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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel

Subject: Complaints against Commission Members

Date: April 8, 2022

Summary

Members of the Fair Political Practices Commission (Commission), including the chair, are subject to the Political Reform Act (Act)¹ like all other state and local officers, and persons participating in regulated political activity. As a result, Commission members can be accused of violating the Act. Such allegations should be investigated and can result in legal action if there is reason to believe a violation occurred. The issue before the Commission is who should handle complaints against a Commission member.

While the Commission is primarily responsible for enforcing the Act, allegations against a member of the Commission create potential for conflicts of interests and other ethical issues if the complaints are addressed by the Commission, or its staff. To avoid conflicts and preserve the integrity of the Act and the Commission, staff recommends adopting a regulation requiring that any complaint filed with the Enforcement Division alleging a member of the Commission violated the Act be referred to the Office of the Attorney General (AG's Office) for investigation and resolution. In referring the case, the Commission would defer to the concurrent jurisdiction of the AG's Office for resolution of the complaint.

Legal Background

A stated purpose of the Act is that "(a)adequate enforcement mechanisms should be provided to public officials and private citizens in order that this title will be vigorously enforced."² Consequently, the Act provides multiple avenues for enforcement of its provisions. Nearly all violations of the Act can be pursued through administrative or civil action.³ Further, if a person knowingly or willfully violates the Act, they can also be subject to criminal prosecution.⁴

The Act also empowers various government agencies, as well as private citizens, to bring legal action alleging violations of the Act. The Commission investigates and prosecutes most

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code. The regulations of the FPPC are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to this source.

² Section 81002(f).

³ Sections 89520, 89521, 91004, 91005, and 91005.5.

⁴ Section 91000.

cases involving alleged violations of the Act via administrative proceedings. The Commission has sole authority to bring administrative proceedings for alleged violations of the Act.⁵ For civil court actions involving violations of the Act, the Commission shares jurisdiction with local district attorneys, city attorneys, and the AG's Office, depending on who is alleged to have violated the Act. Specifically, the Commission is the "civil prosecutor" for cases involving any state agency, except itself. The AG's Office is the civil prosecutor for alleged violations of the Act involving the Commission, including its members.⁶ Local district attorneys, and in some circumstances city attorneys, are the civil prosecutor for offices within their respective jurisdictions.⁷ Also, private citizens can bring civil actions for violations of the Act in the event a designated civil prosecutor fails to pursue a case upon notice of an alleged violation.⁸ Criminal proceedings under the Act can only be initiated by local district attorneys or the AG's Office. The AG's Office has jurisdiction over criminal violations of the Act for state agencies.⁹

While the Act does not explicitly provide for referral of complaints to other agencies, such authority exists as the result of the concurrent jurisdiction provided under the Act. The Enforcement Division occasionally refers complaints to other agencies in instances when doing so would be preferable for obtaining adequate resolution of the complaint, or where the other agency expresses an interest in pursuing a particular complaint. For example, the Enforcement Division may refer a complaint involving intentional and serious violations of the Act to the AG's Office or a district attorney's office for criminal prosecution.

While various agencies and individuals have the authority to bring legal action under the Act, if one agency, or person, pursues a case involving violations of the Act, it typically prevents others from bringing action for the same violation. Specifically, only one civil judgment can be obtained for a particular violation of the Act¹⁰ and an administrative order by the Commission will preclude subsequent civil actions for the same violation.¹¹

Analysis

Legal and ethical concerns with complaints against Commission members

If the Commission were to pursue a complaint alleging a member of the Commission violated the Act, it would create the possibility of a conflict of interest violation under Section 87100 if the member alleged to have violated the Act participated in or attempted to influence a decision concerning the complaint. Under the Act, an official has a financial interest in a decision and may not make, take part in making, or use the position to influence the decision if it is reasonably foreseeable the decision will have a material effect on the official or the official's immediate family.¹² A reasonably foreseeable financial effect on an official's personal finances is material if the decision may result in the official or the official's immediate family member

⁵ Sections 83116 and 83116.5.

⁶ Sections 91001(b).

⁷ Sections 91001(b) and 91001.5.

⁸ Section 91007.

⁹ Section 91001(a).

¹⁰ Section 91008.

¹¹ Section 91008.5.

¹² Section 87100.

receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision.¹³ As a result, the imposition of a monetary penalty in an enforcement matter against a Commission member could result in a conflict of interest violation.

Similarly, Section 1090 prohibits a Commission member from having a financial interest in any contract entered into by the Commission. To determine whether a decision involves a contract, one should refer to general contract principles.¹⁴ However, the provisions of Section 1090 may not be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose.¹⁵ Accordingly, the prohibition of Section 1090 likely extends to the settlement of a Commission enforcement action against a Commission member. Moreover, unlike the Act, recusal is not sufficient under Section 1090 if the disqualified official is a member of a decision-making board. Absent an applicable exception, the Commission, as a whole, is not permitted to enter into a contract in which a sitting member has a financial interest.

Additionally, a Commission enforcement proceeding concerning a Commission member could create the potential for a common law conflict of interest. The common law conflict of interest doctrine requires a public officer “to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.”¹⁶ Similarly, the state’s Code of Ethics prohibits elected and appointed officers from participating in decisions that will have a direct monetary effect on them.¹⁷ The Commission handling a complaint against a Commission member creates obvious risk of violating these provisions.

Beyond specific legal requirements, the Commission strives “to meet high ethical standards that exceed legal minimums...”¹⁸ The actual or even apparent impropriety of internally addressing a complaint against a Commission member is inconsistent with the Commission’s high ethical standard for the conduct of the Commission and the agency.

Options for addressing complaints alleging violations of the Act

By designating the AG’s Office as the civil prosecutor for violations of the Act by a member of the Commission,¹⁹ the Act recognizes the inherent conflict created by an enforcement action against a Commission member carried out by the Commission, or its staff. The apparent intent in including this provision in the Act was to place the authority to investigate and prosecute alleged violations of the Act by a Commission member in the hands of a neutral party. Consistent with this intent, the proposed regulation would explicitly require Commission staff to refer a complaint against a Commission member to the AG’s Office thereby deferring to the concurrent jurisdiction of the AG’s Office.

¹³ Regulation 18702.5(a).

¹⁴ See 89 Ops.Cal.Atty.Gen. 258, 260 (2006); 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).

¹⁵ See *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1333; *People v. Honig* (1996) 48 Cal.App.4th 289, 314; see also *People v. Gnass* (2002) 101 Cal.App.4th 1271.

¹⁶ *Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.

¹⁷ Section 8920.

¹⁸ FPPC Governance Policy, sec. II(c)(7) (Adopted December 19, 2019).

¹⁹ See Section 91001(b).

This proposed regulation would forego an administrative prosecution of a Commission member. However, as detailed above, the Act provides considerable overlapping prosecutorial authority in multiple venues by multiple parties. So while referring allegations of a violation of the Act by a Commissioner to the AG's Office would not allow for an administrative adjudication, civil and criminal prosecution would remain possible in the event of a violation of the Act. These avenues would be adequate to address alleged violations of the Act.

Conclusion

Consistent with Section 91001 designating the AG's Office as the civil and criminal prosecutor for alleged violations of the Act by a Commission member, the proposed regulation would require Commission staff to refer a complaint alleging a current Commission member violated the Act to the AG's Office. While staff currently can refer complaints to the AG's Office for resolution, the proposed regulation would provide clear guidance on handling complaints against Commission members. The proposed regulation would uphold the Commission's high ethical standards and avoid the possibility of conflicts of interest for Commission members by placing the authority to address complaints against Commission members with a neutral party.