending the Act in court, taking positions on legislation, and authorizing forms and manuals.³⁷

The Commission is also empowered to select, evaluate and if necessary discipline the Executive Director, delegate executing of policy to the Chair and Executive Director, and ensuring agency financial integrity and compliance with other laws.³⁸

Each Commissioner is directed to comply with the qualification requirements and the Statement of Incompatible Activities,³⁹ prepare for and govern through regular meetings,

³³ See Memorandum: Proposed Amendment of Regulations 18360, 18361 and 18361.4 and Adoption of Regulations 18361.11 and 18316.6, October 31, 2011. The Governance Principles from 2001 reflect the former practice and were not amended when these regulations were adopted in 2011.

³⁴ § 18361.10, see Minutes of January 20, 2006 (debating and adopting regulation). We found no evidence this has ever been used.

³⁵ § 18751.

³⁶ § 18363.

³⁷ Statement of Governance Principles, Commissioner Manual p. 7 (hereafter Manual). The Chair at the time told us that this statement was modeled after one used by CalPERS, and that before it was adopted the Commission did not have such a statement. Getman Interview.

³⁸ *Id.*

³⁹ The Government Code requires agencies, including the FPPC, to adopt this statement, keep it current, and make employees aware of it. Cal Gov’t Code § 19990. Our present Statement was adopted at the Commission’s August 22, 2013 meeting, amending previous versions adopted in

between meetings communicate to staff through the Executive Director or the Chair,⁴⁰ maintain confidentiality of confidential information, disclose to the Chair and Executive Director any relationships or interests that could appear biased or improper, meet high ethical standards exceeding legal minimums, and apprise the Chair and Executive Director of significant activities pertinent to the Commission.⁴¹

The Statement directs the Chair, as presiding officer of the Commission, to provide leadership, act on behalf of the Commission between meetings, speak for the Commission to the press and public, oversee management, report regularly on acts taken on behalf of the Commission and on achievement of Commission goals and priorities, set the agenda with input from Commissioners and staff, conduct meetings with reference to Robert's Rules of Order and Commission rules, and provides timely, comprehensive, impartial information to the Commission.⁴²

The Statement delegates to the Executive Director primary responsibility for Commission operations and management.⁴³ To that end, the Executive Director hires, promotes, and dismisses staff, prepares office policies, receives and coordinates Commissioner requests for staff work, and with the Chair and division chiefs, prioritizes such requests.⁴⁴ The Executive Director also acts as the chief budgetary and administrative officer, and with the Chair proposes the annual budget and prepares any other budgetary materials, reports regularly on the status of finances, and Commission actions, goals and achievements, approves any fiscal analyses, approves expenditures, and authorizes unbudgeted expenditures up to \$25,000.⁴⁵ The Statement also states that the Executive Director conducts probable cause hearings, which as noted above is a power allocated to the General Counsel or member of the Legal Division in 2011 regulations.⁴⁶ The Statement finally restates the Act and regulations by noting that the

2001 and 1988. See Memorandum: Statement of Activities which are Deemed to be Inconsistent, Incompatible, or in Conflict with the Duties of its Officers and Employees (August 22, 2013); Memorandum: Proposed Revision to Statement of Incompatible Activities (September 25, 2001).

⁴⁰ Debate during consideration of the Statement discussed whether Commissioners should be prevented from communicating directly with other staff. The general consensus was that Commissioners should feel free to contact any staff member, but the Executive Director should serve as liaison between staff and Commissioners to manage workflow and ensure that staff with specific expertise were involved, if appropriate. See Minutes, January 12, 2001.

⁴¹ Manual, p. 8. Chapter 3 of the Manual (titled "Commissioner Responsibilities, Ethical Duties and Restrictions") is also devoted to outlining the duties of Commissioners. We have found nothing to indicate that Chapter 3 was ever officially adopted by the Commission.

⁴² Id.

⁴³ Id.

⁴⁴ Manual p. 9

⁴⁵ Id.

⁴⁶ Id. See supra note 33.

Executive Director also reviews and approves conflict of interest codes, reviews, approves and signs subpoenas, and executes oaths.⁴⁷

How is the FPPC Governed in Real Life?

The Ad Hoc Committee attempted to identify the Commission's actual governance practice over time to the extent we were able. The Ad Hoc Committee circulated a questionnaire to former Chairs, Commissioners, and senior staff who the Ad Hoc committee could find. The responses were very helpful but are incomplete -- some former members are no longer living, and others were not interested in participating. We also interviewed several former Commissioners who wished to speak with us directly.

The Ad Hoc Committee also consulted those agendas, agenda documents, and minutes from meetings it could obtain. The materials from 2011 to the present are available on the FPPC website, and many materials from 1998-2010 can be recovered from Archive.org. Agendas and minutes are also stored at the State Archives, but the Ad Hoc Committee members (neither of whom live in Sacramento) were reluctant to demand the considerable staff time needed to collect more than a select few from there.

A. Powers of the Commission as an Entity (in Practice)

1. Approving annual policy goals and objectives

The Commission's consideration of policy goals appears intermittent. In some years the Commission's agendas and minutes showed staff bringing draft goals to the Commission for discussion and approval.⁴⁸ In other years no such activity appeared. We cannot say whether the exercise in drafting and reviewing such goals failed to happen during those years, or if it happened internally but was just not brought to the Commission (as directed by the Statement). Obviously, if this process had been occurring internally but nothing brought to the Commission, the public (not to mention the four part-time Commissioners) miss the opportunity to deliberate and engage with staff and the full Commission.

2. Approving the Annual Budget

⁴⁷ Id.

⁴⁸ The FPPC adopted a strategic plan for 2006-10 and regulatory priorities in December of 2005; conducted a two-day meeting to consider policies related to conflicts of interests in January 2001; and considered policy goals in October and November 1999. As noted, we do not have access to all agendas and minutes, nor the resources to review them all. These are offered as examples, not as a comprehensive list.

Although the Statement dictates that the Commission shall approve the agency’s budget, this has not been the practice, at least as we have been able to find in the Commission agendas and documents. Admittedly, some of the budget is dictated by statute as \$1,000,000 in 1975 dollars adjusted annually for inflation.⁴⁹ But much of it comes from elsewhere – so that in the 2017-18 budget for the FPPC, \$4,336,000 is the share required by the statute, and \$6,127,000 is the non-statutory balance (for a total of \$11,102,000 from the General Fund).⁵⁰

The non-statutory funding is subject to alteration and negotiation in the budget process. It is important from a transparency standpoint as well as a governance standpoint for the Commission to review and approve the agency’s proposed budget in an open meeting, and receive regular updates on the budget process, expenditures, and requests for reduction or augmentation.

Often, we found that the Commission received budget updates in the Executive Director’s or Administration staff report for the Commission’s information. However, these reports have not been consistently included in Commission agendas, and the recent practice is not to have a separate report from the Executive Director. We conclude, from what we know, that as a practical matter the Commission is only sometimes presented with budget information, and ordinarily has not voted on the budget.⁵¹

3. Interpreting the Act, through regulations, opinions and such other means as the Commission deems appropriate and lawful

For the most part, this role is performed through statutory mandated public votes on regulations and formal opinions.⁵² As noted before, the Commission’s practice of holding an interested person’s meeting and prenoticing regulations before placing them on the agenda for a final vote was streamlined at staff request in 2002 to save money.⁵³ That procedure remains discretionary today, which complies with the APA as it existed in 1975.

⁴⁹ Cal. Gov’t Code § 83122.

⁵⁰ See <http://www.ebudget.ca.gov/2017-18/pdf/Enacted/GovernorsBudget/8000/8620.pdf>.

⁵¹ We did find one request for budget approval in September 2001. Again, there are perhaps others we did not find, so this is just an example. We also found one request for a Commission “working session” regarding the budget, but nothing afterwards to indicate that this was ever scheduled. Minutes of February 14, 2008. Former Chairs and Commissioners also told us that during their service the full Commission regularly reviewed the budget for approval. Getman Interview, Lowenstein Interview.

⁵² Cal. Gov’t Code §§ 83112; 83114.

⁵³ See supra note 18. The debate over how best to present regulations to the public for review and comment seems timeless. See Minutes of October 8, 1999 (staff suggesting substituting working groups for prenotice, but objections from former FPPC commissioners in the audience). At one time the Commission prepared a “preview agenda” 30 days before a meeting to give the public early notice of what items would be coming up. See Attachments to the June

Informal advice letters are issued by staff without prior Commission review, but Commissioners (and the public) may request reconsideration.⁵⁴ Many requestors require a prompt response, so formal full Commission approval of these letters at a hearing would be unwieldy and unhelpful for them. Greater Commissioner participation between meetings may be appropriate as discussed in our Recommendations below.

4. Enforcing the Act, by hearing administrative actions, authorizing civil actions, approving stipulations and such other means as the Commission deems appropriate and lawful

Again, this role is fulfilled when the Commission votes on formal action as required by the Act. Presently, Commissioners rarely participate in hearings on enforcement cases, although under the Act they may.⁵⁵ Because of this possibility (however remote), Commissioners are limited in what they can learn about matters brought before them, so as not to prejudice their views in a future hearing. Commissioners are thus left to learn about, and participate in, enforcement policy on a case-by-case basis primarily through review of stipulations, which themselves vary depending on what the Commission's Enforcement staff and the responding parties could negotiate.

5. Authorizing actions taken to defend the Act in courts

Again, this role is fulfilled when the Commission votes (typically in closed session, followed by announcement in open session) as required by the Act.⁵⁶

6. Taking Positions on Legislative Efforts to Amend the Act

The Commission's role in adopting positions on legislation has also been variable over time. In some years, the Commission not only debates and adopts positions on specific bills, but also considers and votes on a larger legislative program.⁵⁷ In other years, the agency's position on

9, 2011 Agenda, Memorandum: Regulatory Plan for the Remainder of 2011 and 2012, May 25, 2011.

⁵⁴ See Franchetti Letter, July 9, 1992 (reconsidering I-91-301).

⁵⁵ § 83116; § 18361.5.

⁵⁶ § 18361.2.

⁵⁷ See, e.g., Agenda and minutes of January 15, 2002 (legislative program), March 14, 2006 (legislative report listed separately with action item identified within the report), April 8, 2004 (legislative report itself identified as action item on agenda), July 9, 1999 (Chair seeking permission to go to legislature with legislative simplification program).

legislation has been determined by the Chair and staff.⁵⁸ A related complication arose recently when it was unclear if a legislative position had been properly noticed for a vote.⁵⁹

Part of the confusion on the latter item may stem from the recent practice of placing all the executive staff reports into one document, rather than each report having its own agenda item.⁶⁰ That is, while some divisions typically just report information, others, such as the Legislative Division, will issue reports with items that call for action, or that a Commissioner might wish to bring to a vote.

7. Authorizing issuance of forms and manuals used to comply with the Act

The Commission's practice in this area has been uneven. In some years for which we have agendas and meetings, forms were regularly brought before the Commission for approval.⁶¹ In others, staff reported that work was being done on forms, and that forms were changed to reflect changes in the law, but the forms themselves were not brought up for a vote.⁶²

The public's ability to review and comment on forms and manuals was debated in 1996.⁶³ At that time, the California Political Attorney's Association proposed a detailed policy to allow public review and comment on forms and manuals, but staff recommended no change.

Because forms and manuals are a major source of legal information to the public, we believe (as contemplated by the Act and regulations) that the Commission, as an entity, should review and approve these documents, rather than delegating that task (formally or informally) to staff. Public notice and comment are also essential. Technical non-controversial changes to forms can be placed on the consent calendar.

⁵⁸ See Minutes of June 12, 1996 (Chair and staff changed Commission position, Commissioners and public not pleased).

⁵⁹ See agenda and minutes of September 17, 2017 (Legislative Report on AB 249).

⁶⁰ This change appears to have happened in February 2016.

⁶¹ See e.g. Agendas of November 16, 2017 (Campaign Manual 4, Recall Fact Sheet); November 19, 2015 (campaign manual and Form 700); January 15, 2015; January 16, 2014 (Manual for IEs); May 17, 2012 (Form 806); February 10, 2011 (Form 802); May 11, 2006 (Ballot Measures Committee manual); June 8, 2001 (Form 460); August 6, 1999 (Form simplification project for Forms 410, 461, 496, 497, 501, 502, and 498).

⁶² See Minutes of July 21, 2016 and Executive Staff Reports for Meeting of July 21, 2016 (reporting only that materials were updated and posted on the website, with no vote). In 1996, staff reported that, after a review of minutes from the founding of the Commission to that date, "formal actions were not taken by the Commission on forms and manuals. Until 1989 staff sent drafts of the forms and manuals to the Commission for its comments, and were advised by the Chairman that it was not necessary for the Commission to see them." Comments of Ms. Wardlow, Minutes of June 12, 1996. We note that CCR § 18313, requiring Commission approval, was promulgated later that year, in October 1996.

⁶³ See agenda and attachments, Agenda of June 12, 1996 (FPPC staff and CPAA drafts of policy).

B. The Commission as Manager – In Practice

The Statement of Governance Principles then turns to the Commission's duty to ensure proper management of the FPPC. It empowers the Commission with:

1. Selecting, evaluating, and if necessary taking disciplinary action against the Executive Director
2. Delegating execution of established Commission policy and strategic objectives to the Chair(man) and Executive Director, and through the Executive Director, re-delegation to the employees of the FPPC
3. Ensuring the integrity of the financial control and reporting system and the FPPC's compliance with all laws governing the agency.

We are taking these points as a group because we do not have much evidence to indicate that the Commission has exercised power, as an entity, in these ways. Our research suggests that the selection of an Executive Director has often been left to the Chair.⁶⁴ As noted above, we found only one instance of the Commission debating and adopting a strategic plan.⁶⁵ Delegation to the Chair of execution of policy seems to have been assumed, and not ever voted on explicitly. We also do not find the Commission has ever been asked to review or approve administrative financial controls or FPPC compliance with other laws.

C. Commissioners' Duties Under the Statement – In Practice

Next, the Statement of Governance principles addresses the duties required of commissioners. These are set forth above,⁶⁶ and we will take them as a unit.

In our review of Commission practice, we do not see much evidence that any of these duties provoked concern. But we also observe that Commission practice has not complied with the Statement. For instance, we know that Commissioners have felt at liberty, with knowledge of the Chair and Executive Director, to contact FPPC staff individually without first going through the Chair or Executive Director.⁶⁷

⁶⁴ See Porter Steps Down as Head of Political Watchdog Agency, San Diego Union Tribune, August 16, 2011; Leidigh interview; Stern Questionnaire. But there have been times when Commissioners have played a significant role in hiring an Executive Director. See Minutes of December 13, 2002 (discussing subcommittee to develop process for search for Executive Director).

⁶⁵ See supra note 48.

⁶⁶ See supra notes 39-41.

⁶⁷ This seemed to be acceptable practice in at least one meeting held before the Statement was adopted, see Minutes of September 10, 1999 (Commissioner did not need authorization to contact and work with staff on criteria for fines)

For the most part, we are unable to say whether a practice has been observed or been consistent. We simply have not found an instance where a Commissioner disclosed to the Chair or Executive Director “any relationship or interest that is likely to create an appearance of bias or impropriety” but it may be that such communications are not discussed in public meetings. In any case, we have not found instances where the public has expressed concern at a meeting about a specific Commissioner’s failure to disclose bias, partisanship, or inappropriate activities. We note that disputes have occurred among Commissioners.⁶⁸ We have found one case where a member of the public accused the Commission as a whole of bias,⁶⁹ and we acknowledge a press item suggesting impropriety.⁷⁰ We also have not found a case where a Commissioner has “apprise(d) the Chairman and Executive Director of all significant activities pertinent to the work of the Commission” and candidly we are not sure we understand what this provision is intended to accomplish.

D. Chair’s Duties Under the Statement – In Practice

The Statement then turns to the duties of the Chair, which we set forth above.⁷¹ We observe that there have been problems in the past with the Chair acting in the name of the Commission without Commission approval.⁷² The Statement also specifies that the Chair provides “daily oversight” of the management of the Commission, but that duty is duplicative of the duties assigned to the Executive Director, which seems confusing.⁷³ The Chair is instructed to report on a regular basis on actions taken on behalf of the Commission, but this has not been a regular agenda item, and our interviews suggest Chairs have usually kept in irregular casual contact with Commissioners.⁷⁴ As far as the conduct of meetings is concerned, we observed many instances of unconventional procedure throughout the records we have. It may be that

⁶⁸ See Greg Lucas, Fellow Panelists Disempower Head of Political Ethics Group, Sacramento Bee, October 4, 1996 (Commissioners delegate Chair’s powers to Executive Director in response to Chair taking legislative and policy action without Commission approval and Chair’s alleged conflict of interest).

⁶⁹ Minutes, July 9, 1999 (public commenter objecting to legislation because it would “ratif(y) the current ideological imbalance of the Commission” and “extend the life of this biased Commission”)

⁷⁰ “Ethics Commissioner had Secret Meetings with Democrat over Recall Election Rules” Sacramento Bee, August 9, 2017.

⁷¹ See supra note 42.

⁷² See supra note 68, Rushford Interview.

⁷³ See Strumpfer Questionnaire.

⁷⁴ Getman Interview, Ravel Interview, Lowenstein Interview, Schnur Questionnaire. During 2007-08, then Chair Johnson regularly placed on the agenda a “Chairman’s Report” which he delivered orally. It usually acknowledged retirements and new hires, commented on special accomplishments within the staff, and similar observations. See generally agendas and minutes from March 2007 to September 2008, available on archive.org.

Robert's Rules of Order is not the authority best suited for our Commission, and the Commission could consider alternatives.⁷⁵

The Statement also identifies the Chair as the one who "proposes, and with Commission approval, implements short-term and long-term goals and priorities" but our research suggests that staff usually bring proposed policy, goals, and priorities to the Commission in an agenda document. The Chair also is directed to report to the Commission on achievement of goals and priorities – again we observe it is staff who in reality fulfill this role. As with the duty of "daily oversight" discussed above, these tasks seem to overlap with the duties assigned the Executive Director, and it would seem a better practice to simply recognize that this is something the Executive Director should do.

E. Executive Director's Duties Under the Statement – In Practice

With that, we turn to the Statement's assignment of duties to the Executive Director, set forth above.⁷⁶ In addition to the Executive Director's regulatory duties,⁷⁷ the Statement designates the Executive Director as the "chief of staff" of the Commission, and assigns the Executive Director the responsibility to hire, evaluate, promote and fire staff, as well as overseeing other office policies. The Executive Director is also the Commission's chief budgetary and administrative officer, proposes the budget in consultation with the Chair, and reports regularly on the status of finances, prepares budget change proposals, approves expenditures, and authorizes unbudgeted expenditures up to \$25,000.

As noted before, the Commission's budget practices have not been uniform. We did not find a regular practice of bringing the budget before the Commission for approval, updating the Commission on the budget, or reporting unbudgeted expenditures. In some years, the Executive Director's Report presented this kind of information,⁷⁸ but in other years there has not been any such report for Commissioners to consider. Setting the Executive Director's discretion on unbudgeted expenditures at \$25,000 seemed uncontroversial at the time, but perhaps should be adjusted for inflation.

Summary and Explanation of Recommendations

Having done our best to identify the duties of the Commission, the Chair, and the Executive Director, as well as review how these parties have interacted in practice, we now turn to the Ad

⁷⁵ A number of local governments use Rosenberg's Rules of Order, which is a brief and accessible primer on how to run a meeting. See https://www.cacities.org/Resources/Open-Government/RosenbergText_2011.aspx.

⁷⁶ See supra notes 43-47.

⁷⁷ See supra note 47.

⁷⁸ See Minutes of April 13, 2006.

Hoc Committee’s recommendations for revision to the Statement of Governance Principles. These proposals require Commission action for adoption, and are consistent with the Act and regulations. The revised text of the Statement we propose is attached to this document. The reasoning behind our recommendations follows.

The overarching issue to us appears to be the involvement and integration of the full Commission. We observe that practices have been variable over the sixteen years the Statement has been in effect, and were not consistent before then. All Commissioners need to have a role to play in the management of the Commission – primarily because the Act says so, but also because those appointees have valuable perspectives and experience. How to do this, in a context where part time Commissioners live throughout the state, and Commission deliberation must follow the state’s open meeting requirements, is a challenge.

We believe the best solution to this issue is to establish standing committees comprised of two Commissioners to oversee the various functions of the Commission. We think this would provide the oversight contemplated in the Act for the responsibilities under each Committee’s purview, without adding complication or delay. Any matter requiring approval or Commission action would then come before the Commission, allowing for transparency and debate as required by open meeting laws. We are designating these as “standing committees” rather than “subcommittees” to indicate that they would be a permanent feature of Commission governance.⁷⁹

Committees are not new to the Commission. For some period of time from 1998 into the 2000s, there was a Chairman’s Subcommittee on Legislation that worked with staff on legislative analysis and recommendations.⁸⁰ We also found references to several subcommittees organized for particular tasks, including a Subcommittee to Develop Structure and Process for a National Search for Executive Director,⁸¹ and a Subcommittee on Internet Political Activity.⁸² As one former Chair told us, subcommittees were regularly used in her

⁷⁹ See Robert’s Rules of Order, Newly Revised (10th ed.) p. 472, l. 16-19 (distinguishing standing committees from special committees).

⁸⁰ Agenda and minutes for May 7, 2001 (replacing Commissioner Deaver with Commissioner Knox on subcommittee, noting committee formed in 1998). Because the subcommittee was also given authority to act between meetings, it was the Attorney General’s opinion that the subcommittee needed to be advisory to the Chair, under Cal. Gov’t Code § 83108 which allows the Commission to delegate its authority to the Chair or the Executive Director. See Minutes of July 9, 1999. We do not envision our Standing Committees as acting independently, but instead advising the full Commission in the exercise of its retained power, so this is not an issue in our proposal.

⁸¹ Minutes of December 13, 2012. The subcommittee proposal came to the Commission in the form of a memorandum from the General Counsel. See Agenda of December 13, 2012 (Morazzini memorandum).

⁸² See Internet Political Activity and the Political Reform Act: Report from Subcommittee in Internet Political Activity, August 11, 2010, available at

tenure “so that at least one Commissioner besides the Chair played a significant role in any major project.”⁸³

We therefore propose the Commission establish four Standing Committees; a Budget Committee, a Legislative Committee, a Personnel Committee, and a Law & Policy Committee. We believe these committees will better integrate the entire Commission into the oversight of the agency (as contemplated by the Act and regulations) without imposing burdensome meetings and delay, as would occur if such oversight used the full Commission in public meetings.

The Budget Committee would work with the Executive Director and report regularly to the Commission, for Commission approval, at each point in the budgetary process. As explained above, we found Commission participation in the agency’s budget generally to be minimal. Yet under the Act the Commission (as an entity) is obligated to “accept appropriations” and has “primary responsibility for the impartial effective administration and implementation” of the Act.⁸⁴

The Act permits the Commission to delegate its powers to the Chair or Executive Director to act between meetings, but we found no evidence of delegation in the budget context.⁸⁵ To be sure, unlike the regulation addressing delegation by the Executive Director, the Act does not require Commission delegation to be in writing. We think this is a poor practice, and regulations should be adopted to ensure that delegations are in writing, and easily accessed by future Commissioners. For now, the Commission should exercise its authority more responsibly, and we believe a Budget Standing Committee will accomplish this.

The Legislative Committee would work with the Legislative Director to analyze and recommend positions on legislation affecting the Commission or the Act, and work with the Budget Committee on budget bills affecting the Commission. Again, full Commission participation in this area has been inconsistent over the years, but when staff (or staff and a Chair) have moved forward without Commission approval, we see that both Commissioners and the affected

<https://www.scribd.com/document/36085085/FPPC-Internet-Political-Activity-Subcommittee-Report>.

⁸³ Getman Questionnaire and Interview. But other Chairs did not use subcommittees. Ravel Interview (did not use subcommittees, nor did Johnson or Schnur, as far as she could recall).

⁸⁴ See Cal. Gov’t Code §§ 83111, 83117. Since the four part-time commissioners do not get much budget information, they are unable to perform these duties, ask informed questions, or effectively advocate for the Commission. See Schnur Interview.

⁸⁵ Staff has argued that the Chair’s position as the only full time Commissioner implies some delegation. See Woodside Memorandum, October 9, 2017. The full-time Chair, part-time Commissioner structure is unique to California commissions, and we wonder how much implicit authority should be read into this scheme. See Stern questionnaire; Tony Quinn Oral History (California Archives); Ray LaRaja, Enforcing California’s Campaign Finance Laws, Working Paper 98-8, April 15, 1998.

public object. To the extent the Commission needs a body to act on legislation between meetings, such a committee had been in use before under power delegated to the Chair, with the Chair as one of the committee members.⁸⁶ An “action committee” like this is different from what we propose, but it does have precedent, and so we want to acknowledge it as an alternative.

The Personnel Committee would recommend to the Commission the selection, discipline, or termination of the Executive Director; the selection, discipline, or termination of executive staff members; the adoption of personnel policies and procedures proposed by the Executive Director as well as by the Standing Committee; and hear employee appeals of adverse actions taken by the Executive Director. As far as our research shows, the full Commission’s participation in personnel matters has been significant only when the Commission has lacked an Executive Director. Yet, those times were difficult for the Commission, and we believe providing Commissioners with a greater role will encourage continuity, and may assist with recruitment if necessary. Of the Standing Committees we propose, this one may be the least active, but could become critical (and busy) should the Commission find itself without an Executive Director again.

The Law and Policy Committee would have a broad portfolio that, once in place, will bring continuity and predictability to many areas of Commission concern. Its members will also serve as a bridge between the Commission and legal and enforcement staff. Under our proposal, this Committee would review existing policies and procedures, seeking input from those who are affected; develop and propose new policies and procedures as may be needed; and recommend adoption and revision of a policy and procedures manual. It would also recommend the adoption and revision of policies governing enforcement priorities, procedures, categorizing and weighing of the seriousness of various types of violations of the Act, and would thus be a key player in any enforcement review the Commission may pursue. This Committee would develop a pro-forma agenda format for adoption by the Commission and use by the Chair. It would also, if necessary, advise the Commission on legal compliance issues, and offer its recommendations to the Commission on long and short-term goals proposed by the Chair.

One area we believe should receive more consistent Commission attention is the issuance of advice letters. Accordingly, the Law and Policy Committee would review advice letters submitted by the General Counsel before they are issued to the requestor, recommend criteria to limit the scope and application of advice letters, and recommend criteria to delineate when the broadness of questions dictate that Commission Opinions be issued in lieu of advice letters.

The remaining revisions to the Statement reflect our discussion above of the appropriate role of the full Commission, the Chair, and the Executive Director. We believe our amendments address issues of redundancy we identified in the current Statement, as well as better reflect the statutory and regulatory scheme.

⁸⁶ § 83108; see supra note 80.

Conclusion

Our investigation has shown that the governance issues we identify have been persistent ones. There are few challenges the Commission faces in its governance today that are novel. Yet it remains essential for the proper body – the full Commission -- to exercise the authority vested in it by the Act and regulations, or clearly delegate that authority in a manner that comports with administrative law and open meeting requirements.

We have attempted to set forth a revised Statement of Governance Principles that addresses those challenges in a way that will provide a useful structure for years to come. We do not pretend to have the only valid view on this issue, and we welcome discussion, debate, and constructive criticism of this proposal.

Statement of Governance Principles

The following principles have been in place since adoption by the Commission on January 12, 2001, as first amended on March 22, 2018.

To ensure that the accountability and authority for governance and management of the Fair Political Practices Commission is clearly stated, the Commission adopts the following governing principles to identify the roles of the Commission, and its delegation of powers and duties to the Chair or the Executive Director.

THE COMMISSION

All authority granted by statute to the Commission is retained, except as specifically delegated herein or by regulation. The Commission's statutory duty is to ensure that the Political Reform Act is impartially and effectively administered and implemented. The Commission accomplishes that duty in the following manner:

A. The Commission proposes, adopts, codifies, and monitors policies for the FPPC. This includes:

1. Approving or revising annual policy goals and objectives recommended by the Law & Policy Committee and evaluating efforts made to meet those goals and objectives.
2. Approving or revising the annual FPPC budget recommended by the Budget Committee.
3. Interpreting the Act, through regulations, opinions and such other means as the Commission deems appropriate and lawful.
4. Enforcing the Act, by initiating or hearing administrative actions, authorizing civil actions, approving stipulations and such other means as the Commission deems appropriate and lawful.
5. Authorizing or initiating actions taken to defend the Commission's interpretations of the Act in the courts.
6. Upon recommendation of the Legislative Committee, taking positions on efforts to amend the Political Reform Act.
7. Upon the joint recommendation of the Legislative and Budget Committees, take positions on legislation fiscally impacting the operations of the FPPC.
8. Upon recommendation of the Law & Policy Committee, adopting and revising a schema for the codification of the various rules, policies and resolutions of the Commission.

9. Upon recommendation of the Law & Policy Committee, adoption and revision of a policy & procedures manual.

10. Authorizing issuance of forms and manuals used to comply with the Act.

B. The Commission ensures the proper management of the FPPC. This includes:

1. Upon recommendation of the Personnel Committee, selecting, evaluating, and, if necessary, disciplining or dismissing the Executive Director.

2. Upon recommendation of the Personnel Committee, which has considered any employee input received, adopting or revising personnel or office policies proposed to the committee by the Executive Director.

3. Upon recommendation of the Law & Policy Committee, adopting or revising a policy governing the:

a. Proposing and prioritizing the use of the various penalty options to be employed by the chief of the enforcement division.

b. Categorizing of and weighting the seriousness of the various types of violations of the Act to be enforced.

c. Enforcement priorities of, and enforcement procedures for, the effective operation of the enforcement division.

4. Delegating execution of established Commission policy and strategic objectives to the Executive Director and, upon written request of the Executive Director, may by resolution, authorize the re-delegation of specific duties to specified employees of the Fair Political Practices Commission.

5. Ensuring the integrity of the financial control and reporting system by acting on recommendations of the Budget Committee, and the FPPC's compliance with all laws governing the agency by acting on the recommendations of the Law & Policy Committee.

C. The Commission ensures the proper conduct and governance of the Agency. The Commission strives to achieve a governing style that encourages effective operations, frank and collegial discussions among members of the Commission, the staff and the public, and fairness to persons whose compliance with the Act is called into question. To this end, each commissioner shall:

1. Comply with the statutory qualification requirements and the Statement of Incompatible Activities adopted by the Commission.

2. When communicating by email, use only his or her official Commission email account for official business.

3. Thoroughly prepare for and govern through committee meetings and the regularly scheduled Commission meetings.
4. Between meetings communicate with staff through the Executive Director or executive staff, who shall report the information or advice given to his or her division chief, who shall ensure that all Commissioners receive the benefit of information and advice provided to each individual Commissioner.
5. Maintain the confidentiality of all confidential information acquired during the Commission's work.
6. Consult with General Counsel about any relationship or interest that the Commissioner may be concerned about creating a possible conflict of interest, in connection with the Commission's work.
7. Set exemplary ethical standards that reflect positively on the Commission, while refraining from engaging in biased or partisan activities that may reflect poorly on the Commission.

D. The Commission ensures enhanced oversight of Agency administration. To provide thorough oversight of the delegated duties and responsibilities, the Commission has created a system of standing committees as follows:

1. The Commission establishes the following two member standing committees:
 - a. Budget Committee
 - b. Legislative Committee
 - c. Personnel Committee
 - d. Law & Policy Committee
2. The Chair appoints the committee members from among the other Commissioners
 - a. Each committee selects its own chair
 - b. No Commissioner may hold more than one chairmanship;
 - c. Each committee meets at the call of its chair
 - d. Committee actions are by consensus recommendation to the Commission
 - e. Where consensus is not reached on an issue, each committee member may present an alternative recommendation to the Commission.

THE CHAIR

The Chair, appointed by the Governor, is a voting member of, and the presiding officer of the Commission. The Chair:

- A. Provides policy guidance to the Executive Director regarding all aspects of Commission established policy.
- B. Subject to the limitations of Commission established policy, acts on behalf of and in the name of the Commission between meetings of the Commission, including certifying actions taken by the Commission, except for actions that establish or revise policies, promulgate or amend rules or regulations, issue or revise Commission opinions, approve or revise positions on legislation, or take any personnel action or approve any personnel action recommended by the Executive Director.
- C. Pursuant to Commission established policy, exercises oversight of Commission staff in their communications with the public, the press and government institutions to ensure that the communications are forthright, accurate, and do not disparage any Commissioner or staff member.
- D. Provides oversight of the actions of the Executive Director to manage the Commission.
- E. Reports in writing each month to the Commission on actions taken on behalf of the Commission for its review and approval.
- F. After seeking input from Commissioners and staff, submits a tentative Commission agenda to the other Commissioners for their approval, prioritizing and scheduling agenda items in conformance with Commission established policy, however any item proposed for a Commission agenda by two or more Commissioners shall be placed on that agenda in the form requested.
- G. Conducts Commission meetings with reference to Robert's Rules of Order and other rules adopted by the Commission.
- H. Pursuant to Commission established policy, ensures that the information provided to the Commission is comprehensive, timely, impartial and not unduly burdensome.
- I. Proposes to the Law & Policy Committee, for recommendation to the Commission for approval, and oversees the implementation by the Executive Director, of the short term and long-term goals and priorities of the Commission.
- J. Reports to the Commission in writing on achievement of its goals and priorities.

THE EXECUTIVE DIRECTOR

The Commission delegates to the Executive Director responsibility for the operations and management of the agency, in conformance with Commission established policy. The Executive

Director is responsible for ensuring that the Commission is fully informed regarding the operations and management of the FPPC. The Executive Director:

A. Acts as the CEO of the FPPC.

1. Recommends the selection, submits annual evaluations and, when necessary, recommends the discipline or dismissal of executive staff to the Personnel Committee for review and recommendation to the Commission.
2. With the input of the division chiefs, hires, promotes and, when necessary, disciplines or dismisses other staff pursuant to Commission policies and procedures recommended by the Personnel Committee.
3. Prepares and submits to the Personnel Committee for review and recommendation to the Commission, all office policies, including:
 - a. Work hours/flexible schedules/telecommuting of staff
 - b. Handling of communications within and outside the agency, including e-mail and public records act policies
 - c. Policies affecting all employees, such as the agency dress code
 - d. Creation and maintenance of duty statements for all staff positions
 - e. Training and development of staff
 - f. Handling of special assignments and staff projects
 - g. Productivity and time-keeping systems
 - h. Evaluation policies and reports
4. Receives and coordinates requests from commissioners regarding staff work and, in consultation with the Personnel Committee and division chiefs, prioritizes such requests.

B. Acts as the chief budgetary and administrative officer of the FPPC.

1. In consultation with the executive staff, prepares and submits an initial budget proposal, and any budget change proposals, to the Budget Committee for recommendation to the Commission.
2. Submits recommendations to the Budget Committee at each stage of the budgetary process, including prior to the FPPC proposal to the Department of Finance (DOF), the DOF proposal to the Governor, and the Governor's proposed annual budget to the Legislature.

3. Reports regularly to the Budget Committee and Commission on the status of Commission finances.
4. Prepares, and after review by the Budget Committee, submits budget change proposals, requests for deficit funding and other budgetary documents.
5. Submits to the Budget Committee for review, prior to giving final approval, for all fiscal analyses prepared at the request of the Legislature, Legislative Analyst or Department of Finance.
6. Retains final approval for all budgeted expenditures.
7. Authorizes unbudgeted expenditures, when deemed appropriate in accordance with Commission approved guidelines recommended by the Budget Committee, up to \$25,000.

C. Acts in the name of the Commission with respect to the following statutory duties:

1. Reviews and approves conflict of interest codes other than the code of the Commission.
2. Reviews, approves, and signs subpoenas.
3. Executes oaths and affirmations.