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**To:** Commissioner Cardenas

**From:** Dave Bainbridge, General Counsel  
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**Subject:** Commissioner Manual Revision

**Date:** November 13, 2019

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## I. INTRODUCTION

The Commission has asked Legal Division staff to review Chapters 3 and 4 of the agency's existing internal "Commissioner Manual" (the Manual) to identify areas that may require modification. This includes, but is not limited to, clarifying and formalizing the summary of the policies, rules, regulations and laws that establish the scope of each Commissioner's powers and duties, and identifying potential internal policies that may impose limits not required under prevailing legal authority.

Chapter 3 of the Manual is entitled "Commissioner Responsibilities, Ethical Duties and Restrictions," and Chapter 4 is entitled "Statement of Incompatible Activities for Commissioners." Staff has reviewed and researched each section of Chapters 3 and 4 in order to present information and "decision points" regarding the various policies. Chapter 4 was adopted as Commission policy in 2013, Chapter 3 does not appear to have been adopted by the Commission even though it purports to govern the conduct of the Commissioners. Staff recommends that the contents of Chapters 3 and 4 be revised and formally adopted by a vote of the Commission as stand-alone policies.

## II. DISCUSSION

### A. Chapter 3: Commissioner Responsibilities, Ethical Duties and Restrictions.

#### 1. **Holding Office, Participating in Elections and Lobbying.**

The Commissioner Manual includes the statutory language of Government Code Section 83105, which provides, "[n]o member of the Commission, during his or her tenure, shall hold, any other public office, serve as an officer of any political party or partisan organization, participate in or contribute to an election campaign, or employ or be employed as a lobbyist nor, during his or her term of appointment, seek election to any other public office." Recently, the Commission requested an opinion from the Attorney General's Office regarding the constitutionality of Section 83105. That opinion is still pending. In the meantime, three approaches could be taken with regard to the Commission Manual's interpretation of that statute:

- (1) the Manual language could be left as-is, with no changes made to the Manual’s interpretation of Section 83105’s requirements.
- (2) the interpretive language could be revised with a flagging note to the effect of, “although an AG opinion on the constitutionality of Section 83105 is currently pending, the statute could reasonably be interpreted to prohibit conduct such as . . . . In order to prevent any potential violation of Section 83105 and until an AG Opinion is released with analysis to the contrary, commissioners are highly encouraged to refrain from any and all participation or contribution to campaigns for elections held in California, including campaigns the FPPC does not oversee.”
- (3) the interpretive language could be removed, so that only the statutory language of Section 83105 is included. Commissioners could be encouraged to inquire with the Legal Division on issues of interpretation and could also be referred to Chapter 4 for additional adopted policies regarding political activities. This is the option staff recommends.

## 2. Limitations on Honoraria.

The Commissioner Manual accurately states that “Commissioners may not accept honoraria or fees for speeches, published articles, public appearances, interviews, or similar services unless the payment is earned income for personal services provided in connection with the practice of a bona fide business outside the Commission. (Sections 89501 and 89502.) Payments for actual necessary expenses incurred are permitted.” The Manual then suggests, “[y]ou should always check with the Chair and Executive Director prior to accepting any payments from outside groups for Commission-related expenses, including travel.”

Presumably, checking with the Chair and Executive Director is intended to ensure that acceptance of such payments is permissible. In some cases, it may be appropriate to consult with the Chair or Executive Director when there is concern over whether expenses are Commission-related. In other cases, an honoraria-related question may require legal research and analysis, and therefore it may be more appropriate to consult with the General Counsel. Accordingly, staff proposes adding the General Counsel to the list of people commissioners may seek guidance from when legal questions arise.

*Decision Point:* “Commissioners [**should** or **must**] always check with [**the Chair** and/or **Executive Director** and/or **General Counsel**] prior to accepting any payments from outside groups for Commission-related expenses, including travel.”

## 3. Conflicts of Interest.

Currently, with regard to potential conflicts of interest, the Commissioner Manual reads: “Like all other elected or appointed officials in California, FPPC Commissioners are prohibited from making or participating in a decision that may have a reasonably foreseeable material financial effect on any individual or entity that constitutes an economic interest of or to the Commissioner.” Although the Manual also notes the availability of the FPPC’s publication “Recognizing Conflicts of Interest,” which provides more thorough advice on conflicts, staff recommends expanding the “Conflicts of Interest” section of the Manual. Staff proposes the implementation of the following language:

*Section 87100 of the Act provides that “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” Section 87103 further specifies that “[a] public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain economic interests, including:*

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.*
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.*
- (c) Any source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.*
- (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.*
- (e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating [five hundred dollars (\$500)] or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. . . .*

*On the Commission’s website is a publication titled “Recognizing Conflicts of Interest,” which provides additional information regarding the Act’s conflict of interest requirements. If you have a question regarding a potential conflict of interest, you should consult with the General Counsel. If you determine a conflict of interest exists, or you otherwise decide not to participate in an agenda item, you should inform the Chair and Executive Director prior to the meeting.*

In addition to the expanded language regarding the Act’s specific conflicts provisions, the proposed language would also alter the current language to suggest that Commissioners concerned about a potential conflict discuss their concerns with the General Counsel given the General Counsel’s expertise on conflicts under the Act and inform the Chair and Executive Director of a decision not to participate in an agenda item.

#### **4. Ethics Training.**

The Commission Manual currently reads: “Within six months of assuming office, and once every subsequent two years, Commissioners (and other state officials) must complete an ethics training course. You can take an interactive Internet course located at <https://oag.ca.gov/ethics/course>. Please keep a written record of the date of your compliance.” This language is generally sufficient, but could be more precise. With regard to recordkeeping, Government Code section 11146.2 requires, “[e]ach state agency shall maintain records indicating the specific attendees, each attendee’s job title, and dates of their attendance for each [ethics] course . . . for a period of not less than five years after each course is given.” Thus, the onus isn’t necessarily on individual officials/employees to “keep a written record,” but the

agency itself. It may be more helpful to revise the current language to read: “After completing the training course, a Commissioner should send a copy of his or her training certificate to [specific person/position title].”

## 5. Ex Parte Communications in the Regulatory/Rulemaking Context.

Currently, the Commissioner Manual provides somewhat conflicting advice regarding ex parte communications in the regulatory/rulemaking context. The Manual states that “there is no APA rule stating that the discussion of a pending regulation with persons off the record is prohibited,” but provides several citations to support the position that “any comments, suggestions or discussions that occur outside the public meeting should be disclosed during the meeting for the public to understand the conclusions reached.” Upon further review, the sources cited only tenuously support that position. However, several public policy reasons *do* support such an approach for ex parte communications in the rulemaking context, and the Commission should consider its various options.

“Although not required by the APA, some agencies advise that ex parte contexts made during a rulemaking proceeding should be fully disclosed on the record and not allowed after the close of the record.” (California Research Bureau and Simmons, Charlene Wear, “Ex Parte Communications: The Law and Practices at Six California Boards and Commissions” (2008). *California Agencies*. Paper 290, p. 5 [“Ex Parte Communications”].) Potential options for a policy governing ex parte communications on quasi-legislative matters include:

- *No Disclosure Requirements:* At the State Water Resources Control Board, the Board follows the guideline that “[i]f a rulemaking or other proceeding is pending or impending before a water board, a board member may, if he she chooses to do so, have ex parte communications regarding issues in that rulemaking.” (*Id.* at p. 13.) Disclosure of ex parte communications during rulemaking procedures is recommended by the Board’s Chief Counsel, however. (*Id.* at p. 14.) Similarly, under the Public Utilities Code, in quasi-legislative proceedings conducted by the Public Utilities Commission, ex parte communications are “allowed without restriction or reporting requirement.” (P.U.C. § 1701.4(b).)
- *Mandatory Disclosure at Board Meetings:* At the California Air Resources Board, Board Members “are not only permitted, they’re actually encouraged to communicate with people about rulemakings outside of Board proceedings. But when [they] do have such contacts, [they] have to disclose the names of the people that [they] had contact with and the general content of those communications for the record.” (*Id.* at p. 7.)
- *Mandatory Disclosure in a Public Log System:* According to the Chief Counsel of the California Integrated Waste Management Board (“CIWMB”), “the Board receives hundreds of written and oral ex parte communications every month. The CIWMB’s policy is to log all communications on items that may someday come to a roll call vote, even a year or two later. They are entered into a detailed database and are maintained as public records. Since they are usually logged prior to committee or Board meetings, their disclosure is not evident in the minutes of CIWMB meetings. Only those ex parte communications that occur at the last minute before a board meeting are disclosed at the Board meetings and thus are evident in the meeting minutes. (*Id.* at pp. 11-12.) A similar system is followed by the California Coastal Commission, which requires

that commissioners submit a standard disclosure form for each ex parte communication, which is then received by the executive director, who makes the report a part of the public record. A 2017 Assembly bill (A.B. 694) would have required that the California Coastal Commission develop and implement a similar searchable ex parte communication database, but

The FPPC could adopt similar policies regarding ex parte communications in the regulatory/rulemaking context. Below, we have included sample language for some of these examples:

Example 1: *In any quasi-legislative proceeding, ex parte communications are allowed without restriction or reporting requirement. (Modeled after P.U.C. § 1701.4(b).)*

Example 2: *No commission member, nor any interested person, shall conduct an ex parte communication unless the commission member fully discloses and makes public the ex parte communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the commission on the record of the proceeding at that hearing. (Modeled after Cal. Pub. Res. Code § 30324(a); as noted above, the California Coastal Commission is also required to submit a standard disclosure form for reporting ex parte communications, an example of which can be seen by [clicking here](#). Similarly, members of the California Coastal Commission have been provided with a helpful “[Ex Parte Communication Disclosure Checklist](#).”)*

Example 3: *No commission member, nor any interested person, shall conduct an ex parte communication during the six (6) months preceding a related quasi-legislative decision unless the commission member fully discloses and makes public the ex parte communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the commission on the record of the proceeding at that hearing. (Based on Cal. Pub. Res. Code § 30324(a), like Example 2, but with additional language specifying the time period in which ex parte communications must be disclosed.)*

If the Commission is inclined to require disclosure of ex parte communications, it should consider what topics or issues would trigger the reporting requirements. For example, for maximum disclosure, the Commission could adopt a policy requiring disclosure of any communication concerning a topic within the jurisdiction of the Commission. Alternatively, the Commission could adopt a policy that would require disclosure of communications regarding any matter currently on the FPPC’s agenda and/or regulation calendar. Or, the Commission could require the disclosure of ex parte communications received within a certain amount of time prior to a decision, or when it is reasonably foreseeable that the matter discussed will be taken up by the Commission in the future.

## 6. Additional Rules

**The following is a list of additional rules the Commission may wish to consider implementing:**

- A prohibition on the use of electronic communications by Commissioners during Commission meetings.

- Requiring Commissioners to only use only their FPPC email addresses for FPPC-related emails (currently in the Governance Principles)
- Adopting a Code of Conduct for the Commission that goes beyond Regulation 18308.1’s requirement to “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.” For instance, the Connecticut Office of State Ethics has a similar policy, but also has policies that board members shall “be unswayed by partisan interests, public clamor or fear of criticism;” “be patient, dignified and courteous to all persons who appear in board or OSE proceedings and with other persons with whom the members and employees deal in their official capacities;” and “refrain from making a statement outside of a board or OSE proceeding, which would have a likelihood of prejudicing a board or OSE proceeding.”
- Rules and guidance regarding conduct on social media.

## **B. Chapter 4: Statement of Incompatible Activities for Commissioners.**

### **1. Chapter 4 is an Adopted Commission Policy.**

Chapter 4 of the existing Manual was formally adopted as policy by the Commission on March 21, 2013, which summarized the policy as follows:

This policy statement expresses the intent of the members of the Fair Political Practices Commission to refrain from engaging in any employment, activity, or enterprise which is inconsistent, incompatible, or in conflict with duties as a commissioner of the Fair Political Practices Commission or which could imply individual or Commission partisanship.

There are three general issues to consider. *First*, formal policymaking procedures would be required to modify this section. *Second*, Chapter 4 is a stand-alone policy that was apparently added to the Manual. This is confusing. The Commission should consider either adopting the Manual as formal policy in its entirety or conspicuously identifying the parts of the Manual that are formal policy by, for instance, placing all formal policies together in a single chapter, or removing formal policies from the Manual. *Third*, as discussed below, several parts of Chapter 4 require clarification and may require modification of language to be restated, reorganized, removed or added.

Staff recommends removing policies governing the conduct of the Commission from the body of the Manual and adopting them as a stand-alone memo(s) approved by a vote of the Commission. The policy could then be included as an attachment to the Manual.

### **2. Definitions.**

Definitions are set forth in Chapter 4 because it is a stand-alone policy. There are two primary issues to consider with these definitions. *First*, the terms defined here are stated in previous chapters in the Manual. If the Manual is intended to be a comprehensive reference rather than a collection of separate stand-alone chapters, then these definitions should be set forth at the beginning of the Manual,

along with the definitions of other terms stated throughout the Manual. *Second*, the existing definitions require legal citations and thus should be modified as follows:

- “Commission” means the Fair Political Practices Commission. (Section 82012.)
- “Commissioner” means the full-time chairman and the four part-time Commission members. (Section 83100.)
- “Person” means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation association, committee, or any other organization or group of persons acting in concert. (Section 82047.)
- “Campaign services” means services provided in connection with a campaign, including, but not limited to, preparing campaign statements, management and policy development activities, solicitation of funds (including ticket selling), endorsements (e.g., participating in newspaper or other published advertisements), and nonmanagerial activities (e.g., manual, clerical, and secretarial services, precinct walking or phoning, and displaying bumper stickers, buttons or lawn signs). It does not include rendering advice regarding compliance with the Political Reform Act. (See Section 82015.)

### **3. Gifts.**

The existing Manual states the Commission policy regarding gifts is to comply with Section 83117.5. There are three issues to consider: *First*, whether adopting statutory law as policy is necessary since it applies to the Commission regardless of its policy.

*Second*, whether statutory law that applies to Commissioners should be set forth verbatim in the Manual, summarized in the Manual, or merely cited as a requirement and attached as an addendum to the Manual. Providing the law or a summary of law in the body of the Manual is easier to reference. However, this would require modification of the Manual whenever a law or regulation changes. This may be impractical, particularly if the Manual or parts of it are adopted as formal policy and formal procedures are required to modify it. For example, the existing policy on gifts refers to Regulation 18726, which was repealed after the policy was adopted and is thus outdated. To avoid this problem, the Commission could adopt, for instance, a general statement that the Commission is subject to all state laws and regulations regarding gifts, cite the applicable laws and attach them as addendums to the Manual. To eliminate the need to formally modify a policy, staff could be authorized and directed to perform the ministerial function of updating the prevailing legal authority attached to the Manual.

*Third*, legal citations are required for the provisions in this section and should be provided to support any statement of law or regulation set forth in the Manual.

### **4. Misuse of Position.**

In this section of Chapter 4, the Commission adopted Section 19990, which applies to state officers and employees. There are three matters to consider: *First*, as appointed State officials who take an oath of office, Commissioners are likely state officers subject to the requirements of this statute.

*Second*, even if the statute does not apply, the Commission has adopted Section 19990 as policy. *Third*, as a general matter, whether the Commission should impose requirements on itself that are not required by law but nevertheless demonstrate a commitment as an ethics agency to adhere to higher standards of ethics than are required of persons subject to the PRA and FPPC Regulations.

Staff recommends stating that Commissioners comply with Section 19990 and including a copy of the statute.

## 5. Political Activities.

In this section, the policy confirms that the Commission must comply with Section 83105. This statute is addressed in the discussion of Chapter 3 above. Some issues to consider that were discussed in the above sections apply here, but there are three additional matters to consider: *First*, the overlap of issues in the Manual’s chapters should be resolved to avoid duplication and confusion. *Second*, the Commission should scrutinize and consider clarifying and modifying any part of its policy that states what Commissioners “should” or “should not” do, such as the language in Chapter 4, Parts V.A.4-5 and V.C. These provisions may either be restated to set forth bright-line requirements, moved to a separate “best practices” section of the Manual, or removed altogether. *Third*, legal citations should be added to support all statements of law in this section.

Additionally, in some cases, the restrictions on political activities found in Section V of Chapter 4 do not clearly stem from Section 83105. Below, we have categorized the Manual’s incompatible activities related to political activities into three categories: (1) clearly required under Section 83105; (2) potentially required under Section 83105; and (3) not required under Section 83105. The Commission should consider whether it would like to adopt “incompatible activity” policies that impose more restrictions than Section 83105.

### Clearly Required Under Section 83105:

- Contributions to any election campaign for any primary, general, special or recall *state* election held in this state;
- “Commissioners should not provide campaign services to any . . . *state or local* election campaign in California, whether those services are compensated or volunteered.”

### Potentially Required Under Section 83105:

- Contributions to any election campaign for any primary, general, special or recall *federal* election held in this state;
- “Commissioners should not provide campaign services to any *federal* . . . election campaign in California, whether those services are compensated or volunteered;”
- “Commissioners should not serve on a state or county central committee or assembly district committee, serve as a delegate to a party convention, or serve as an officer, delegate, or in any other representative capacity in a political party club.” (Note that Section 83105 only prohibits “serv[ing] as an officer of any political party or partisan organization” and “participat[ing] in or contribut[ing] to an election campaign . . . .”)



Not Required Under Section 83105:

- “Commissioners should not attend campaign fundraisers for any state or local election.” (Note that the Manual *does* allow attendance at fundraisers for federal elections held in California, so long as they provide no contributions or campaign services for the election campaign.)
- “Commissioners should not engage in any political activities in Commission offices or while representing the Commission.”
- “[A] commissioner should not in any way influence his or her spouse to perform political activities which would be inappropriate for the commissioner to perform, nor should a commissioner participate with his or her spouse in the performance of those activities.”
- “It is the policy of the Commission that each commissioner should take reasonable precautions to assure that the Commission is not identified with his or her political activities.”
- “Each commissioner should disqualify himself or herself from participating in any Commission matter which would directly or significantly affect a campaign to which he or she has contributed or volunteered services.”

### III. GENERAL CONSIDERATIONS

As previously noted by the Commission, the style and format of the Commissioner Manual can reasonably be characterized as unclear due to a lack of distinction between legal requirements, legal interpretation, and “best practices.” In addition to the Commission’s consideration of substantive changes to its own internal policies, staff also proposes consideration of extensive revisions for style, such that a commissioner reading the material for the first time would be able to easily discern what is required by law, what is required by adopted policy, and what is recommended as “best practices.”

- General issues:
  - Purpose of the Manual: internal reference for Commissioners or comprehensive summary of policies and legal requirements
  - Formal or informal?
  - All or portion of Manual adopted as policy or regulation?
  - Manual published on Commission website?
- Distinction between, or separate sections or chapters in the Manual for:
  - Legal requirements
  - Legal interpretations
  - Policies
  - Recommended or best practices
- Summary statement of higher ethical standards expected of Commissioners
- Consistency of style:
  - Inconsistently provides examples or scenarios in some topics and not in others
  - Provide more examples for all topics where needed or remove all examples
  - Provide more comprehensive examples
- Decide how applicable policies, rules, regulations or laws are stated:
  - Verbatim
  - Summarized

- Cited and attached for reference
- Organization, no overlap of issues in different chapters
- Legal citations for all legal and regulatory requirements
- Attach laws and regulations as addendums
- Use of cell phones and electronic communications during meetings
- For large bodies of law, add reference to outside sources in lieu of summary in the Manual:
  - Bagley-Keene Act
    - AG 120-page summary <https://oag.ca.gov/conflict-interest>
    - Department of Consumer Affairs 59-page summary [https://www.dca.ca.gov/publications/bagleykeene\\_meetingact.pdf](https://www.dca.ca.gov/publications/bagleykeene_meetingact.pdf)
    - CDFA 61-page summary [https://www.cdfa.ca.gov/Fairs\\_&\\_Expositions/Documents/CEO/CDFABagley-KeeneGuide.pdf](https://www.cdfa.ca.gov/Fairs_&_Expositions/Documents/CEO/CDFABagley-KeeneGuide.pdf)
  - Conflicts of interest – AG 40-page summary [https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/bagleykeene2004\\_ada.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/bagleykeene2004_ada.pdf)
- Manuals of other state agencies that may be helpful:
  - California Coastal Commission: <https://www.coastal.ca.gov/meetings/rules-procedures/>
  - California Law Revision Handbook: <http://clrc.ca.gov/pub/Misc-Report/CLRC-Handbook-2019.pdf>
  - California Commission on Uniform State Laws: <https://ccusl.ca.gov/procedures>
  - California Public Utilities Commission: <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M209/K618/209618807.PDF>