



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 7, 2017

Linda Filchev
Staff Attorney
Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94706

Re: Your Request for Informal Assistance
Our File No. I-17-169

Dear Ms. Filchev:

This letter responds to your request for advice regarding the procedure for conflict of interest code adoptions or amendments under the Political Reform Act (the "Act").¹ Please note that we can only provide advice under the Political Reform Act, and nothing in this letter should be construed as advice regarding the agency's obligations under other laws including the Administrative Procedure Act (the "APA"). In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)²

QUESTIONS

1. In adopting or amending a conflict of interest code, must the California Public Utilities Commission ("CPUC") comply with requirements for agencies subject to the APA enumerated in Regulation 18750(a)(3)(B)?

2. Does the filing of notice, by the Commission with the Office of Administrative Law, ("OAL") of the proposed approval of CPUC's conflict of interest code trigger any duties on behalf of the CPUC regarding the OAL?

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 Because your request is general in nature, we treat your request as one for informal assistance. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

1. Section 87311 provides that the preparation of proposed conflict of interest codes by state agencies shall be subject to the APA. Regulation 18750(a)(3)(B) clarifies basic notice requirements for any agency subject to the APA. Regulation 18750(a)(3)(B) does not impose APA notice requirements on any agency not subject to the APA's notice requirements. To the extent that the CPUC is exempt from the APA's notice requirements, the requirements enumerated in Regulation 18750(a)(3)(B)(i)-(v) do not apply to the CPUC. However, the Commission is not authorized to provide advice regarding the APA, so it is ultimately the CPUC's responsibility to determine the extent that it is exempt from the APA and must comply with any provisions of the APA otherwise applicable to the CPUC. If you need additional assistance regarding the provisions of the APA, you may wish to seek assistance from the Attorney General's Office.

2. Notwithstanding any exemption the CPUC may have from the provisions of the APA, an action by the Commission with regard to review of the CPUC's conflict of interest code remains subject to the APA. Accordingly, the Commission is required to provide notice through the OAL of its proposed approval of the CPUC's conflict of interest code under Section 87311. The Commission's notice to the OAL does not trigger any duties under the Act for the CPUC to assist the Commission in noticing the proposed conflict of interest code through the OAL.

FACTS

You are an attorney with the Legal Division of the CPUC and are seeking assistance regarding the conflict of interest code adoption and amendment process as applicable to the CPUC. While you are aware that Section 87311 states that the preparation of proposed conflict of interest codes by state agencies shall be subject to the APA, you note that Section 11351(a) exempts CPUC from the following provisions of the APA:

- Article 5: Public Participation Procedure – Procedure for Adoption of Regulations commencing with Section 11346.
- Article 6: Review of Proposed Regulations (by the OAL) commencing with Section 11349.
- Article 7: Review of Existing Regulations (by the OAL) commencing with Section 11349.7.
- Article 8: Judicial Review commencing with Section 11350.

ANALYSIS

Section 87311 of the Act provides:

“The review of proposed Conflict of Interest Codes by the Commission and by the Attorney General and the preparation of proposed Conflict of Interest Codes by state agencies shall be subject to the Administrative Procedures Act.”

Clarifying the Commission's interpretation of Section 87311, Regulation 18750(a)(3)(B) further provides: “For any state agency subject to the Administrative Procedure Act, the notice must also comply with the Administrative Procedure Act as required by Section 87311.” The Regulation

then goes on to list basic APA requirements applicable to state agencies that are subject to the APA. In limiting the application of this portion of the regulation to those agencies that are subject to the APA, the Commission has recognized that a state agency not subject to the APA is not required to comply with APA notice requirements. Accordingly, as interpreted by the Commission, Section 87311 does not require an agency not subject to the APA to comply with APA notice requirements.

We also note that the conclusion that a state agency is not required to notice the adoption or amendment of a conflict of interest code pursuant to APA notice rules if the agency is not subject to the APA, is consistent with the Commission's past practices as stated in former Regulation 18750.2. Current Regulation 18750 was adopted to consolidate the procedures for adopting and amending a conflict of interest code found in former Regulations 18750 through 18750.2 and 18752. Under former Regulation 18750.2, state agencies "exempt" from the APA were not required to notice the promulgation or adoption of a conflict of interest code. An agency was "exempt" if the agency was exempt from notice requirements in APA Section 11346.4(a)(5).

Notwithstanding any exemption the CPUC may have from the provisions of the APA, any Commission action with respect to the review of the CPUC's conflict of interest code remains subject to the APA under Section 87311. Accordingly, the Commission is required to notice its adoption of CPUC's proposed conflict of interest code through the OAL prior to approval. While the Commission must comply with the APA before approving a conflict of interest code, this requirement does not trigger any duties under the Act for the CPUC to assist the Commission in noticing the proposed conflict of interest code through the OAL.

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

Sincerely,

Jack C. Woodside
General Counsel



By: Brian G. Lau
Assistant General Counsel

BGL:jgl