



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION

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

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Subject: Commissioner Code of Conduct Update

Date: October 5, 2020

Legal staff presents a proposed “Commissioner Code of Conduct,” along with additional reference materials for the Commission’s review and potential adoption, subject to any amendments the Commission may wish to make. Legal staff envisions that current and future Commissioners would be provided with digital and hard copies of these materials for their reference, and any additional questions Commissioners may have could be directed to the Executive Director or General Counsel. The Code of Conduct and additional reference materials could also be posted on the FPPC’s website to provide public transparency of the Commission’s rules of conduct.

Background

At the October 18, 2019 Commission meeting, and upon the Commission’s request, Legal Division staff presented a review of Chapters 3 and 4 of the current “Commissioner Manual.” The Commissioner Manual is a document that covers a wide variety of topics relevant to the role and duties of a Commissioner, as well as the day-to-day operations of the FPPC. At the October meeting, staff highlighted that Chapters 3 and 4 of the Manual contain a mixture of express legal requirements, aspirational or “best practices” suggestions, legal interpretations and discussions, as well as strictly informational material.

Legal staff followed up on the matter at the December 19, 2019 meeting. Upon the Commission’s request, staff identified several areas of Chapters 3 and 4 requiring revision. The Commission approved several motions adopting language, or directing staff to produce language, addressing several aspects of the Commissioner Manual that staff proposed revising. At that same meeting, the Commission voted to repeal existing “Governance Regulations,” which had also been included in the Commissioner Manual as Chapter 2. Instead, the Commission adopted the substance of the regulations, with amendments, as internal rules. In discussing the proposed repeal of the regulations and adoption as internal policies, Commissioner Cardenas noted a desire, with respect to his review of Chapters 2, 3, and 4 of the Commissioner Manual, to “once and for all, we can just . . . have this book, that we can turn to and say, ‘there it is, we understand its genesis, we voted for it, this is the way that we conduct ourselves, now let’s get on with the People’s business.’” (December 19, 2019 Commission Meeting, at 1:41:25.)

At the February 20, 2020 Commission meeting, staff produced the language requested during the December 2019 Commission meeting and indicated an intent to incorporate the language into a comprehensive Commissioner Code of Conduct that would consolidate the contents of Chapters 3 and 4 of the Commissioner Manual and “provide all the rules that apply to Commissioner conduct.” Staff now presents this Code of Conduct, along with additional materials, for the Commission’s review and adoption.

The Commissioner Code of Conduct

With the above background in mind, staff drafted the Commissioner Code of Conduct to clearly distinguish between express legal requirements, legal interpretations, legal analysis, and best practices.

To that end, the sources of the various provisions are identified and each statute or regulation referenced in the Code of Conduct has a hyperlink to a copy of that statute or regulation, so that Commissioners may more easily reference the source material.

I. Governance

The first section of the Commissioner Code of Conduct is taken from the Governance Policy adopted by the Commission in December 2019. The Governance Policy itself has been incorporated in a standalone document that will be provided separately to Commissioners, rather than including it as a chapter of the Code of Conduct, as was done with the Commissioner Manual. In general, the Governance Policy lays out the authority and duties of the Commission, Chair, and Executive Director, as well as the FPPC budget process. Given that the majority of the Governance Policy does not pertain to how Commissioners should conduct themselves, only this excerpt on that topic is included in the Code of Conduct.

The language included here is the same language adopted by the Commission in December 2019, with two exceptions. First, the Governance Policy, as adopted in December, currently includes a reference to Commissioners complying with “the Statement of Incompatible Activities” (former Chapter 4 of the Commissioner Manual). For reasons discussed in the section below, staff proposes removing the “Statement of Incompatible Activities” section (while keeping most of its substantive content), and replacing the reference to it with language requiring Commissioners comply with “the Governance Policy and those policies included in the Commissioner Code of Conduct.”

Second, during the December 2019 Commission meeting, Commissioner Cardenas expressed an interest in re-incorporating language that was formerly included in, but apparently at some point removed from, the Commission’s governance principles. That language required that Commissioners “[a]t all times meet high ethical standards that exceed legal minimums, including refraining from activities that suggest partisanship or other bias by the Commission or individual Commissioners.” Staff has included that language in this version of the Governance Policy for the Commission’s consideration.

II. Political Activities

Section 83105 of the Act places various restrictions on the political activities Commissioners may permissibly engage in. Section 83105 was featured in both Chapters 3 and 4 of the Commissioner Manual, but much of the content related to Section 83105 either lacked clarity or necessity. In some cases, the commentary on Section 83105 essentially restated what is already clearly required under Section 83105. In other instances, it was unclear, for instance, whether the Commission was intending to adopt policies formally interpreting Section 83105 to prohibit certain content, or whether refraining from certain political activities was merely recommended as “best practices.” Much of this unclear content was found in Chapter 4 of the Commissioner Manual, titled “Statement of Incompatible Activities for Commissioners.”

In drafting the Code of Conduct, staff has proposed removing the “Statement of Incompatible Activities” title, because “Statement of Incompatible Activities” is a term of art, referring to an official document created by an appointing power for employees under its jurisdiction, and approved by CalHR. (See Section 19990.)

In consolidating the content of Chapters 3 and 4 pertaining to political activities, staff has thus far only included a description of the conduct expressly prohibited by Section 83105, and has also noted the Commission’s policy, re-adopted in December of 2019, interpreting Section 83105 to prohibit contributions to and participation in federal elections involving candidates on the ballot in California. The Commissioner Manual’s “Statement of Incompatible Activities” contained more extensive content related to political activities but, as explained above, the Manual prefaced the section by stating, “[i]n accordance with Government Code Section 83105, it is the *policy* of the Commission that commissioners *should not* participate in the following activities” (Emphases added.) Consequently, in drafting a Commissioner Code of Conduct that aims to more clearly lay out for Commissioners precisely what is required of them, staff has revised the language in this section to differentiate between clear prohibitions under Section 83105, Commission-adopted interpretation of Section 83105, and recommended best practices.

III. Statement of Economic Interests

This section contains information on Commissioners’ statutorily required disclosure of economic interests (via Form 700s). Similar information was included in Chapter 3, Section B of the Commissioner Manual, but the section has been reorganized and expanded to include more detail. A link to the FPPC’s Form 700 training and outreach webpage has also been included for the sake of providing Commissioners with an easily accessible source of additional information.

IV. Gifts

This section pertains to gifts carries over much of the same information included in Chapters 3 and 4 of the Commissioner Manual, though language has been changed to more closely reflect the actual language of the applicable statutes. Additionally, Chapter 4 included several exceptions to the general gift prohibitions, but was worded in such a way as to suggest the exceptions were Commission policies, rather than exceptions in place under the Act and

FPPC regulations. As with the Commissioner Manual, staff has included a link to the FPPC’s fact sheet on gifts and gift exceptions, which provides greater detail on the subject.

V. *Honoraria and Travel*

Similarly, the Code of Conduct’s section on honoraria and travel is similar to the Commissioner Manual’s, though language has been changed to more closely reflect the language of the applicable statutes. Additionally, staff has included a policy adopted by the Commission at the December 19, 2019 Commission meeting.

VI. *Conflicts of Interest*

This section provides general information related to conflict of interest rules. Chapter 3, Section F of the Commissioner Manual only briefly addressed conflicts of interest, essentially just informing Commissioners that the Political Reform Act’s conflict of interest provisions also apply to them. The Code of Conduct includes additional details regarding the main conflict of interest prohibition under the Act, and provides links to additional resources. Staff also included a text box recommending Commissioners consult with the General Counsel and inform the Chair and Executive Director if a conflict of interest exists or the Commissioner otherwise decides not to take part in an agenda item.

VII. *Ethics Training*

This section carries over the content of Chapter 3, Section G of the Commissioner Manual, with minor updates to the language. The Commissioner Manual asked Commissioners to “Please keep a written record of the date of your compliance.” However, under the applicable statute, the onus with respect to recordkeeping is on the agency, rather than the individual. Accordingly, staff updated the section to request that Commissioners forward a copy of their training certificate to the Commission Assistant.

VIII. *Ex Parte Communications in Enforcement Proceedings*

This section addresses the topic of ex parte communications in the context of enforcement proceedings. The Commissioner Manual addressed the subject of ex parte communications, but it was not always clear whether the Manual’s instructions were reflective of express statutory requirements, Commission policies, or recommended “best practices.” Accordingly, staff has included the express language of relevant statutes in the APA, with slight modifications to the statutory language for the sake of clarifying the statutes’ application in the specific context of FPPC enforcement proceedings.

The Commissioner Manual’s section on ex parte communications also included two pages of hypotheticals illustrating different applications of the ex parte communication requirements. Staff did not include these hypotheticals in the Commissioner Code of Conduct for several reasons. In part, the hypotheticals seemed unnecessary, given that the express language of the statutes included in the section are easier to understand and apply than what was formerly contained in the Commissioner Manual. Additionally, the inclusion of illustrations for only one section of the Code of Conduct seemed inconsistent with the general goal of clearly

distinguishing legal requirements from legal advice. Staff has instead general “best practices” advice in this section, along with another recommendation that Commissioners consult with the General Counsel regarding any additional questions.

IX. Additional Commission Policies

a. Ex Parte Communications Outside the Context of Enforcement Proceedings

This section includes the policy language requested by the Commission at the December 2019 Commission meeting and reviewed at the February 2020 Commission meeting. This policy replaces ambiguous language and legal analysis formerly contained in the Commissioner Manual.

b. Cell Phones and Similar Electronics

Similarly, this section also includes policy language requested by the Commission at the December 2019 Commission meeting and reviewed at the February 2020 Commission meeting.

c. Use of Non-FPPC-Issued Electronics and Email Addresses

This section also includes policy language requested by the Commission at the December 2019 Commission meeting and reviewed at the February 2020 Commission meeting.

d. Misuse of Position

This section is carried over from Chapter 4 of the Commissioner Manual, the “Statement of Incompatible Activities.” The version found in the Commissioner Manual included examples of activities that Commissioners “should not” do. Legal staff believes this section would be advisable to include as a Commission policy, but with the language revised to state that Commissioners “may not” take part in activities that would be considered a misuse of position. The version found in the Commissioner Manual also included, as an example of improper activities, “[u]sing the commission's postage or stamping facilities even though the Commission is reimbursed before or after such use.” It appears this was included as boilerplate language, as other state agencies have included in their properly adopted Statements of Incompatible Activities. The FPPC’s own Statement of Incompatible Activities (applying to FPPC officers and employees) does not include this language, and it seems irrelevant to Commissioners, so it has been removed.

e. Time Sheets

This section also includes policy language requested by the Commission at the December 2019 Commission meeting and reviewed at the February 2020 Commission meeting.

Additional Materials

In adopting a Code of Conduct that would replace the Commissioner Manual, staff did not want Commissioners to lose the helpful information contained in the other chapters of the Commission Manual. Staff has provided several additional documents as reference materials for Commissioners in conducting their official duties. These additional documents are:

1. Governance Policy

The governance policies included in this document are those adopted by the Commission at the December 2019 Commission meeting. The only changes that have been made, which have not yet been approved by the Commission, are:

- Updating references to the policies as “regulations” to “Governance Policy;”
- Making minor stylistic changes, such as changing “transparence” to “transparency;”
- The aforementioned replacement of a reference to the “Statement of Incompatible Activities”;
- Fixing typos, such as changing “discipline of dismissal” to “discipline or dismissal;” and
- The aforementioned inclusion of the provision requiring Commissioners to “[a]t all times meet high ethical standards that exceed legal minimums”

In conjunction with considering the Code of Conduct, staff also recommends adopting this updated version of the Governance Policy.

2. Commissioner Reference Material – An Overview of the FPPC

This document contains much of the informational material included in Commissioner Manual Chapters 1 (“Overview”), 5 (“Commission Meetings”), 8 (“Commission Staff and Overview of Division Functions”), 9 (“Fees and Expenses”), and 10 (“Commissioner’s Leaving Office Checklist”). This document re-organizes and consolidates this material, particularly with respect to details on Commission meetings, and incorporates minor updates for greater accuracy, clarity, and detail.

3. Commissioner Reference Material – Additional Resources

This document includes additional helpful, informative material for the Commissioners’ review. Staff has included links to the Bagley-Keene Open Meeting Act, as well as the Attorney General’s “Handy Guide” to Bagley-Keene, replacing the Commissioner Manual’s “primer” material on Bagley-Keene. Legal staff believes this is preferable, given that the Attorney General is responsible for enforcing Bagley-Keene and the AG’s “Handy Guide” is more extensive in its discussion of Bagley-Keene than the Commissioner Manual’s material. Given the importance of Bagley-Keene and the frequency with which its provisions are applicable to the operations of the FPPC, staff believes Commissioners referencing the more detailed guide is preferable. As noted in the document, Commissioners’ questions regarding Bagley-Keene can also be directed to the General Counsel.

Similarly, while the Commissioner Manual contained a chapter on enforcement proceedings, staff has replaced this with a link to the FPPC’s “Enforcement Material” webpage, which includes the periodically updated Enforcement Division Manual. This is intended to avoid situations in which the informational material the Commission is referencing differs from the Enforcement Division Manual or becomes out of date as a result of updated regulations.

Additional resources include links to materials on conflicts of interests, fact sheets (covering topics such as gifts and travel, as well as Form 700 disclosures), an organizational chart, and pending legislation.

4. Commissioner Reference Material – History of the Political Reform Act

This document preserves Appendix B of the Commissioner Manual with minor updates to the language, as well as a new section on the Disclose Act.

Because the material contained in the above “Commissioner Reference Material” documents is generally for the purpose of providing an informal resource for Commissioners on broad topics, and is not intended to impose any requirements regarding Commissioner conduct, staff believes it would be efficient if staff were able to review these documents on a periodic basis and make any necessary changes to more accurately reflect the most up-to-date information on a given subject, then send Commissioners an updated copy with an explanation of any changes.

Conclusion

Staff believes that the Commissioner Code of Conduct improves upon the Commissioner Manual by clearly informing Commissioners of what is required of them and the basis on which it is required. The Code of Conduct presents material in a more matter-of-fact way, with minimal commentary, and provides Commissioners with additional resources they may consult if they wish to explore certain subjects more in-depth. It also consolidates material included in the Commissioner Manual that was duplicative or otherwise unnecessary. Additionally, the Governance Policy and Commissioner Reference Materials generally preserve and expand on the rest of the content contained in the Commissioner Manual. Accordingly, staff recommends the Commission adopt these materials, but is also prepared to incorporate additional revisions to these documents per the Commission’s request.

Attachments

- A. Commissioner Code of Conduct**
- B. FPPC Governance Policy**
- C. Commissioner Reference Material – An Overview of the FPPC**
- D. Commissioner Reference Material – Additional Resources**
- E. Commissioner Reference Material – History of the Political Reform Act**