

Chapter 3 Commissioner Responsibilities, Ethical Duties and Restrictions

Because they exercise the power of a publicly-elected government and of an agency created by the citizens to uphold official ethical conduct, FPPC Commissioners are expected to adhere to the highest ethical standards, place the public interest above any personal, private or partisan interests, and use and allocate Commission time and resources to best serve the public. Toward that end, Commissioners are required to make all efforts to attend meetings of the Commission, adequately prepare for issues to be discussed at each meeting, fully participate in the discussions, and vote fairly on matters that come before them. In striving to collectively make the best decisions, the Commission has traditionally encouraged a robust public discussion of issues on which it deliberates. Therefore, Commissioners should expect to hear a variety of viewpoints from both fellow Commissioners and members of the public on these issues and are expected to treat each speaker with dignity and respect.

In addition, FPPC Commissioners are required to comply with the Political Reform Act as detailed under “Restriction on Commissioners’ Activities” (below), the Statement of Governance Principles in the previous section, the Statement of Incompatible Activities (in the next section), and any other laws applicable to the conduct of public officials.

Restrictions on Commissioners’ Activities

A. Ban on Holding Office. Participating in Elections and Lobbying

Government Code section 83105¹ provides in part:

"No 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."

Thus, Commissioners may neither hold public office during their time on the Commission, nor run for public office during their appointed term. Also, they may not serve as officers of partisan organizations. This includes service on party central committees.

Section 83105 also prevents Commissioners from employing lobbyists and from accepting employment as lobbyists. Commissioners are permitted to lobby **without compensation** for persons or groups which do not employ lobbyists and which make no contributions or expenditures for political purposes.

Finally, section 83105 prevents Commissioners from participating in or contributing to any election campaign. Thus, Commissioners may not promote the passage or defeat of any measure that appears (or may appear) on a ballot anywhere in California. They may not make contributions to any

¹ All references are to the Government Code unless otherwise indicated. All references to regulations are to Title 2, sections 18109 – 18997, of the California Code of Regulations.

campaign involving an election held in this state. This includes campaigns for federal office if the candidate will appear on the ballot in California (e.g., a campaign for President or a California congressional seat).

"Participation" in these campaigns is also prohibited. This includes soliciting funds and endorsing candidates or ballot measures. Spouses are not prohibited from contributing to, or participating in, election campaigns. However, the Commission's Statement of Incompatible Activities arguably goes even further than the statute.

B. Duty to Disclose Economic Interests

Commissioners, like many other government officials, are required to file annual statements disclosing their economic interests. These are called statements of economic interests ("SEI" or "Form 700").

Within 30 days after assuming office, Commissioners must file assuming office statements on Form 700. On these statements, Commissioners must disclose investments, interests in real property and income received during the preceding 12 months. (Sections 87200, 87202 and 87203.)

On or before March 1, each year, Commissioners must file annual statements on Form 700. (Regulation 18723.) A statement must also be filed within 30 days after leaving office. On these statements, Commissioners also must disclose investments, interests in real property and income. (Section 87204.)

The FPPC staff is available to assist Commissioners with questions about preparing and filing these required statements. If a Commissioner would like staff to review their statement in advance of the filing deadline, please contact the Commission Assistant.

C. Ban on Gifts

Commissioners may not receive gifts, made directly or indirectly, worth \$10 or more from state candidates, elected state officers, legislative officials, agency officials, lobbyists, or any person listed in Section 87200. (Section 83117.5.) This ban applies on a monthly basis. For example, a Commissioner who accepts a lunch worth \$9 from a lobbyist in February may not accept a second similar lunch during the same month.

D. Limitations on Gifts

In addition to the gift limitations set forth above, Commissioners may not accept gifts in excess of \$470 per calendar year from any other persons whose gifts the Commissioner must report in his or her statement of economic interests. (Section 89503.) The source of the gift must be disclosed if \$50 or more in the aggregate is received from that source during the year (Section 87207(a)(1).)

This prohibition does not apply to gifts from immediate family; gifts of home hospitality when the homeowner is present; and, gifts approximately equal in value exchanged with another individual on holidays, birthdays or similar occasions.

Commissioners may refer to the FPPC fact sheet on "[Limitations and Restrictions on Gifts, Honoraria, Travel and Loans](#)" for more detail on gift limits and travel provisions that apply to them as state officials.

E. Ban on Honoraria and Similar Fees

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. [You should always check with the Chair and Executive Director prior to accepting any payments from outside groups for Commission-related expenses, including travel.](#)

F. Conflicts of Interest

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.

On the Commission's website is a publication titled "[Recognizing Conflicts of Interest.](#)" If you are concerned that you may have a conflict with regard to a matter pending before the Commission, please discuss it with the Chair or General Counsel.

G. Ethics Training

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.](#)

H. Ex parte Communications

There are a few important things to remember regarding ex parte communications on matters pending before the Commission: (1) you may not receive ex parte communications in enforcement matters, except in very limited circumstances; (2) [you are not prohibited from engaging in ex parte communications on rulemaking matters, but you must be aware of bias and fairness issues, and are strongly urged to share the communication with fellow Commissioners and the public at the meeting where the matter is discussed; and \(3\) similar to regulations, discussion of a pending opinion with persons off the record is not prohibited so long as issues of fairness and bias are considered.](#)

1. Ex Parte Communications and Enforcement Matters

The Administrative Procedure Act (APA), commencing with Government Code section 11400, sets forth rules governing administrative adjudication by state agencies. As part of these rules, the APA

imposes limitations on certain communications between Commissioners and parties (or interested non-parties) to certain proceedings ("ex parte" rules).²

Enforcement actions subject to Commission approval, including those which result in stipulations, are "adjudicative proceedings" as contemplated by the APA and are therefore subject to the rules of the APA. The enforcement proceedings are *evidentiary hearings* for determination of facts pursuant to which the agency formulates and issues a decision. (Section 11405.20.)

The APA includes an "Administrative Adjudication Bill of Rights." Section 11425.10 requires in pertinent part that:

- The hearing shall be open to public observation. (Section 11425.20.)
- The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision. (Section 11425.50.)
- Ex parte communications shall be restricted. (Section 11430.10.)

Sections 11425.20(a) and 11425.50(c) require that a hearing shall be open to public observation and that the statement of *the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding.*³ According to the Law Revision Commission, the provisions of this section specify the minimum due process and public interest requirements that must be satisfied. In cases where ex parte communications form the basis for an administrative decision, courts may invalidate the decision of the agency.

If you receive a written ex parte communication regarding an enforcement matter, do not read it. If someone tries to speak with you about an enforcement matter, end the conversation immediately. And, in any event, tell the Chair or the Executive Director immediately about the ex parte contact. Section 11430.50(a) provides that if a presiding officer receives an improper communication, the presiding officer shall make the writing and any written response of the presiding officer to the communication a part of the record in the proceeding. The Chair would announce receipt of the improper communication at the meeting (i.e.: "Concerning agenda item #, the Commissioners have received a comment letter on this item. We would like to reiterate that the Commission will not consider third party comments in connection with enforcement matters. The comments will not form the basis for a decision in the matter.")

² Generally, "ex parte" means by or for one party only or something done on the application of one party only. (See Black's Law Dict. (5th Ed. 1979) p. 517, col. 1.) Ex parte contacts are communications received from a party or interested person outside the presence of the other party or interested person. It is important to note that the term "ex parte contact" includes ex parte contacts with persons inside the agency, that is, the staff, not just with persons outside the agency.

³ For example, even comments from a disinterested third party, such as the media, may invite claims of bias. Section 11425.40 provides that a presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.

The Commission must notify all parties (including the enforcement division, which is a party) that a communication described in this section has been received and made a part of the record, **but will not be considered in deciding the merits**. Copies of the ex parte communication will then be provided to the parties.

There is a limited exception for communications “concerning a settlement proposal advocated by the advisor.” (Section 11430.30.) This means that a Commissioner may ask enforcement staff questions about a stipulation on an agenda even if the respondent is not present. **However, the staff cannot reveal too much factual information, in case the stipulation is rejected and the Commission thereafter finds itself presiding over an administrative hearing on the matter.**

Because of the ex parte communication rules, the Commission does not allow third party comments on pending enforcement cases even during the public hearing on the matter. However, members of the public may be allowed to speak in general terms on legal or policy issues related to a pending case. The Commission may decide to pull a stipulation from the agenda while it considers the more general legal or policy questions.

2. Ex Parte Communications and Rulemaking

In connection with rulemaking, there is no APA rule stating that the discussion of a pending regulation with persons off the record is prohibited, but as discussed below, issues of fairness and bias may be raised.

Under the Bagley-Keene Open Meeting Act, meetings must be open and public so that the public has an opportunity to speak. Also, agency actions must be taken openly and the deliberations must also be conducted openly. (Government Code sections 11120 and 11125.) **This would suggest 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.** If any interested person proposes that these rules have not been followed, then any action taken may be nullified through a judicial determination. (Government Code section 11130.3.) These rules apply to both the regulations and emergency regulations. (Government Code sections 11422.1 and 11425.) Also, regulation 18312(b)(6) incorporates the APA rules by requiring a complete rulemaking file which includes the record of the hearing as well as all "other materials pertinent to the regulatory action."

Case law also suggests that any information received outside the meeting should be stated on the record. (*California Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 131 Cal.Rptr. 744.) The courts have considered two views regarding disclosure of ex parte communications. The strict rule suggests that the APA has two objectives: (1) to ensure meaningful participation in adoption of administrative regulations by state agencies, and (2) the creation of an administrative record assuring effective judicial review. (*Ibid.*) This rule suggests that all information used in reaching a conclusion should appear on the record to permit adequate judicial review. This view also supports the idea that even if the minimum standards of the APA are satisfied, the rule-making proceeding will be deficient if it fails to satisfy the APA's goal of an effective judicial review.

Another view places emphasis on the importance of public input. As long as the record reflects the relevant information supporting or refuting the conclusions reached by the agency so that they may

be brought to the attention of the reviewing court, then ex parte communications are beneficial to increase public input. (*Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 960 P.2d 1031, 78 Cal.Rptr.2d 1.)

3. Ex Parte Communications and Commission Opinions

The standard of review for regulations is that the court will give deference to an agency's rule unless the rule itself is "arbitrary and capricious." (*Californians for Political Reform Foundation v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472, 71 Cal.Rptr.2d 606.) Because Commission opinions are precedent-setting interpretations of the law administered by the FPPC, case law indicates that they would be given the same deference in judicial review that a regulation would be given. (*Brown v. FPPC*, 84 Cal.App.4th 137, 150, 100 Cal.Rptr.2d 606, 615 (2000).) Citing *Yamaha*, the *Brown* court gave "substantial weight" to opinions and similar agency interpretations. The court considered "whether the agency has a comparative interpretive advantage over the courts, and also whether its interpretation is likely to be correct." (*Ibid.*) The factors which indicate whether the agency was correct include "indications of careful consideration by senior officials, particularly a collective decision reached after public notice and comment; evidence that the agency has consistently maintained the interpretation; and indications that the interpretation is contemporaneous with the enactment of the statute or regulation being interpreted." (*Ibid.*)

This standard of review, as well as the fact that opinions are categorized closer to quasi-legislative (regulations) than quasi-adjudicative (enforcement actions), creates a need to limit ex parte communications when considering opinions to a standard similar to that of regulations. (*Ibid.*) Also, since opinions have established procedures in the regulations, a complete record as well as a thorough consideration of the matter is ensured. (Regulations 18320 - 18327.) Even though the APA and case law are both silent as to what information is allowed off the record and what must be included, the standard of judicial review indicates that discussion of a pending opinion with persons off the record is not prohibited so long as issues of fairness and bias are considered.

All Ex Parte Communications

The general concern that permeates through the Commission's consideration of enforcement matters, opinions and regulations is preventing any appearance of impropriety, thus the hypotheticals and guidelines below are designed to afford you maximum protection.

Examples and Hypotheticals Regarding Ex Parte Communications

1. Hearing on ALJ Decision/Enforcement Stipulation/ Request for Civil Enforcement Authority

HYPO: An interested person approaches a Commissioner either before the Commission meeting or during a Commission meeting break and wants to discuss the case. The Commissioner listens patiently and responds by saying, “I’m sure that will be considered.” What are the Commissioner’s obligations?

This type of communication is a prohibited ex parte communication, and the Commissioner should have stopped the conversation immediately. If in fact the communication occurs, then Government Code section 11430.50 provides a precise procedure to follow. First, the Commissioner shall create a memorandum stating the substance of the communication, any response made by the Commission, and the identity of the speaker. (This can be done by stating these facts on the record and ensuring that the Commission Assistant incorporates them into the minutes). This shall be made part of the record of the meeting and all parties shall be notified of the communication. The parties are then allowed to comment and may request an opportunity to address the comment within 10 days after they receive notice of it. The Commission may then hear additional evidence concerning the subject of the communication or reopen a hearing at its discretion.

In addition, by listening to the speaker outside the public hearing, the Commissioner may be accused of bias and may even be disqualified. (See Government Code section 11430.60). The appearance of bias or impropriety can taint the perception that a fair and impartial consideration of the matter was held. **The Commissioner also could be accused of rendering a decision based on facts obtained outside the public hearing. (Bagley-Keene Act, Government Code section 11120 et seq.)** Note that the interested person is not a party to the case but the outcome would be the same if he were.

What if the communication happens at a time other than the day of the Commission meeting?

The same rules and process discussed above apply to this situation and the Commissioner would be obligated to disclose the information on the record of the next Commission meeting.

What if the communicator is an enforcement staff person?

This is not prohibited conduct under the Administrative Procedures Act (“APA”) if the enforcement staff person is not the “investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage” or if the communication is “concerning a settlement proposal advocated by the advisor.” (Government Code section 11430.30).

Thus, Commissioners may request limited information from enforcement staff concerning a proposed stipulation but not concerning a proposed ALJ decision or request for civil enforcement authority.

What if the communicator is a legal staff person?

This is not prohibited conduct under the APA if the legal staff person is not the “investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage” or if the communication is “concerning a settlement proposal advocated by the advisor.” (Government Code section 11430.30). Because FPPC legal staff act as counsel for the Commission in situations such as ALJ hearings, this rule would not limit their communications with Commissioners.

What happens if the communication is in writing?

Government Code section 11430.50(a)(1) gives clear guidelines regarding what to do if a written communication in violation of the ex parte rules is received. The written communication and any response from the Commissioner shall be made part of the record of the next meeting. Thus, any Commissioner who receives such a writing should immediately inform the Executive Director or Chair, who will ensure that these procedures are followed. The Commissioner should not respond to communication.

2. Regulations – Written Communications

HYPO: An interested person mails written comments to a Commissioner regarding a pending regulation. What are the Commissioner’s obligations?

The discussion above regarding written communications is not mandatory regarding rulemaking. We strongly recommend that it be followed here as well, however, so that the communication can be shared with other Commissioners and made part of the rulemaking record.

3. Regulations – Verbal Communication

HYPO: An interested person calls before a meeting or approaches a Commissioner during the break of a Commission meeting to discuss pending regulation. What are the Commissioner’s obligations?

Although there is no APA rule stating that the discussion of a pending regulation with persons off the record is prohibited, issues of due process, fairness and bias may be raised. The most cautious course of conduct is for the Commissioners to refrain from participating in outside communications or to disclose such communications on the record of the Commission meeting to satisfy the Bagley-Keene Open Meeting Act requirements. (Government Code sections 11120 and 11125).

Chapter 4 Statement of Incompatible Activities for Commissioners

POLICY STATEMENT REGARDING ACTIVITIES THAT ARE INCONSISTENT, INCOMPATIBLE, OR IN CONFLICT WITH DUTIES AS A COMMISSIONER OF THE FAIR POLITICAL PRACTICES COMMISSION

The following principles have been in place since adoption by the Commission on March 21, 2013.

I. Purpose

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.

II. Definitions

- A. Commission.** "Commission" means the Fair Political Practices Commission.
- B. Commissioner.** "Commissioner" means the full-time chairman and the four part-time Commission members.
- C. Person.** "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.
- D. Campaign Services.** "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.

III. Gifts

- A. General Policy.** It is the policy of the Commission to comply with Government Code Section 83117.5 regarding prohibitions on commissioners accepting gifts from specified persons.
- B. Acceptable Gifts.** Notwithstanding Section A, it is the policy of the Commission that commissioners may accept gifts such as the following:

- (1) Occasional home meals and lodging in a home on a social basis.
- (2) Transportation in a noncommercial vehicle.
- (3) Intra-state travel, necessary meals and accommodations, and other nominal benefits which are not reportable under 2 California Code of Regulations Section 18726 and which are provided directly in connection with a panel, seminar or similar event at which a commissioner makes a speech or like appearance.
- (4) Gifts of approximately equal value exchanged between a Commissioner and an individual other than a lobbyist on holidays, birthdays or similar occasions.
- (5) Gifts from a commissioner's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person.

In case of doubt as to the propriety of accepting a gift, the doubt should be resolved against acceptance.

IV. Misuse of Position

A. Improper Activities. It is the policy of the Commission that commissioners should not use state time, facilities, equipment or supplies for personal purposes or for the advantages of another person. In addition, commissioners should not use information available to them solely because of their status as commissioners for personal gain or for the advantage of another person. Examples of improper activities include:

- (1) Using the commission's postage or stamping facilities even though the Commission is reimbursed before or after such use.
- (2) Using status with the Commission to solicit, directly or indirectly, business of any kind or to purchase goods or services for private use at discounts from:
 - (a) A person who is or may reasonably be expected to be subject, directly or indirectly, to the regulation or enforcement action of the Commission.
 - (b) A person doing or soliciting business with the Commission.

(Discounts and other considerations that are offered to all state officers and employees are not prohibited.)

- (3) Providing, or allowing access to, confidential information available to them solely because of their status as commissioners to persons to whom the issuance of such information has not been authorized.

- (4) Providing services or information to some prospective bidders on contracts with the Commission for supplies or services when such services or information are not available to all such bidders.
- (5) Providing or using names of persons or records of the Commission for a mailing list that has not been authorized.

V. Political Activities

A. General Policy. It is the policy of the Commission to comply with Government Code Section 83105 regarding restrictions on the political activities of commissioners. In accordance with Government Code Section 83105, it is the policy of the Commission that commissioners should not participate in the following activities:

(1) Contributions, Fundraisers and Volunteered Services.

- (a) Contributions to and participation in any election campaign for any primary, general, special or recall election held in this state are prohibited. This includes contributions to the campaign of any candidate for President and contributions to the campaign of any other candidate for federal office when the election is held in California.
- (b) Commissioners should not attend campaign fundraisers for any state or local election. Commissioners may attend fundraisers for federal elections held in California, so long as they provide no contributions or campaign services to the election campaign.
- (c) Commissioners should not provide campaign services to any federal, state or local election campaign in California, whether those services are compensated or volunteered.

(2) Political Party Organizations. 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.

(3) State Lobbying. A commissioner should not influence state legislative or administrative action for non-Commission compensation. A commissioner should not voluntarily influence state legislative or administrative action unless the commissioner (a) represents only himself or herself, or (b) represents another person or group which does not employ a lobbyist or make contributions or expenditures for political purposes.

(4) Political Activities in Commission Office or While Representing the Commission. Commissioners should not engage in any political activities in Commission offices or while representing the Commission.

(5) Spouses. This policy statement does not purport to restrict political activity by the spouse of any commissioner. However, 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.

B. Acceptable Activities. Notwithstanding Section A, it is the policy of the Commission that commissioners may participate in the following activities.

- (1) Contributions, Fundraisers, and Volunteered Services for Out-of-State Election Campaigns.** Commissioners may make contributions of any amount to, attend fundraisers for, and participate in volunteered nonmanagerial activities for, campaigns for out-of-state candidates and out-of-state ballot measures, except the campaign of any candidate for President. “Volunteered nonmanagerial activities” includes manual, clerical, and secretarial services, precinct walking or phoning, and displaying bumper stickers, buttons or lawn signs, for which no compensation is provided. Reimbursement for expenses incurred while performing volunteered nonmanagerial activities may be accepted so long as like reimbursement is provided to others performing like activities.

Commissioners may attend fundraisers for federal elections held in California as specified in Section A(1)(b), so long as they provide no contributions or campaign services to the election campaign.

- (2) Voter Registration Activities.** Serving as a deputy registrar of voters is permitted so long as the activity is in no way identified with a candidate for public office, a ballot measure, or a political party.

C. Policy Regarding Commission Identification and Disqualification.

- (1) Commission Identification.** 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.
- (2) Disqualification.** 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.