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To: Chair Miadich and Commissioners Cardenas, Hatch, Hayward and Wilson

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Subject: Prenotice Discussion of Proposed Amendments to Regulations 18360, 18361.4, 18361.5, 18361.9, 18361.11 & 18404.2

Date: June 8, 2020

Proposed Commission Action

For the Commission's review and comments, staff proposes amendments to the regulations governing enforcement matters discussed below. Incorporating any Commission direction, the proposed amendments to the regulations will be noticed for adoption at the Commission's regularly scheduled meeting in August 2020.

Background and Reasons for Proposed Regulatory Action

Staff from both the Legal and Enforcement Divisions have identified several areas of improvement to multiple regulations governing enforcement matters including revised procedures and requirements for probable cause proceedings, administrative hearings, briefing procedures associated with proposed decisions, and administrative terminations. These recommended improvements would modify existing regulations in accordance with governing statutes to promote and facilitate compliance with, and enforcement of, the Political Reform Act ("the Act"), while ensuring fairness and due process for persons subject to enforcement proceedings. The proposed amendments, which incorporate Commissioner recommendations from past meetings, also include numerous non-substantive changes intended to clarify existing regulations.

Regulatory Proposals

18360 – Enforcement Complaints

The Commission has traditionally received more than 2,000 complaints each year accusing public officials, campaigns, and lobbyists of violating various requirements under the Act. Until recently, the Enforcement Division manually entered each complaint into its electronic system. However, in 2016, the Commission established an Electronic Complaint System ("ECS"), which allows members of the public to electronically file complaints with the Commission on its website and directly access information concerning pending Enforcement complaints and cases. Staff proposes repeal the current version of the regulation and adopt a new version to reflect the

application of this new electronic filing system as well as several technical changes to clarify and improve the existing provisions.

Current subdivision (a) sets forth the requirements to file sworn complaints, which must be signed under penalty of perjury and entitle the filers to notifications under the Act. (See Section 83115.) Staff proposes broadening the scope of subdivision (a) to include the requirements for any complaint or referral filed using the ECS. (Proposed subdivision (a)(1)(A) – (a)(1)(F). A specific requirement that sworn complaints also be electronically signed under penalty of perjury would be located in proposed subdivision (a)(2), and additional requirements specific to referrals would be located in proposed subdivision (a)(3)(A) – (C).

Current subdivisions (b) – (e) address the procedural rights under Section 83115 that apply whenever a complaint is filed under penalty of perjury. In addition to several technical revisions, staff proposes grouping all of these requirements in one subdivision. (See proposed subdivision (b)(1) – (5).)

Staff proposes technical changes to the current provisions in subdivision (f) concerning Commission initiated cases, and those provisions would move to proposed subdivision (c).

The provisions in current subdivision (g) relate to information available to the public with respect to complaints and referrals. Those provisions, with technical changes, would move to subdivision (d), and would also be posted on the Commission website for ease of reference.

Finally, for purposes of efficiency, staff proposes adding a provision to authorize the Enforcement Division to reject any duplicate complaints or referrals submitted by the same complainant filing officer. (Proposed subdivision (e).)

18361.4 – Probable Cause Proceedings

The Act and its regulations provide persons accused of violating the Act certain procedural protections beyond those provided by the Administrative Procedures Act found in Sections 11500, et. seq. ("APA"). Among them are the requirements that the Commission make a finding of probable cause and respondents have the right be heard at a probable cause proceeding. (Section 83115.5.) Under existing Regulation 18361.4 (e), the Enforcement Division must provide evidence sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed a violation at the probable cause conference in order for the FPPC to make a finding of probable cause against a respondent. (Regulation 18361.4 (e).)

Generally, the proposed amendments would: rearrange the regulatory provisions to correspond with the sequence of events that occur in a probable cause proceeding; rephrase the existing probable cause standard; clarify and simplify filing deadlines, service requirements and scheduling procedures; and eliminate existing regulatory procedures and requirements that, in practice, provide little or no benefit to the parties and make the process less efficient.

Proposed Subdivisions (a) and (b) – Probable Cause Report

Current subdivision (a) describes the Enforcement Division process of preparing a probable cause report, including the required contents. Specifically, the report must contain a summary of the law and evidence gathered through the investigation as well as any known "exculpatory and mitigating information and any other relevant material and arguments."

However, the primary function of the probable cause report is to set forth evidence that supports a finding that probable cause exists to believe a violation of the Act has occurred. (See Section 83115.5 ["No finding of probable cause to believe this title has been violated shall be made by the commission unless … at any proceeding of the commission held for the purpose of considering whether probable cause exists for believing the person violated this title"].) Only after this determination is made may the Commission then "hold a hearing to determine if a violation has occurred." (Section 83116.)

Staff proposes eliminating the requirement that the probable cause report contain "exculpatory and mitigating information and any other relevant material and arguments" because this information is not relevant to whether probable cause exists to believe a violation of the Act has occurred in the first instance, and therefore serves no purpose at the probable cause stage and can confuse the issue of whether there is cause to believe a violation occurred.

In addition, the probable cause standard currently located in two inconspicuous places in the Regulation is whether "the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a proposed respondent committed or caused a violation." (See subdivisions (c)(2) & (e).) The phrases "lead a person of ordinary caution and prudence" and "entertain a strong suspicion" are both unclear and unnecessary.

Staff proposes a simpler, more straightforward, plain language probable cause standard located in proposed subdivision (a) as follows: "Under Sections 83115.5 and 83116, probable cause exists when the evidence sufficiently supports a reasonable belief or strong suspicion that the Act has been violated." Under the existing regulation, the probable cause standard is not only confusingly worded, but also seemingly hidden. Moving the probable cause standard to subdivision (a) would place it conspicuously at the top of the proposed regulation to eliminate any confusion caused by the existing regulation. This change is not intended to substantively change the standard for finding probable cause but rather to make it easier to understand and apply.

The current provisions in subdivision (a) would move to subdivision (b).

Proposed Subdivision (c)

Current subdivision (b) contains the notifications the Enforcement Division is required to provide to any respondent at least 21 days before a probable cause hearing can proceed, including a copy of the probable cause report as well as notice of the respondent's right to submit a written response to the probable cause report and request a probable cause conference.

The current probable cause process can be confusing with respect to various actions available to respondents and the associated deadlines. In addition, it can result in a burdensome scheduling task for the Commission Assistant, leading to significant delays in scheduling the probable cause conference. For example, respondents will oftentimes request a conference by leaving a telephone message for the Commission Assistant without providing their contact information, or email the Commission Assistant without providing dates of availability. This often leads to delays in the scheduling of a conference where the Commission Assistant either spends substantial time and effort in tracking down their contact information or respondents simply fail to respond to repeated inquiries about their availability dates.

Therefore, in addition to the current notification requirements, staff proposes adding a probable cause checklist form that clarifies the options available to respondents (filing a written response, requesting evidence and/or a probable cause conference) including important deadlines associated with each option. (Proposed subdivision (c)(4).) In addition, respondents would be asked to fill out and return the form to provide their contact information, available dates, and preferred method of service. (*Ibid*.)

This checklist form would increase the overall efficiency of the probable cause process by providing respondents with all of the possible actions and associated deadlines upfront. Moreover, by providing their contact information, dates of availability and the preferred method of service, the process of scheduling a probable cause conference would become less burdensome and more efficient for both the Commission Assistant and the parties. The current provisions in subdivision (b) would move to subdivision (c).

Proposed Subdivision (d) – Response to Probable Cause Report

As described above, there are three separate actions a respondent may currently take within 21 days after service of the probable cause report: 1) submit a written response to the probable cause report under subdivision (c)(1); 2) request evidence relied upon by the Enforcement Division to establish probable cause along with any exculpatory or mitigating evidence under subdivision (c)(2)[1]; and 3) request a probable cause conference under current subdivision (d). Staff proposes amendments to clarify and revise the existing procedures related to these actions.

Initially, the proposed amendments would group these three related options into the same subdivision for ease of reference. (See proposed subdivision (d)(1)-(3).) With respect to a respondent seeking to file written response to the probable cause report, it is not unusual for such responses to include information not relevant to the probable cause inquiry. Therefore, the proposed amendments seek to narrow the focus of these responses to information potentially affecting a finding of probable cause only by limiting the information to "law and evidence supporting the respondent's position that the report fails to establish probable cause that any or all of the alleged violations occurred. (Proposed subdivision (d)(1).)

[1] If a request for this evidence is made, then the respondent may submit a written response to the probable cause report within 21 days after service of the discovery.

As mentioned, there are occasions where a respondent will request a probable cause conference but scheduling is delayed, sometimes for months, because the Commission Assistant does not have the correct contact information or the respondent delays in providing dates of availability. In order to prevent any attempt by a respondent to impede the progress of a case by significantly delaying the scheduling of a probable cause conference, the proposed amendments would impose a 75-day deadline, to begin when the Commission Assistant receives a request, for the conference to proceed subject to extension by the assigned hearing officer only through a showing of good cause by any party. (Proposed subdivision (d)(2).)

The proposed amendments would also change the current provisions that allow for "discovery" of evidence, upon request, relied upon by the Enforcement Division "sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a proposed respondent committed or caused a violation, along with any exculpatory or mitigating evidence." (Subdivision (c)(2).) To begin, staff proposes eliminating the term "discovery" from the regulation as that term implies a broader legal process used in civil matters. Moreover, respondents would no longer be entitled to receive exculpatory or mitigating evidence at this stage of the case as such evidence is irrelevant to the existence of probable cause. Instead, the Enforcement Division would be required, upon request, to produce evidence in its possession that supports a finding of probable cause for each alleged violation of the Act. (Proposed subdivision (d)(3).) The APA contains broader discovery requirements that would be applicable if a case proceeded to an administrative hearing. (See Section 11507.6.) The proposed amendments would also expressly clarify that the Enforcement Division is not required to produce any confidential or otherwise protected information, and that the evidence produced pursuant to Regulation 18361.4 is considered the final production at the Probable Cause stage and not appealable. (*Ibid*.) These proposed modifications are more narrowly tailored to comply with the Act's requirements under Section 83115.5, which does not provide for discovery or disclosure of anything more than "a summary of the evidence."

Finally, when a respondent fails to timely take any of the available actions above, or takes no action at all, the Enforcement Division has traditionally prepared an ex parte request[2] asking the assigned Legal Division hearing officer to find probable cause and order an accusation to be served on the respondent. Staff proposes eliminating this ex parte process. Instead, the proposed amendments would expressly waive a respondent's right to further probable cause proceedings for failing to timely file response, making a timely request for a probable cause conference, or scheduling a probable cause conference within the specified timelines. The waiver would constitute a finding of probable cause and the hearing officer would issue an Order Finding Probable Cause to be served on all parties. (Proposed subdivision (d)(4).) The current provisions in subdivision (c) would move to subdivision (d). Waiver of rights in a probable cause proceeding is consistent with the probable cause provisions under the Act in Section 83115.5, which sets forth a deadline for respondents to assert their rights to appear and be heard at a probable cause proceeding. The term "ex parte request" is incorrectly used in the existing regulation since such request occurs after a respondent has been served but has not appeared as a party in the proceeding. Under the proposed

[2] The request is normally a packet consisting of the Probable Cause Report, the Ex Parte Request for a Finding of Probable Cause and an Order that an Accusation be Prepared and Served to be signed by the hearing officer.

amendments, waiver of rights would take effect by operation of law in accordance with Section 83115.5, and no formal request will be needed.

Proposed Subdivision (e) – Rebuttal

Current subdivision (c)(3) permits Enforcement to submit a rebuttal to a response. Proposed subdivision (e) moves that provision to a separate subdivision for purposes of organization and clarity.

Proposed Subdivision (f) – Probable Cause Conference

Probable Cause Conferences have traditionally been closed to the public with only the parties and hearing officers authorized to attend. On occasion, a respondent will appear at the conference with a potential witness, without notice, and ask that the individual be allowed to testify. In those instances, the hearing officer is forced to make a determination on the spot about whether to allow the witness testimony. Staff proposes a requirement that any party who seeks to have a witness testify at the conference must submit a request to the Commission Assistant, and all other parties, at least 7 days before the conference. This would provide the other parties, in particular the Enforcement Division attorney, a meaningful opportunity to object while providing the hearing officer sufficient time to make his or her determination. The provisions in current subdivision (d) would move to subdivision (f).

18361.5 – Administrative Hearings.

Section 83116 authorizes the Commission to hold a hearing once it determines there is probable cause to believe a violation of the Act has occurred. Sections 11512(a) and 11517(a)[3] authorize agencies, including the Commission, to determine whether an Administrative Law Judge will hear the case alone or together with the agency.

Subdivisions (a) – (c)

Regulation 18361.5 governs certain aspects of the Commission's administrative hearing process. When the Commission itself hears a contested matter, subdivision (a) requires the Executive Director to submit to the Commission one week before the hearing a written brief that discusses the anticipated evidence and legal arguments to be presented at the hearing. Any respondent may also submit a brief.

When the Executive Director determines that an administrative hearing should be conducted before an administrative law judge alone, subdivision (b) requires the Executive Director to provide a copy of the accusation and a memorandum describing the issues involved to each Commissioner. However, subdivision (b) also permits the Commission itself to hear the matter if, at the next regularly scheduled meeting after the Executive Director's determination, two or more Commissioners vote to participate in the hearing. When the hearing will be in front of the

[3] These two statutes are part of the Administrative Procedures Act ("APA"), which governs Commission hearings.

Commission, subdivision (b) provides the Chair may delegate authority to decide motions regarding procedural matters, "validity or interpretation of the Political Reform Act, disqualification of any member of the Commission, or any other matters" to the assigned ALJ alone prior to the hearing, and that such motions or matters must be timely noticed. Finally, subdivision (b) allows a person to request reconsideration of any ALJ decision by the Commission at least 14 days prior to the hearing as specified.

The proposed amendments to current subdivision (b) would require that at least three Commissioners (a majority), rather than two, vote to have any contested matter heard by the Commission itself. (Proposed subdivision (a).) Staff believes it should require a majority of the Commissioners not only to change a significant aspect of the actual hearing (ALJ alone v. ALJ and full Commission), but also to commit the time and resources of all Commissioners for this purpose. Requiring that at least three Commissioners vote to hold a hearing before the Commission itself also appears consistent with Regulation 18327, which requires the votes of three or more Commissioners to take any formal action such as granting a petition for rehearing or issuing "any decision, order or declaration pursuant to Government Code Section 83116.[4]

Further, the references to the Executive Director in subdivisions (a) and (b) would be changed to the Enforcement Division because the latter traditionally submits a written brief to the Commissioners prior to a hearing before the Commission itself, and provides a copy of the accusation and memorandum to the Commissioners after determining that an administrative law judge alone should hear a particular case.

The proposed amendments would move subdivision (a) of the current regulation to subdivision (b) and subdivision (b) to subdivision (a) to lay out the above process in a more logical manner. Staff also proposes moving provisions concerning the Chair's authority to delegate decision-making authority on the specified pretrial matters to the assigned ALJ alone from current subdivision (b) to subdivision (c). The proposed amendments in subdivision (c) clarify that filing and deciding the pretrial matters for the assigned ALJ alone would be done pursuant to the relevant OAH Regulation (1 CCR § 1022) governing such matters.

Subdivision (d)

The current provisions in subdivision (d) concerning the factors to be considered by an administrative law judge and Commission in an order following the finding of a violation of the Act or a stipulated order following a negotiated settlement would move to new subdivision (e).

At the Commission hearing in January 2020, the Commission instructed staff to add (1) comparable cases and (2) sophistication of the respondent to the current list of six mitigating/aggravating factors to be considered by an administrative law judge and Commission in an order following the finding of a violation of the Act or a stipulated order following a negotiated settlement. In addition, the Commission requested that staff eliminate the term "seriousness" from

[4] Section 83116 provides, in part, that after probable cause has been found in any matter, the Commission may hold a hearing to determine if a violation has occurred.

subdivision (d)(1) and replace it with a factor that takes into account the public harm or the type of violation.

Therefore, proposed subdivision (e)(1) eliminates the term "seriousness" and states the Commission must consider "the extent and gravity of public harm caused by the specific violation." In addition, the Commission would be required to consider "[t]he level of experience and sophistication of the violator" with the requirements of the Act under proposed subdivision (e)(2) and "[p]enalties previously imposed by the Commission in comparable cases" under proposed subdivision (e)(3). The remaining five factors would be moved down accordingly into proposed subdivisions (e)(4) through (e)(8).

18361.9 – Briefing Procedure of Proposed Decision by an Administrative Law Judge; Reconsideration.

The vast majority of contested cases are heard by an ALJ sitting alone. When this occurs, the ALJ must prepare a proposed decision within 30 days after the case is submitted by the parties. Within 100 days of receipt by the agency of an ALJ's proposed decision, the agency may act on the decision in one of five statutorily prescribed ways set forth in Section 11517(c)(2) of the APA. Regulation 18361.9 requires the Enforcement Division to file an opening brief no later than 14 days after the date of service of the proposed decision. (Subdivision (b)(1).) Any respondent may file a response brief within 14 days after service of the opening brief (subdivision (b)(2), and the Enforcement Division may then file a reply brief within 14 days after service of the response brief (subdivision (b)(3)). Although not statutorily required by the APA or the Act, the briefing provides the parties an opportunity to raise issues specified in subdivision (b)(1) with respect to the proposed decision before the Commission makes a final determination to adopt or reject it.

Subdivision (b)

This subdivision describes the procedures for parties to file briefs for consideration by the Commission addressing the proposed decision after it has been served on the parties by the Executive Director pursuant to subdivision (a). Subdivision (b)(1) provides that the Enforcement Division should consider addressing specified issues in the opening brief including "[w]hether there is additional material evidence that could not, with reasonable diligence, have been discovered and presented at the administrative hearing." (Subdivision (b)(1)(C).) Staff proposes eliminating this as a potential issue because it is duplicative of one of the potential grounds that a party can raise in a Petition for Reconsideration in subdivision (c)(2)(A).

After receipt of all briefs, subdivision (b)(5) requires the Executive Director to submit a copy of the briefs to each Commissioner "in a timely fashion." The proposed amendment to this provision would require the Executive Director to submit the briefs to the Commissioners "no later than 14 days after the Enforcement Division's deadline to file a reply brief." This amendment would eliminate the possibility of the Executive Director missing an arbitrary deadline by tying it to the existing deadline for the Enforcement Division's reply brief.

Finally, the proposed amendments would add subdivision (b)(6) to set forth the Commission process for considering proposed decisions. Specifically, the Commission would consider any

proposed decision in a closed session where it could take any action authorized by Government Code section 11517, subdivision (c), such as adopting the proposed decision in its entirety, adopting the proposed decision and making technical or other minor changes, etc.

When the Commission has considered proposed decisions at meetings in the past, there has sometimes been confusion whether to allow oral argument by the parties. Proposed subdivision (b)(6) would expressly prohibit oral argument concerning the ALJ's proposed decision. This prohibition recognizes that a party is not legally entitled to an opportunity to make oral arguments before an agency to support or oppose an ALJ's decision. (See *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 314 [neither Section 11517 nor due process require a proposed decision to be served on respondent prior to action of agency head or that respondent be given opportunity for oral argument to agency head].) This is true even where an agency refers the matter back to an ALJ pursuant to Section 11517(c)(2)(D) and then adopts the ALJ's second proposed decision. (*Strode v. Board of Med. Examiners for State of Calif.* (1961) 195 Cal.App.2d 291, 294-298.)[5]

Moreover, administrative decisionmakers are limited to consideration of the evidence in the record. Pursuant to Section 11425.50(c) of the APA, "[t]he 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." In this regard, the prohibition against oral argument would help ensure that the Commission does not inadvertently consider new evidence when making its determination about the proposed decision.

18361.11 – Default Proceedings.

As mentioned, Section 83116 makes the APA applicable to the enforcement of violations pursued by the Commission, and thus persons subject to enforcement actions are afforded due process both by the Act and by the APA. Respondents in enforcement actions are afforded the right to an administrative hearing, if they provide a notice of defense within 15 days of personal service of the notice of defense. If no notice of defense is submitted within the 15-day period, the APA allows the Enforcement Division to seek a default finding by the administrative adjudicator in the case. (Section 11520.)

The Commission has traditionally used certified mail when sending Default Decision and Order and Demand for Payment of Imposed Administrative Penalty "Default Order" letters to respondents. However, the APA states that while an accusation may be sent to a respondent by any means selected by the agency, "no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall been served personally or by registered mail as provided herein." (Section 11505(c).) It further states that "[s]ervice by registered mail shall be effective if a statute or agency rule requires the respondent to file the respondent's address with the agency and to notify the agency of any change." No statute or Commission regulation requires a respondent to register its address and to keep that address current with the Commission.

[5] The only time an agency must afford parties the opportunity to present either oral or written argument is after the agency rejects a proposed decision and decides the case itself pursuant to Section 11517(c)(2)(E). (See Section 11517(c)(2)(E)(ii) ["The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself"].)

Thus, in order to bring the provisions of Regulation 18361.11 into conformity with the requirements of the APA, the proposed amendments would require that default orders be personally served on a respondent instead of sending them via certified mail.

18404.2 – Administrative Termination.

Section 84214 of the Act requires committees and candidates to terminate their filing obligation pursuant to regulations adopted by the Commission, including recipient committees (Regulation 18404). Nonetheless, many recipient committees who no longer engage in campaign activity fail to terminate pursuant to Commission regulations and mistakenly discontinue filing required campaign statements. Regulation 18404.2 provides a mechanism by which the Commission itself can terminate a recipient committee – an "administrative termination." This proposal seeks to expand the grounds to administratively terminate inactive recipient committees.

Currently, Regulation 18404.2 permits the Chief of Enforcement to administratively terminate a recipient committee on the following grounds, if it has failed to:

(1) File a campaign statement in the previous 12 months, and the committee had an ending cash balance of $3,000 or less on its last campaign statement;
(2) File a campaign statement in the previous 12 months, the committee had an ending cash balance of $5,000 or less on its last campaign statement, and the committee owes $2,000 or more to the controlling candidate;
(3) File a campaign statement in the previous 48 months; or
(4) Respond to the Enforcement Division's reasonable efforts to contact the committee regarding the committee's failure to file campaign statements or pay annual fees.

The proposed regulation would permit the Chief of Enforcement to administratively terminate a recipient committee on the following additional grounds if:

(5) The committee filed a Statement of Organization in error; or
(6) The Chief of the Enforcement Division obtains sufficient evidence to show the individual responsible for the committee is deceased or incapacitated.

If a committee wishes to remain active after receiving the notice of termination it may do so by sending a written objection. A terminated committee may be reinstated by request and filing delinquent campaign statements and paying any outstanding fees or fines.

Conclusion

The proposed amendments are intended to improve the procedures applicable to the specified regulations governing enforcement matters while also improving their clarity. Accordingly, staff seeks input and direction from the Commission prior to the August 2020 meeting where they will be on the agenda for adoption.