



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel
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Subject: Proposed Repeal and Adoption of Regulation 18329, Formal Written Advice and Informal Assistance

Date: May 16, 2019

Requested Action: Prenotice Discussion

Staff submits proposed Regulation 18329 for prenotice discussion.¹ The Law & Policy Committee heard this regulation at its meeting on April 23, 2019, and recommended its approval. The proposed language is intended to facilitate discussion at the Commission's May meeting, and to allow the Commission to provide guidance and instruction to staff prior to presenting the proposed regulation for approval at a subsequent Commission meeting.

Summary of Proposal

Proposed Regulation 18329's language reflects current practices and Commission structure, eliminates outdated provisions, consolidates provisions for clarity, delineates established practices for a requestor's withdrawal of a request, request for reconsideration, or appeal of formal written advice, and clarifies terms. The language proposes a process for advice requests that present a policy issue best made through a Commission Opinion, regulatory action or legislation. Additionally, the language details the Commission's oversight role in the advice process.

Background

To promote compliance, Section 83114(b) charges the Commission with the duty to provide formal written advice upon request, in a timely manner, to any person with duties under the Political Reform Act ("Act").² The written advice request provides the requestor with certain

¹ The proposed regulation is submitted pursuant to the Law and Policy Committee's authority to recommend, in consultation with the General Counsel, the Commission's adoption or revision of a regulation governing the review process for advice requests to be followed by the Legal Division. (Regulation 18308.1(d)(6)(F).)

² The Political Reform Act is contained in Government Code sections 81000 through 91014. All further statutory references are to the Government Code. The regulations of the Fair Political Practices Commission are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations.

immunities regarding future action.³ Where the requestor acts in reliance on the advice provided, or acts in the absence of timely Commission advice, it is (1) a complete defense to an enforcement proceeding by the Commission, and (2) evidence of good faith conduct in any other civil or criminal proceeding.⁴

Regulation 18329, originally adopted in 1976, sets forth the procedures and requirements related to requesting and providing advice. The regulation was substantially amended in 1985 to recognize the Commission's increased volume and complexity of advice requests, and established practices, such as providing informal assistance orally and in writing.⁵

Recently, the Commission requested staff revise the regulation to reflect current Commission practices, provide clarity; and better identify when a request presents a matter of policy interpretation best addressed through a Commission Opinion or adoption of a regulation,⁶ or an overly-broad or hypothetical question,⁷ and propose a process for response in these instances, as provided in Regulation 18308.1(d)(6)(F).

³ Advice is provided to assist in compliance. Accordingly, advice is provided only in instances when future actions are in question.

⁴ Section 83114(b) states:

(b) Any person may request the Commission to provide written advice with respect to the person's duties under this title. Such advice shall be provided within 21 working days of the request, provided that the time may be extended for good cause. It shall be a complete defense in any enforcement proceeding initiated by the Commission, and evidence of good faith conduct in any other civil or criminal proceeding, if the requester, at least 21 working days prior to the alleged violation, requested written advice from the Commission in good faith, disclosed truthfully all the material facts, and committed the acts complained of either in reliance on the advice or because of the failure of the Commission to provide advice within 21 days of the request or such later extended time.

⁵ In 1982, the Commission received 96 requests for formal advice and 582 requests for informal assistance. In 1985, the Commission received 327 requests for formal advice and 1200 requests for informal assistance. In 2018, the Commission received and responded to 273 request for formal advice, and 23,441 requests for informal assistance.

⁶ These types of questions regard an unsettled area of law or language open to more than one reasonable interpretation.

⁷ These types of questions lack a specific issue and accompanying facts necessary to evaluate the required elements of compliance under the Act. Examples: "What are my rights and duties under the Act once I retire from state service?" or "I am a real estate agent running for city council. What conflicts of interest might I have?" The Commission created fact sheets suitable for general questions.

Current Regulation

Regulation 18329 establishes a procedure for formal written advice requests and requests for informational assistance. Subdivision (a) states that the Commission is to assist persons in complying with the Act in a timely manner. Subdivision (b), regarding formal written advice procedures, is summarized as follows, with notes regarding evolutions in practices:

- **Requirements.** A request for formal written advice must be in writing, name the person whose duties under the Act are in question, provide authorization for requests made by a representative, and state all facts material to the question. The 21-day time period for providing a response commences once these elements are provided.
- **The Commission's duties upon receipt.** The requestor must be promptly notified if the above requirements are lacking and given a copy of the regulation. When the requirements are met, a written acknowledgement is sent, both to the subject of the request and the authorized representative, and may be sent to an agency representative as well. The acknowledgement is to include the assigned staff person's name and phone number, and the date the 21-day period expires. *(It is no longer customary to provide copies of the regulation. Written acknowledgement is sent upon the request's receipt with a statement that the 21-day period commences once sufficient material facts are provided. The staff administrator's name and general phone contact information is provided.)*
- **General principles.** The request and response are generally public records. Summaries may be published in the Commission's Bulletin newsletter. The advice is not an Opinion under Section 83114(a); nor is the advice a declaration of Commission policy. Because advice is the application of the law to a particular set of facts, the immunity provided under Section 83114(b) is particular to the requestor. *(Summaries are now provided in the Advice Letter Report, along with a link to full copies of the advice, in the Commission's regular public meeting agenda.)*
- **Guidelines for declining a request.** The Commission may decline to give formal written advice if the required elements of a request are lacking, such as a request that involves past conduct, not made by the person subject to the Act (or their stated authorized representative), has insufficient or unreliable material facts, does not pertain to the Act, or is purely hypothetical. A second type of request that may be declined are those that present a policy interpretation issue best made by a Commission Opinion, or by adoption of a regulation. Lastly, a request may be declined when the rendering formal written advice is inappropriate or otherwise not in the public interest.
- **Requests inappropriate for formal advice.** Additionally, a request may be declined for formal written advice, and treated as a request for an Opinion under

Section 83114(a) or as a request for informal assistance under subdivision (c). *(For the former, the current practice is to notify the requestor and determine if he or she wishes to pursue an Opinion request, and provide instructions on the process. Where informal written assistance is more appropriate, the advice is issued as an “I” letter with the statement that it is for general information and provides no immunity.)*

Subdivision (c) sets forth the informal assistance process, and is summarized below. Although not detailed under Section 83114(b), informal assistance is an important part of the Commission’s role. Because informal advice provides general information, it does not provide immunity to a requestor, and the requirements are less stringent.

- It may be requested by any person whose duties are in question, that person’s authorized representative. It may also be requested by any person with a duty to advise persons with duties under the Act, or by an agency with members or employees subject to the Act.
- It may be requested and rendered orally or in writing. *(Note: In 2018, the Commission received 12,911 informal assistance requests by email and 10,530 by telephone.)*
- The Commission may limit assistance to general explanations of the requirements of the Act or decline to provide informal assistance for similar reasons as noted above for formal advice.

Proposed Regulation 18329

The proposed revisions reflect current practices, add defining language, make organizational changes for readability, and propose processes related to the Commission’s oversight role. The proposed changes include:

- **Proposed Subdivision (a): *General*.** The proposed language incorporates the current principles applicable to formal advice and informal assistance, including those in (b)(7), stating that advice is neither precedential, nor an Opinion or statement of policy. The language clarifies that written advice may be subject to further Commission review and action.
- **Proposed Subdivision (b): *Formal Written Advice*.** The proposed language consolidates and organizes the existing provisions. Proposed new language is noted as follows:
 - The Request Process: *Request Requirements, Acknowledgement, 21-day Response, Immunity and Withdrawals*, proposed (b)(1) through (5).

Proposed new language in (b)(1)(B) provides a 14-day timeline for a requestor to respond to staff’s request for additional information.

Proposed new language in (b)(3) allows the General Counsel to extend the 21-day response time upon a determination of good cause.

Proposed new language in (b)(5) reflects current practices for a requestor to withdraw a request.

- *Requests Declined*, proposed (b)(6)(A) through (H).

Proposed new language in (b)(6)(E) clarifies the process where the request is more appropriate for the Opinion, regulation or legislative process. These are questions that regard an area of unsettled law, or an area of law susceptible to multiple reasonable interpretations. The language states that staff may provide guidance to the requestor in an Opinion request, and, when appropriate, may provide advice pending further Commission action, if it may do so without construing the unsettled law or interpretation issue.

Proposed (b)(6)(F) adds language defining an overly-broad or hypothetical question, and delineating when the General Counsel may treat a hypothetical question as one for informal assistance.

Proposed (b)(6)(G) adds language for declining a request where the facts or parties are the subject of an Enforcement proceeding or other judicial or administrative action.

- *Reconsideration and Appeal*, proposed (b)(7). New language reflecting current practices delineates that the General Counsel may amend or reconsider formal advice where the requestor provides sufficient facts. It also states that a requestor may appeal formal written advice through the Opinion request process.
- **Proposed Subdivision (c): *Informal Assistance***. The proposed language consolidates and organizes the existing provisions. Reflecting current practices, new language in (c)(4)(E) directs staff to inform a requestor, where the question is too complex or otherwise not appropriate for informal assistance, that a formal written advice request or an Opinion request may be made.
- **Proposed Subdivision (d): *Commission Oversight***. The proposed language details the Commission's oversight role in the advice process related to review and action on formal written advice, as well as the impact on any previously provided immunity.
- **Proposed subdivision (e): *Public Records***. Proposed language sets forth that written responses and requests for advice are public records, and subject to public inspection unless protected under the Public Records Act, similar to language in current subdivision (b)(6).

Summary

Proposed Regulation 18329 updates and organizes the language to reflect current formal advice and informal assistance practices, as well as proposes processes for Commission actions in responding to written requests. The proposed amendments will provide clarity for requestors as to their rights and duties in requesting and receiving timely compliance assistance.

Attachments: Proposed Regulation 18329 for Repeal
Proposed Regulation 18329 for Adoption