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

From: Galena West, Executive Director
Angela Brereton, Chief of Enforcement

Subject: Adoption of Proposed Amendments to the Enforcement Division's Streamline and Warning Letter Programs (Regulations 18360.1 and 18360.2) and New Tier Two Streamline Program (Regulation 18360.3)

Date: January 11, 2020

Requested Action and Summary of Proposal

As proposed, Regulations 18360.1, 18360.2 and 18360.3 will expand and adjust the Commission's Streamline Settlement and Warning Letter Programs. These changes are in response to the Commission's request when it approved the new program at the January 17, 2019 Commission Meeting that the Enforcement Division reevaluate the Streamline Program after it had been in effect about a year. Since the adoption of the current program through June 2020, the Enforcement Chief has approved approximately 329 Streamline cases. In contrast, the Commission has been presented approximately 113 mainline stipulations (not including defaults) during this time, which is about 34% of all cases. Prior to that time, the percentage of mainline cases presented to the Commission under the previous program was 23%. The increase in the percentage of cases can be attributed to certain criteria being stricter than the previous program. Instead of loosening these criteria, staff instead recommends the Commission adopt a second tier to the Streamline Program to capture this activity with some minor changes to the existing program. This second-tier idea was presented at the May, October and December 2020 Law and Policy Committee meetings as well as at the July 24, 2020 Commission meeting and received support.

More broadly, the Commission has expressed its policy preferences that enforcement resources be primarily directed at the most serious and complex violations of the Political Reform Act, and lower-level violations of the Act, including unintentional violations by first-time candidates/committees, generally be handled through the Streamline and/or Warning Letter Programs. The Commission has also expressed its interest in creating a "diversion" program through its Education and Outreach Division that would allow certain types of low-level violations to be resolved by a respondent participating in educational programs designed to improve compliance in the future. The changes proposed by staff are intended to further these policy preferences expressed by the Commission.

Background and Current Law

The Commission's Streamline Program was established for the Enforcement Division's prosecution of violations with limited public harm. A staff memorandum dated May 11, 2015

outlined the initial parameters of Enforcement's Streamline Program. A large percentage of cases before the Commission were resolved through that program. In 2018, 77% of all cases presented to the Commission were resolved through the program.

In January 2019, the Commission approved regulations codifying the Streamline Program. Violation types that can qualify for the streamline program currently include:

- Statement of Economic Interests Non-Filer
- Statement of Economic Interests Non-Reporter
- Campaign Statement/Report Non-Filer
- Campaign Statement/Report Non-Reporter
- Lobbyist/Lobbying Firm/Lobbyist Employer/Lobbying Coalition/$5,000-Filer Report Non-Filer
- Unreported Lobbying Activity
- Cash Contributions or Expenditures of $100 or more
- Campaign Bank Account
- Committee Naming
- Advertising and Mass Mailing Disclosures
- Recordkeeping
- Gift Limit
- Slate Mailer Organization Filing Issues
- Proper Recusal of a Conflict of Interest
- Major Donor Notification

The Enforcement Division has discretion to include or exclude any case from the program based upon mitigating and aggravating circumstances. If mitigating circumstances exist, a case will result in a warning letter rather than a fine. If aggravating circumstances exist, the case is handled through the standard administrative process (i.e. Mainline). Penalties in streamline cases start at $100 - $200 and can increase based on the amount of activity not properly reported in the case, and the efforts required to gain compliance and resolve a case.

Proposed Changes

1. New Violation Categories.

Staff proposes two additional categories be added to the existing Streamline Program structure to increase efficiency and maintain consistency in those areas. Those categories of minor violations that would be added to the Streamline Program include:

- Major Donor Filers
- Behested Payment Reports

The proposed regulations place major donor filers in their own category, which is consistent with their prior treatment in previous iterations of the program. The last two

amendments to the program attempted to add major donor filers into the category of campaign late filers but staff has found that since these filers have unique characteristics they have not fit well into the existing criteria and need their own category. Criteria that is unique to major donor filers includes: (1) their committees are terminated automatically every year, (2) they could have received no notification of the California filing requirements but still have qualified under the Political Reform Act, and (3) one contribution can sometimes cause them to miss two reports and statements, which may exclude them from the current Streamline Program.

Major Donor Committees who made contributions of $50,000 or less will be eligible to participate in Tier One and Major Donor Committees who made contributions of more than $50,000 and less than $150,000 (with less than three statements or reports filed late) will be eligible to participate in Tier Two. Major Donor Committees who made contributions that also required 24-Hour Reports to be filed within the last 16 days before the relevant election and the recipient of the contribution did not file a 24-Hour Report before the relevant election will be excluded from participation in either program.

The second category staff proposes to add is for behested payment reports. Staff has found that these cases are on the increase and should be eligible for the Streamline Program. Characteristics that make this category appropriate for streamline include: these reports are disclosing items that are not contributions, expenditures or gifts, and multiple factors, like difficulty receiving information, number of public officials involved in the behest and timing issues, cause these violations to be appropriate for the Streamline Program where these criteria can be evaluated consistently and made public.

A behestor will be excluded from Tier One if the amount reported late was $50,000 or more for a single behested payment report, or the amount required to be reported, when divided by the number of public officials participating in the behest, was $50,000 or more. A behestor will be excluded from Tier Two if the amount to be reported on the behested payment report exceeded $150,000, or the amount required to be reported, when divided by the number of public officials participating in the behest, was $150,000 or more.

Suggestions included from discussions during Law & Policy meetings led to the addition of specificity regarding who the criteria applies to and for what period of time, including if the maker of the payment is a named party in, or the subject of, a governmental decision before the behestor or the behestor's agency while the decision is pending and within three months before and for three months following the date a final decision is rendered, the behestor is prohibited from participating in either tier. "Maker" includes the individual, the entity and any agent acting as an intermediary. For governmental decisions regarding legislation, the regulation now specifies that "governmental decision" includes only nongeneral legislation as defined in Section 87102.6. If there is a "perceived personal benefit" then the matter is excluded from eligibility to receive a Warning Letter or participate in either Streamline Program. A "perceived personal benefit" is defined as the Enforcement Chief believes the evidence sufficiently supports a reasonable belief or strong suspicion that the official received a benefit, which includes evidence of a direct benefit to a family member of the official.

2. Changes to Existing Rules

Staff proposes only a few changes to the existing rules. Staff has found through the analysis of the nearly 600 cases that have been processed through both the Mainline and Streamline Programs since the adoption in January 2019 that a few of the criteria are problematic. The first is the bottom portion of the population requirement numbers. Some cases concern only activity on a post-election semiannual statement but since the limit for the population is low, the case will most likely only qualify for a Mainline stipulation. Specific examples of Mainline cases include:

- A filer from Gardena – population 58,829 - had $11,000 of activity on a statement but the population threshold was $8,200.
- A filer from Lake County – population of 64,665 – activity threshold $11,700 – activity reported $12,100.
- A filer from San Anselmo – population of 12,336 – activity threshold $5,700 – activity reported $5,900.
- And a filer from Modoc County – population of 9,329 – activity threshold $4,000 – activity reported $4,700.

Staff recommends that these bottom threshold groups be consolidated to a consistent number that would capture more activity in these jurisdictions. The criteria used to exclude cases by population of jurisdiction is proposed to be modified to return to the thresholds more similar to prior thresholds that worked successfully in the past since approximately 90% of jurisdictions had their eligibility thresholds greatly reduced.

Additionally, staff would recommend a single number for special district candidates whose districts have not provided their population numbers in place of them being excluded from the program. Only about a quarter of the districts contacted have responded and the California Special Districts Association and others from the special districts have said that many of the special districts do not have these numbers available because they serve areas that cross borders. The proposal by staff would still allow for the information to be used if available but sets a default threshold otherwise.

Third, staff recommends lowering the lobbying report thresholds so that tier one encompassed only the lower activity, as intended, and the second tier can encompass the more extensive activity with threshold limits. This would cause Tier One to be limited to $50,000 in lobbying activity and Tier Two to top out at $100,000. Currently, Tier One is capped at $100,000 of lobbying activity.

Next on the topic of thresholds, staff recommends removal of the percentage thresholds for campaign nonreporting but leaving in the criteria for cash contributions and expenditures, and campaign bank account violations. Staff has found that excluding high percentages of both cash contributions and campaign bank account violations is proper because of the public harm. However, for campaign nonreporting, the 20% thresholds have a disproportionate effect on

smaller committees. For instance, a candidate for county board of education failed to timely disclose more than 20% of the total contributions or expenditures for the reporting period but amended immediately after Enforcement contact and before the election but because of the 20% threshold, did not qualify for the Streamline Program.

Staff has found that the percentages added to the penalty regulation (Regulation 18360.2) have caused more confusion than assistance. The increase in the percentages has caused complicated computations for staff and has become more of a penalty for not participating in the process as opposed to the equalizer it was meant to be. The purpose of the percentages attached to the base penalty was to account for the difference between the larger amounts and smaller amounts charged. And it still does that with the 1% additional penalty for most contributions and expenditures, which increases to 3% if no disclosure within 7 days of the election. However, these percentages continue to increase as the process goes on, causing the confusion. This percentage penalty was not intended to act as an additional penalty for non-participation or lack of cooperativeness in the process. Staff proposes keeping the percentages the same as the process continues, instead of the incremental increase and leaving the base fine to increase appropriately.

Finally, the changes clarify some of the advertisement standards that staff has struggled to interpret consistently since the program went into effect. Staff asks that changes be made to emphasize the importance of having the correct committee name on the advertisement and explaining what is meant by the term "missing or incorrect disclosure" used in the Streamline Program. The advertising rules are also suggested to be clarified to specify that top contributor information is only included when it is incorrect (not missing) for Tier One. And for Tier Two, the regulation has been modified to address the concerns that two missing or wrong top contributors could still qualify for streamline.

3. Addition of a Second Tier

Instead of making significant changes to the existing program to accommodate the cases increasingly pushed into the Mainline Program, staff proposes fixing the minor issues addressed above and adding a second level to the existing program. The changes would capture cases currently bound for mainline where the violations are not unique or intentional, and do not result in public harm such that the Commission and the public would require a full briefing of the details. Staff believes the current program works well to capture activity with very minimal public harm and the changes detailed above would help solidify that process but that a second step is needed.

Cases will still be excluded from <u>both</u> Streamline Programs if there is evidence of:
(i) Intent to violate or conceal a violation of the Act or regulations relating to the Act.
(ii) Respondent presenting false or altered evidence to the FPPC.
(iii) Making false statements to the FPPC regarding material facts.
(iv) Intentional interference with a witness in the FPPC matter.
(v) Public harm in the aggregate that is more than minimal.
(vi) Other violations under review for prosecution that do not qualify for a streamline penalty.

Tier Two would offer the Commission, staff and the public a way to expedite more cases so that case closure rates can rise and resolutions can be achieved sooner for cases where intentional behavior is not found, and although the activity is more significant, the filer has more experience with the Act, or a prior prosecution, the facts and violations do not justify a Mainline Penalty with a stipulation containing extraneous details. Tier Two will have higher penalties than Tier One but will be presented in a more efficient and effective format to move the cases more quickly.

4. Penalties.

To maintain equity while applying the two Streamline Programs in place of a Mainline prosecution, Staff recommends that a section be added to the beginning of Regulation 18360.2 to state:

"The Enforcement Division has the discretion to exclude violations that caused minimal public harm when the total penalty meets or exceeds the total amount raised or spent by the filer, the total penalty exceeds the amount that would be paid in a Mainline Stipulation, respondent's lack of experience or knowledge of the Act's requirements caused multiple violations with minimal public harm that were corrected upon contact, or the committee raised and spent less than $10,000."

This would provide some much-needed discretion when prosecuting very small committees, filers with a low level of experience and sophistication, inexperienced candidates, and other criteria that the Commission has identified as important to consider when prosecuting under the Act. Staff believes the language is sufficiently narrow to apply to only the small, inexperienced actor dipping their toe into the realm of the Political Reform Act. This proposed change will allow for some discretion within the rigid criteria where a case is excluded from the Streamline and Warning Letter Program if a specific criterion is met even when the overall evaluation of the case justifies a lesser treatment than a Mainline Stipulation. For instance, if a first-time filer has amended to fix their filings before the election, they will not be considered for a warning letter or streamline penalty if they exceed the population threshold for that reporting period.

5. Education Division Program

Language has been added to allow for an education diversion program to be developed as an option for enforcement in the future. This program will be able to be implemented by policy once resources are in place to start the program. This program is anticipated to apply to first-time, inexperienced parties who attempted to comply in good faith and were unfamiliar with the filing requirements but were cooperative with the Enforcement Division when contacted. The specific language added to the introduction in Regulation 18360.1 is:

"The Commission will develop a diversion program as soon as feasible to allow of education of respondents who have little or no experience with the Political Reform Act and commit minor violations, in lieu of monetary penalties."

Conclusion

Staff after reviewing the current Streamline Program at the Commission's request, recommends adoption of the proposed amendments to Regulations 18360.1, 18360.2 and 18360.3 to continue to meet the Commission goal of enforcement resources be primarily directed at the most serious and complex violations of the Political Reform Act.

Attachments:
Proposed Amended Regulation 18360.1
Proposed Amended Regulation 18360.2
Proposed New Regulation 18360.3