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

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Subject: Proposed Repeal and Adoption of Regulation 18360; Proposed Amendments to Regulations 18361.1, 18361.4, 18361.5, 18361.9, 18361.11 & 18404.2

Date: October 5, 2020

Proposed Commission Action and Background

Staff proposes the repeal and adoption of Regulation 18360 as well as amendments to Regulations 18361.1, 18361.4, 18361.5, 18361.9, 18361.11 and 18404.2. 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.

Staff initially presented these proposals to the Commission at its June 2020 meeting and, based on input from the Commissioners, made changes consistent with the direction from the Commission. Subsequent to the June meeting, the Law and Policy committee reviewed and provided input on the proposed regulations at its meetings in August, September, and October so various changes have also been made to reflect that input. Staff recommends the Commission adopt proposed regulatory changes.

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 repealing the current version of the regulation and adopting 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 or filing officer. (Proposed subdivision (e).)

In addition, staff had proposed a provision authorizing the Enforcement Division to reject without notice complaints deemed by the Executive Director to be harassing. (Proposed subdivision (e).) At the June meeting, members of the Commission expressed concern that the term "harassing," without further definition, was too broad and unworkable. According to the Chief of Enforcement, the provision was proposed to deal with complaints filed with the Commission typically alleging that numerous public officials have been harassing the complainant. As a result of these allegations that fall outside the scope of the Act, the Enforcement Division has been forced to perform the laborious task of providing notice to all of the subjects of the complaint.

Staff now proposes deleting the term "harassment" and instead inserting a provision that permits the Chief of Enforcement to reject without notice nonsworn or anonymous complaints that fail to allege facts that could result in a violation of the Act.

18361.1 – Administrative Subpoenas

After the June meeting, the Law and Policy committee instructed staff to propose a provision that would require the subject of an administrative subpoena to provide a description of records withheld in response to an administrative subpoena. This provision is intended to be similar to the requirement in proposed Regulation 18361.4(d)(3)(B) whereby Enforcement staff must

provide a description of any records withheld from a request for records in a probable cause proceeding (see discussion below). Staff therefore proposes amendments to Regulation 18361.1(b) that would require subjects of an administrative subpoena to produce a detailed description of all records withheld in response to the subpoena.

Under the Act, the Commission's subpoena powers are set forth in Section 83118 which provides:

> The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers.

"The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission." (Section 83112.) Requiring identification of documents not produced in response to a subpoena issued by the Commission carries out the purposes and provisions of Section 83118 and is consistent with current Enforcement practices of requesting identification of any records withheld in response to a subpoena.[1]

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 that respondents have the right be heard at a probable cause proceeding. (Section 83115.5.) Under existing Regulation 18361.4(e), a hearing officer determines whether the evidence, as summarized in a probable cause report prepared by the Enforcement Division, is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed a violation after the probable cause conference, if requested, in order for the Commission to make a finding of probable cause against a respondent. (Regulation 18361.4(e).) If the hearing officer, typically a senior attorney in the Legal Division, determines the standard for finding probable cause is met, Enforcement Division staff are authorized to issue an accusation thereby initiating an administrative adjudication.

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; revise the requirements in the regulation for production of records by the Enforcement Division; and eliminate existing regulatory procedures and requirements that, in practice, provide little or no benefit to the parties and make the process less efficient.

[1] If a subpoenaed witness fails to identify withheld records, then the Commission's recourse is a superior court order that compels production.

Section 83115.5

Under the Act, the Commission's probable cause proceedings are authorized by Section 83115.5, which provides:

> No finding of probable cause to believe this title has been violated shall be made by the commission unless, at least 21 days prior to the commission's consideration of the alleged violation, the person alleged to have violated this title is notified of the violation by service of process or registered mail with return receipt requested, provided with a summary of the evidence, and informed of his right to be present in person and represented by counsel at any proceeding of the commission held for the purpose of considering whether probable cause exists for believing the person violated this title. Notice to the alleged violator shall be deemed made on the date of service, the date the registered mail receipt is signed, or if the registered mail receipt is not signed, the date returned by the post office. A proceeding held for the purpose of considering probable cause shall be private unless the alleged violator files with the commission a written request that the proceeding be public.

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 originally proposed eliminating the requirement that the probable cause report contain "exculpatory and mitigating information … and any other relevant material and arguments" because it believed a violation would not be charged if exculpatory evidence existed and therefore requiring such information was unnecessary and confusing. Mitigating evidence 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.

However, in response to Commissioner and public comment at the August Law and Policy meeting, the current proposed draft explicitly requires identification of exculpatory evidence in the probable cause report, stating that the report must contain:

> …a written summary of the law and evidence that supports a finding of probable cause that each alleged violation of the Act has occurred, as well as a description of any exculpatory evidence indicating a violation alleged in the report did not occur…

(Proposed subdivision (b).) Therefore, the report will contain the information necessary, including any exculpatory evidence, to support a finding of probable cause for each alleged violation of the Act. Staff notes that mitigating information is not required in the report because it is not relevant to a finding of probable cause; however, pursuant to the proposed regulation, the Enforcement Division will, upon request, produce records in its possession, including mitigating information, pursuant to proposed subdivision (d)(3).[2]

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 delays in scheduling the probable cause

[2] The production of certain records is subject to objection by the Enforcement Division as specified in that subdivision.

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 the Commission Assistant spending substantial time and effort in tracking down respondents' contact information or respondents simply fail to respond to repeated inquiries about their availability.

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)[3]; 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).)

Request for probable cause conference

Under proposed subdivision (d)(2)(A), a respondent may request a probable cause conference not later than 21 calendar days after service of the probable cause report, or the date records were sent to respondent pursuant to proposed subdivision (d)(3). At the request of the Law

[3] 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.

and Policy committee in August, staff added proposed subdivision (d)(2)(B) to permit the assigned hearing officer to grant respondent's late request for a probable cause conference upon a showing of good cause by respondent such as not timely receiving the report or some other circumstance reasonably justifying the delay. However, no request shall be granted if the hearing officer has already issued an order for an Accusation to be served.

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 either when the Commission Assistant receives a request or after the date records are sent pursuant to proposed subdivision (d)(3), 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)(C).) If the probable cause conference does not timely proceed, the Commission Assistant shall set a probable cause conference to occur within 14 calendar days of the deadline, which gives the respondent one last chance to proceed with the probable cause conference while providing finality to the process.

Production of Records

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).)

At the June 2020 Commission meeting, staff proposed an amended version of the regulation similar to the current regulation with regard to production of records but which eliminated the term "discovery" from the regulation, which confusingly implies a broader legal process used in formal judicial proceedings. That version also eliminated the requirements that Enforcement Division produce mitigating evidence, which is irrelevant to the determination of probable cause. The explicit requirement to disclose exculpatory evidence was also removed because staff believed a violation was unlikely to be charged if exculpatory evidence existed, and if it did, disclosure of that evidence would be required by Section 83115.5;[4] thus, its inclusion in the regulation was duplicative and potentially confusing to respondents. However, a provision explicitly requiring disclosure of exculpatory evidence, while not necessary, is not objectionable.

[4] Section 83115.5 states in relevant part: "No finding of probable cause to believe this title has been violated shall be made by the commission unless … the person alleged to have violated this title is notified of the violation …, provided with a summary of the evidence, and informed of his right to be present in person and represented by counsel at any proceeding of the commission held for the purpose of considering whether probable cause exists for believing the person violated this title." The summary of evidence provision requires all evidence relevant to the Commission's determination of probable cause; this includes the Enforcement Division's disclosure of exculpatory evidence relevant to any or all alleged violations of the Act against a respondent.

In response to Commissioner and public comment at the June 2020 Commission meeting and subsequent Law and Policy committee meetings, staff drafted alternate provisions relating to disclosure of records. Under these proposed amendments currently before the Commission, the Enforcement Division would be required to produce "all records in its possession that are not publicly available or otherwise in the possession of the requesting respondent, except records that it claims are confidential, were received in response to an administrative subpoena, or otherwise contain protected information…" (Proposed subdivision (d)(3).) Therefore, pursuant to a request for records, a respondent will receive all the records in possession of the Enforcement Division, including exculpatory and mitigating information, except records that fall in those categories listed above.

Staff recently received public comment stating that the "reference to 'publicly available' records is also overly broad, and imposes an unnecessary burden on respondents to obtain such information where the FPPC has that information in its possession and has the authority to charge for its duplication." However, as explained at the September Law and Policy meeting, those documents that would most commonly be available to the public or in the possession of the requesting respondent are campaign statements that the respondent is legally required under the Act to maintain in their possession and to make public. In addition, the Federal Elections Commission uses the identical standard when producing records to a respondent at an even later stage of its enforcement proceedings.

With respect to not disclosing subpoenaed records, generally records obtained through an administrative subpoena are not disclosable prior to an administrative adjudication, except when specific exceptions apply. (See Sections 11181 and 11183.) Section 11183 states:

> Except in a report to the head of the department or when called upon to testify in any court or proceeding at law or as provided in Section 11180.5 or subdivisions (g) and (h) of Section 11181, an officer shall not divulge any information or evidence acquired by the officer from the interrogatory answers or subpoenaed private books, documents, papers, or other items described in subdivision (e) of Section 11181 of any person while acting or claiming to act under any authorization pursuant to this article, in respect to the confidential or private transactions, property or business of any person. An officer who divulges information or evidence in violation of this section is guilty of a misdemeanor and disqualified from acting in any official capacity in the department.

The Commission has the power to subpoena witnesses under Section 83118 to, among other things, "require by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers." Thus, the limits and prohibitions under Section 11183 likely apply to evidence produced in response to a subpoena issued by the Commission under Section 83118.[5]

[5] Sections 11180 – 11191 provide general authorization for investigations and hearings conducted by a state department. Section 11181(e) authorizes a department to issue administrative subpoenas and the FPPC has additional

Exceptions to the prohibition on disclosure of subpoenaed evidence under Section 11183 include evidence disclosed: (1) "in a report to the head of the department or when called upon to testify in any court or proceeding at law" (Section 11183); (2) "to a court or at an administrative hearing in connection with any action or proceeding" (Sections 11181, subd. (h) and 11183); and (3) other law enforcement agencies if they agree to maintain confidentiality, as required by the statute (Sections 11180.5, 11181, subd. (g); and 11183). Due to the preliminary nature of a probable cause proceeding, the exceptions permitting disclosure of records obtained by subpoena do not apply in the probable cause process. Further, given the limited statutory scope of the probable cause process under Section 83115.5, procedural options for subpoenaed documents such as protective orders are not available at probable cause proceedings. Protective orders provide for consequences if violated, like sanctions or contempt. FPPC hearing officers do not have authority to decide discovery disputes, let alone issue protective orders. However, once an administrative proceeding is initiated subsequent to a finding of probable cause, the Administrative Procedures Act (APA), which includes provisions and procedures for addressing evidentiary disputes, applies to the enforcement matter. (Section 83116.) Further, many records obtained by subpoena and not disclosable during the probable cause process, would be available upon initiation of an administrative action under the APA.

Staff has received public comment opposing the proposed exclusion of subpoenaed records from the document production requirements for probable cause proceedings. But given the lack of authority under Section 11183 to produce subpoenaed records prior to initiation of an administrative action, and the fact that violations of Section 11183 can result in a misdemeanor and disqualification from acting in an official capacity, staff has significant concerns with producing subpoenaed records in conjunction with probable cause proceedings. The APA has established rules and procedures for addressing such issues, and Section 11183 contains exceptions in the administrative hearing context such that respondents will receive all records to which they would be entitled under the APA during the administrative adjudication process.

Lastly, records obtained via subpoena are often produced by respondents and third parties (e.g. banks, email providers, and other vendors) pursuant to subpoena rather than voluntary production precisely because subpoenaed records are protected from disclosure. Records produced pursuant to subpoena are withheld from public production pursuant to the Public Records Act even after the conclusion of an Enforcement case. That being the case, withholding records produced pursuant to subpoena during the probable cause proceeding is consistent with the Enforcement Division's current practice under the Public Records Act.

Description of Records Withheld

Proposed amendments to Regulation 18361.4(d)(3)(B) would require the Enforcement Division, if requested by a respondent, to produce a description of records withheld from its production of records obtained for purposes of an investigation. As discussed above, this is similar to the proposed amendment to Regulation 18361.1.

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statutory authority to issue subpoenas under Section 83118. The Enforcement Division interprets Sections 11180 – 11191 as applicable to the conduct of its investigations, except if any such provision conflicts with the Act.

In addition, the records produced pursuant to Regulation 18361.4 would be considered the final production at the probable cause stage and not appealable. (Proposed subdivision (d)(3)(A).) Section 83115.5 does not provide the assigned hearing officer with authority to make legal determinations as to whether any record must be produced to the respondent if an Enforcement Division attorney objects to such production; nor is the assigned hearing officer statutorily authorized to make an order requiring production. However, if an accusation is ultimately filed, a respondent is entitled to seek an order to compel production under the APA.

Finding of probable cause without a hearing

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[6] asking the assigned hearing officer to find probable cause and order an accusation to be served on the respondent. At the June meeting, the Commission discussed certain provisions proposed by staff but did not request any changes. However, staff has further considered the regulatory changes concerning the situation where respondent either fails to request a probable cause conference or after making a request for the conference or fails to schedule it within 75 days after the Commission Assistant receives the request or the date records are sent pursuant to proposed subdivision (d)(3). Staff originally proposed that in those situations, a respondent would waive the right to further probable cause proceedings under Section 83115.5, and the waiver would automatically constitute a finding of probable cause. After further consideration, staff believes the finding of probable cause should not be automatic. Instead, the process currently in place for finding probable cause in these situations should remain the same. Therefore, staff proposes when a respondent waives his or her right to further probable cause proceedings:

> …the Enforcement Division may transmit copies of the Probable Cause Report, Request for a Finding of Probable Cause, and Order that an Accusation be Prepared to the Commission Assistant requesting that a hearing officer from the Legal Division find probable cause based on the information provided. Upon a finding of probable cause, the hearing officer will issue an Order Finding Probable Cause and serve it on all parties.

(Proposed subdivision (d)(4).)

In sum, even in those situations where no probable cause conference is held, a hearing officer from the Legal Division will still be required to find probable cause on the papers before an accusation is prepared and served on a respondent.

Extension of time for good cause

Finally, proposed subdivision (d)(5) would permit the assigned hearing officer to extend any of the time limits in proposed subdivision (d) based on good cause.

[6] 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.

Proposed Subdivision (e) – Rebuttal

Current subdivision (c)(3) permits Enforcement to submit a rebuttal to a response.[7] 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 that identifies each proposed witness and the subject of the witness's testimony. 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.

Staff also recommends a provision that would allow a party, upon a showing of good cause, to submit additional evidence after the probable cause conference. There have been instances during the discussion of an issue at a conference where a party states they have information, such as an email or document not currently in their possession, that verifies or confirms what they are stating. In these instances, staff believes it would be beneficial to allow the party, if good cause exists, to provide the supporting information to the hearing officer after the conference, but only to verify or confirm a statement made at the hearing. Allowing only evidence to verify or confirm statements made during the conference should eliminate any concerns that a party will attempt to introduce new evidence after the conference has concluded.

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)[8] authorize agencies, including the Commission, to determine whether an Administrative Law Judge will hear the case alone or together with the agency.

[7] The Enforcement Division cannot assert new allegations in a rebuttal. (See, e.g., *People v. Nunez & Satele* (2013) 57 Cal.4th 1, 30 [in a criminal trial it is improper for a prosecutor to withhold crucial evidence properly belonging in the case-in-chief and to present it in rebuttal to take unfair advantage of a defendant].)

[8] These two statutes are part of the APA, which governs Commission hearings.

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 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.

Staff originally proposed a requirement that three or more Commissioners, rather than two, vote to have any contested matter heard by the Commission itself to make it consistent with the requirement for other Commission actions. However, based on comments from Commissioners at the Commission meeting in June and the Law and Policy committee meeting in August, staff no longer proposes changes to that provision.

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 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.

Subdivision (b)

Subdivision (b)(1) of 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 and provides that the brief *may* consider addressing specified issues.

During the meeting, the Commission discussed the requirement that administrative decisionmakers are limited to consideration of the evidence in the record pursuant to Government Code section 11425.50(c) of the APA, which states "[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 light of this statutory requirement, staff believes it should be made clear that the Enforcement Division's opening brief *may only* address the specified factors in subdivision (b)(1). By limiting the issues in this way, staff also believes it would be logical to eliminate the catch-all factor in subdivision (b)(1)(E) permitting "[a]ny other issue the Enforcement Division determines to be relevant."

In addition, 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.

Proposed subdivision (b)(6) would permit any party to request oral argument before the Commission with respect to a proposed decision. The request would need to be made within 14 days of service of the Enforcement Division's opening brief, and it would be limited to evidence in the record. Although staff had originally proposed prohibiting any oral argument from the parties primarily to ensure the Commission does not inadvertently consider new evidence when making its determination about the proposed decision, the current proposal reflects direction provided to staff by the Law and Policy committee.

The proposed amendments would add subdivision (b)(7) 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.

In addition, at the June 2020 Commission meeting, the Commission requested that a prohibition against public comment also be incorporated. Government Code section 11125.7, subdivision (a), requires that state bodies provide an opportunity for members of the public to directly address the state body on each agenda item. However, that requirement is "not applicable to closed sessions held pursuant to Section 11126." (*Id*., § 11125.7, subd. (e).) Therefore, public comment with respect to a proposed decision to be considered in closed session would be prohibited.

Finally, in light of the requirement that decisionmakers are limited to consideration of the evidence in the record, subdivision (b)(7) would clarify that "the Commission shall only consider evidence in the underlying administrative record when taking any action authorized by Government Code section 11517, subdivision (c)."

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.

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.