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To: Chair Miadich and Commissioners Baker, Wilson, and Wood

From: Dave Bainbridge, General Counsel
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Subject: Amendments to Regulation 18360 Regarding Referrals to the Enforcement Division and Public Information and Records Requests for Pending Enforcement Matters.

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Introduction

Staff presents for Commission adoption amendments to Regulation 18360, regarding requirements for referrals to the Enforcement Division under the Act¹ and the Commission's practices when responding to public requests for records and other information concerning a pending Enforcement matter.

The proposed amendments would provide a comprehensive list of information filing officers must include when making Statement of Economic Interests (SEI) and Campaign non-filer referrals to the Commission's Enforcement Division, as well as steps filing officers should take to avoid submitting referrals missing critical information. These amendments were presented to the Commission for pre-notice discussion at the May Commission meeting. Additional amendments which were originally presented to the Commission for pre-notice discussion at the April Commission meeting would shorten the delay period between providing notice of a complaint, referral or case opened on the Commission's initiative, to the subject of the Enforcement matter and making information and records available to the public; clarify when the Commission will comment on the specifics of a pending Enforcement matter; and make other clarifying changes to make clear to the public and regulated community how the Commission responds to public requests for information and records.

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 18104 through 18998 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.

Proposed Regulatory Changes

1. Referrals

Section 81010 requires filing officers to report apparent violations of the Act to the appropriate agencies. Typically, filing officers report apparent violations of the Act by filing a referral with the Commission's Enforcement Division. Regulation 18360, subdivision (a) details the requirements for filing a complaint or referral with the Commission's Enforcement Division. Filing officers submit referrals through the Electronic Complaint System via the Commission's public website. The Enforcement Division receives approximately 100 referrals per month on average. To submit a referral, a filing officer must complete the electronic complaint form, which prompts the filing officer to provide their current contact information and current contact information for the respondent, whether they are an individual, committee, or candidate. Information regarding any attempt the referring entity made to obtain compliance, including copies of at least two written notices sent to a respondent in an effort to gain compliance prior to submitting a referral to the Enforcement Division, must also be provided. Though not currently required by regulation, the Enforcement Division also requires a copy of the most recently filed form (i.e., SEI, campaign statement), if there is one, and for SEI referrals, a copy of the respondent's agency conflict of interest code if applicable.

Enforcement intake staff has observed a pattern of referrals containing insufficient, unclear, outdated, or incorrect information which creates significant delays with processing and handling of these referrals. Some of these issues stem from a lack of clarity as to what information referring filing officers must provide and what steps they must take to avoid or cure deficient referrals. Also, the Enforcement Division notes that filing officers sometimes send Leaving Office SEI notifications to non-filers' agency email addresses after the non-filer has left the position and no longer has access to the email account. Following up on these issues and resolving them requires significant staff time and resources. Further, it means non-filers may be referred to the Enforcement Division without receiving notice of the failure to file and opportunity to file before being referred for an alleged violation of the Act.

To address the issue of ensuring contact with non-filers who have left office, staff recommends amending Regulation 18360(a)(3)(C) to require filing officers to include, as part of information regarding all attempts to obtain compliance, the email address, mailing address, and phone number at which the referred person or entity was contacted, and specifying that for those officials that have left office, that the contact attempts should be made to a personal email address, home mailing address, or personal telephone number known by the filing officer, if the filer cannot be contacted through an agency email address, telephone number, or mailing address. These changes will reduce the staff time and resources currently spent following up on referrals of non-filers who have only been notified at their agency email addresses after they have left the position and no longer have access to their agency email account, and help ensure non-filers receive notice from filing officers before they are referred to the Enforcement Division.

Next, staff recommends adding two new subparagraphs, (D) and (E), to Regulation 18360(3), in order to specify what a filing officer must include in a referral to the Enforcement Division.

Campaign Non-Filer Referrals

Proposed subparagraph (D) would specify that campaign non-filer referrals should include:

- (i) A copy of the most recently filed campaign statement, if any, including all relevant schedules.
- (ii) Committee name and identification number and, in the case of a candidate-controlled committee, the candidate's name.
- (iii) Office sought or held, if applicable.
- (iv) The name of the committee's treasurer.
- (v) Current contact information for the committee, candidate, if applicable, and the committee's treasurer.
- (vi) Required filing methods available to filer at their agency, such as paper or electronic filing.

As specified above, the Enforcement Division requires referrals to include at least two written notifications the filing officer has sent in an effort to get the respondent to comply and a copy of the most recently filed campaign statement. Explicitly requiring a referral to include a copy of the most recently filed campaign statement as proposed in clause (i) would reduce the number of referrals filed with Enforcement that lack this information and in turn allow Enforcement to process referrals more efficiently. Likewise, requiring a committee or candidate's name, committee ID number, the office sought or held, as well as current contact information for the committee, candidate, and/or the committee's treasurer—as required under proposed clauses (ii), (iii), (v)—would provide Enforcement Intake staff with basic information necessary process a referral. Proposed clause (iv), meanwhile, would require the name of the committee's treasurer, which is relevant for a referral to the Enforcement Division because it is the duty of the treasurer to ensure that the committee complies with the Act's campaign reporting requirements, and because a committee's treasurer may be held jointly and severally liable with the committee for violations committed by the committee. (See Sections 81004, 84100, 83116.5, 91006, and Regulation 18427.)

Finally, in some cases, filing officers send a non-filer a notification that is generated by an electronic filing system. When such a case is referred to the Enforcement Division, it is impossible for Enforcement to determine where the notifications were sent. Requiring campaign non-filer referrals to include information about the required filing methods available to the filer would allow Enforcement Intake staff to better determine where the referring filing officer sent the non-filer notifications.

SEI Referrals

Proposed subparagraph (E) would specify that SEI non-filer referrals should include:

- (i) A copy of the most recently filed statement of economic interests, if any.
- (ii) A copy of the agency's conflict of interest code, in the case of Section 87300 filers.
- (iii) Any personal contact information such as a personal email address, home mailing address, or personal telephone number in the possession of the filing officer if the filer has left office or is no longer employed by the agency and can no longer be contacted through an agency email address, telephone number, or mailing address. If the filing officer does not have any personal contact information for the filer, the filing officer shall make best efforts to obtain personal contact information for the filer, including requesting the information from the filer.
- (iv) Written confirmation from the filer's agency on whether the filer is still active or employed. If the filer is out on leave, also provide that information along with expected return date if any.

Again, as specified above, the Enforcement Division requires referrals include a copy of the most recently filed SEI and, for 87300 filers, a copy of their agency's conflict of interest code. Explicitly requiring a referral to include a copy of the most recently filed SEI and the filer's agency's conflict of interest as proposed in clauses (i) and (ii) would increase efficiency for processing and resolving referrals. The requirements in proposed clauses (iii) and (iv), meanwhile, would address the most pressing issue Enforcement encounters with referrals: contacting filers who have since left office or are no longer employed by the agency, but who no longer have access to their agency email account and whose contact information has not been updated.

Finally, staff proposes adding subsection (a)(4) to Regulation 18360, which would provide that if a filing officer receives a filing from a referred candidate, committee, or statement of economic interests filer, the filing officer shall notify the Enforcement Division within seven days of receipt of the filing. This change would save the Enforcement Division staff time and resources currently spent on following up with filers who file shortly after they have been referred.

In May, staff also presented for prenotice discussion proposed amendments to Regulation 18115, regarding the duties of filing officers concerning Statements of Economic Interests. However, discussion at the May Commission meeting made clear that the Enforcement Division's biggest problem with respect to referrals was reaching filers who had left office and no longer had access to their agency email accounts. In addition, the Commission heard public comment from a Los Angeles County about concerns that a new duty to include referred filers' personal contact information could impede local filing officers' ability to make referrals. In light of these concerns, Legal Division and Enforcement Division staff determined the proposed amendments to Regulation 18115 were unnecessary so long as adequate contact information could be obtained as a result of the referral requirements contained in the proposed amendments to 18360. That being the case, staff is not recommending any amendments to Regulation 18115.

2. Public Requests for Information about Enforcement Matters

Regulation 18360, subdivision (d) details how the Commission responds to public requests for information and records regarding a pending Enforcement Division matter. Generally, subdivision (d) identifies the information and records the Commission can provide to the public and the circumstances in which it may be provided. In accordance with due process principles and the California Public Records Act, the Commission may consider amendments to increase transparency and specify the Commission's practices when responding to public requests for information and records concerning a pending Enforcement Division matter.

In general, Regulation 18360(d) balances the need for transparency with the need to protect the integrity of a case, including individuals' due process rights. The amendments proposed today are aimed at further specifying the Commission's approach to respecting that balance. The proposed amendments would:

- Shorten the timeframe between providing notice to the subject of a pending Enforcement matter and making certain information and records available to the public;
- Specify that, aside from the information and documents expressly permitted for release, the Commission will not comment on specific facts or legal issues relating to a pending Enforcement matter; and
- Re-organize the regulation to clarify its provisions, including the records and information potentially available to the public and the circumstances in which they are made available.

Shortened Period Between Providing Notice and Releasing Information to the Public

The Commission's website contains a "Media FAQs" page that explains:

The FPPC is protecting the due process rights of those complained against. It is only fair for those involved to have a chance to see the complaint firsthand before hearing about it in the media. Others may release complaints or information to the media and it's their right to do so. But as an enforcement agency, our regulation and policy is to ensure due process, maintain fairness and allow for the investigatory process to be thorough and unbiased.

("Media FAQs," available at <https://www.fppc.ca.gov/media/media-faq.html>.)

This same reasoning applies to the release of other information and records specified in Regulation 18360, including the confirmation of the existence of a complaint, a copy of a referral, a document accompanying a complaint or referral, or a document reviewed by the Enforcement Division in making a determination to open a case.

With the above concerns in mind, Regulation 18360 currently includes a five-day delay before the Commission may provide any of the above information or records. Staff now proposes shortening that delay period to two days where notice has been provided via email. Per the Commission's request during pre-notice discussion at the April 2022 Commission meeting,

Regulation 18360 would maintain a five-day delay where notice has been provided only via physical mail. In the context of notice given via physical mail, a five-day delay serves a more useful purpose, as it provides a “buffer” period between the day notice is physically mailed to the subject of an Enforcement matter and the day it is received by the subject. Today, however, most complaints, and other types of notice, are provided to the subjects via email, rather than physical mail, making a five-day timeframe unnecessary in that context.²

A two-day delay between notification via email and release of information and records to the public would maintain fairness to the subject of the Enforcement matter while also allowing us to respond to the public more immediately and transparently. A shortened delay period would also help protect the Commission’s credibility by preventing scenarios where certain information or materials have already been made public (by the complainant, for instance), but the Commission is unable to provide any time of confirmation for another five days.

No Commentary on Pending Enforcement Matters

Currently, Regulation 18360 states the circumstances in which information and records relating to pending Enforcement matters will be released to the public, but it does not specify that the Commission will not provide additional comments relating to those matters. As our website explains:

We try to answer as many questions as thoroughly as possible, but in many cases we are unable to comment on specific situations. The reason for this is fairness. First, absent a full investigation, we do not know all the facts and most situations are very fact specific. Second, we want to avoid any public comment that would impede an ongoing investigation. And lastly, until there is a final resolution of a case, we do not want to accuse or exonerate someone based on based on an *alleged* violation of the Act. That’s one reason why “fair” is part of our name. We will conclude whether or not a violation has occurred only after a thorough investigation and a determination by the Commission. With these principles in mind, we often provide answers in general terms.

We also try to provide guidance and point to sections of the law and regulations that are relevant to your questions.

(“Media FAQs,” available at <https://www.fppc.ca.gov/media/media-faq.html>.)

Consistent with the above reasoning, staff proposes amending Regulation 18360 to codify its current practices of: (1) providing available public records, information regarding the current stage or recent results of an Enforcement matter (e.g., whether a probable cause hearing has been conducted and probable cause found), as well as general information relating to specific provisions of the Act or Section 1090 (e.g., what a “conflict of interest” means under the Act); and (2) refraining from providing additional commentary regarding a pending Enforcement matter.

² Of the 29 complaints processed and opened into cases between January 1 and March 25 of this year, 28 of 29 potential respondents received notice either solely by email or a combination of email and physical mail.

Re-Organization of the Regulation

Finally, staff proposes amending Regulation 18360 to re-organize subdivision (d) into five sections to more clearly list the circumstances in which the Commission may respond to requests for information and records pertaining to ongoing Enforcement matters. The first section would list actions the Commission may take in responding to public requests for information and records relating to pending Enforcement matters. The second section would clarify that the Commission generally may not comment on the Enforcement Division's intended actions until after notice of the intended action has been sent to the complainant. The third section would make express that the Commission may disclose the scheduling or result of any step in an administrative action. The fourth section would make express that the Commission will not provide commentary regarding ongoing Enforcement matters. The final section would remain unchanged, apart from re-numbering and correcting a typographical error, and explain that, consistent with CPRA's balancing test, the Commission may withhold certain documents or information if the Enforcement Division Chief determines that disclosing the information would jeopardize the matter, or the information is privileged, private, or confidential.

Education and Outreach

Staff will undertake efforts at education and outreach to ensure the public is aware of this change upon the adoption of this regulation. This will include providing a copy of the regulation to all people who have signed up for the Commission's Newly Adopted, Amended or Repealed Regulations mailing list, posting the amended regulation on the FPPC's webpage for new and amended regulations, and providing targeted outreach via email to filing officers and members of the press.

Summary

The proposed amendments to Regulation 18360 would help streamline the Enforcement Division's intake and processing of the many referrals it receives every month by specifying what information referring filing officers must provide and what remedial steps they must take to cure deficient referrals. The proposed amendments would also provide express Commission procedures and increase transparency with respect to requests for information and records concerning a pending Enforcement Division matter, most notably by providing quicker access to such information and records where electronic notice has been provided to the subject of the Enforcement matter.

Attachments

Proposed Amendments to Regulation 18360