



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Silver, Commissioners Baker, Ortiz, Wilson, and Wood

From: Dave Bainbridge, General Counsel, Legal Division
Jack Woodside, Senior Counsel, Legal Division

Subject: Prenotice Discussion of Proposed Amendments to: Regulations 18991, 18993 & 18994¹

Date: June 3, 2024

Executive Summary

Staff submits draft language for prenotice discussion regarding amendments to Regulations 18991, 18993 and 18994. To avoid duplicative audits, former Regulation 18996 contained a provision in subdivision (d) that provided the Fair Political Practices Commission (the “Commission”) with the authority to exclude from random selection under Regulation 18991(c) those jurisdictions that were already subject to audit by a local agency or the Commission. However, after the legislature codified the provisions of Regulation 18996, with the exception of subdivision (d), the Commission appeared to have inadvertently repealed the entire regulation. The proposed amendment to Regulation 18991 would therefore restore the provision in former 18996(d).

Regulation 18993 defines the term “contain in detail” as that term is used in Section 90004(c), which addresses the findings in reports of the Franchise Tax Board (the “FTB”) with respect to the accuracy and completeness of each report and statement the FTB reviews. Regulation 18994 governs the standards and procedures to be used by the FTB in conducting audits and investigations under Section 90000, et seq. The proposed amendments to Regulations 18993 and 18994 would clarify that these provisions also apply to audits performed and reports prepared by the Commission.

The final versions of the proposed regulations are not up for consideration at this meeting. The proposed language for these regulations is intended to facilitate discussion, and to allow the Commission to provide guidance and instruction to staff prior to presenting the regulations for approval at a subsequent Commission meeting. These regulations will be presented to the Commission for adoption on or after August 15, 2024, the scheduled date of the Commission’s August meeting.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Background and Reasons for Proposed Regulatory Action

In 1974, California voters passed an initiative, Proposition 9, that created the Commission and codified significant restrictions and prohibitions on candidates, officeholders, and lobbyists. As part of its regulation of campaigns and lobbying, the Political Reform Act (the “Act”) requires candidates, political committees, and lobbyists to prepare periodic statements and reports disclosing their activities. The Act also requires routine mandatory audits and investigations of campaign statements and reports and lobbying firms, lobbyist employers, and lobbyists, and sets forth those who are subject to audits and investigations. (Section 90001.)

In particular, Section 90000 requires the FTB to perform audits and investigations of local candidates and their controlled committees selected for audit pursuant to Section 90001(i)(1), which directs the Commission to adopt regulations providing the method of selection. Regulation 18991, which sets forth the method of selection, requires the Commission to select 20 local jurisdictions and, in turn, local candidates and their controlled committees within those jurisdictions to be audited. (Regulation 18991(c).) Because some jurisdictions are already subject to audit by a local agency or the Commission itself, former Regulation 18996 was amended in 2015 to provide the Commission with the authority to exclude those jurisdictions from the selection process under Regulation 18991(c) in order to avoid duplicative audits. (Former Regulation 18996(d).) However, in 2020, after the legislature codified all of the provisions in Regulation 18996,² with the exception of subdivision (d), the Commission repealed the regulation in its entirety.

Because the Commission appears to have inadvertently repealed 18996(d),³ the proposed amendment to Regulation 18991 would restore the former provision to provide the Commission with the authority to exclude jurisdictions that are already subject to audit by a local agency or the Commission itself from the random selection process to avoid duplicative audits.

The Commission shares responsibilities for performing audits under the Act with the FTB. While a majority of the audits required under the Act are conducted by the FTB (Section 90000), the Act requires the Commission to conduct audits of candidates for Controller and members of the Board of Equalization, and of committees supporting these candidates due to potential conflicts of interest for the FTB.⁴ (Section 90006.) In addition, the Act authorizes both the FTB and the Commission to conduct discretionary audits and investigations of any reports or statements required by the Act (Section 90003) and preselection audits (Section 90008).

² The provisions are now located in Section 90002.

³ AB 902, which was enacted in 2019, codified several Commission regulations, including Regulation 18996. In light of AB 902, a 2020 Memorandum to the Commission recommended, among other things, repeal of several regulations, stating “[b]ecause AB 902 codified the provisions of these regulations in their entirety, staff recommends repealing these regulations to avoid redundancy.”

⁴ This arrangement protects against an appearance that the Controller and the Chair of the BOE, who are members of the FTB, could improperly seek to influence those audits.

Because the Commission’s Audits and Assistance Division (“Audits Division”) has historically performed mandatory audits consistent with the guidelines, standards, scope, and reporting requirements employed by the FTB, the Commission adopted Regulation 18998 in 2019 to codify this long-standing practice. Pursuant to Regulation 18998, the Audits Division is required to apply the same “auditing guidelines, standards, and scope when performing audits pursuant to Section 90006 as the Franchise Tax Board when performing audits pursuant to Section 90001,”⁵ and to prepare audit reports consistent with the requirements in Section 90004 and Regulation 18995. (Regulation 18998(a).)

There are currently two regulations pertaining to audits that expressly reference only the FTB, not the Commission. First, Regulation 18993 provides the definition for the term “contain in detail” located in Section 90004(c), which pertains to the findings that must be included in audit reports. Second, Regulation 18994 provides the auditing standards and procedures to be used in audits and investigations pursuant to Sections 90000, et seq. On their face, it is unclear whether these regulatory provisions likewise apply to mandatory audits of the Commission as currently required under Regulation 18998.

Proposed Regulations

Regulation 18991 – Audits of Campaign Reports and Statements of Local Candidates and Their Controlled Committees.

As mentioned, the Act requires routine mandatory audits and investigations of campaign statements and reports and lobbying firms, lobbyist employers, and lobbyists, and sets forth those who are subject to audits and investigations, including local candidates and their controlled committees. (Sections 90000 & 90001.)

According to the 2015 Commission Memorandum proposing amendments to Regulation 18996, Commission staff sought to amend that regulation, in part, to avoid duplicative audits:

As for mandatory audits or investigations of local candidates and their controlled committees by the FTB, Section 90001, subdivision (i)(1), requires the Commission to adopt regulations that provide the method of selection. This selection method is in Regulation 18991. Subdivision (c) of the regulation requires the FPPC to select 20 local jurisdictions and, in turn, local candidates and their controlled committees within those jurisdictions to be audited. Currently, the regulation does not explicitly exclude a jurisdiction from selection for auditing even if that jurisdiction is already subject to audit by a local agency or the FPPC. The proposed amendment would expressly state that the FPPC may exclude from the selection process any jurisdiction that is subject to audit by a local agency or the FPPC.

For example, Section 83123.5 authorizes the FPPC to contract with the County of San Bernardino to undertake responsibility for the

⁵ The guidelines, standard and scope are located in Section 90002 and Regulations 18994-95.

administration, implementation, and enforcement of the county’s local campaign finance reform ordinance. Under its contract with the county, the FPPC is responsible for auditing local candidates and their controlled committees. If the county is selected for audit in the random drawing pursuant to Regulation 18991, the FTB technically also would be required to audit the county candidates and their controlled committees.

This risk of a duplicative audit or investigation is also apparent with regard to those local agencies with their own ethics commissions that may conduct their own mandatory audits and investigations, such as Los Angeles, San Diego, and San Francisco, among others. Staff will list the excluded jurisdictions on the FPPC website on the page where the jurisdictions selected for audit are currently posted.

(FPPC Memorandum (2015), Amend Regulation 18996, pp. 2-3.)⁶

The proposed amendments to former 18996 therefore sought to clarify the Commission’s authority to exclude from selection under Regulation 18991(c) any jurisdiction that is subject to audit by a local agency or the Commission:

(d) The Commission may exclude from the selection of jurisdictions required by Regulation 18991(c) any jurisdiction that is subject to audit by a local agency or the Commission.

(Former Regulation 18996(d).)

The proposed amendments to Regulation 18996, including subdivision (d), were approved by the Commission and became operative in February of 2016. However, as stated above, the Commission appears to have inadvertently repealed Regulation 18996(d) after the enactment of AB 902. Thus, the issue regarding duplicative audits continues to exist. Staff recommends therefore that the Commission amend Regulation 18991 to restore the former provision providing the Commission with the authority to exclude from the selection of jurisdictions required under Regulation 18991(c) any jurisdiction that is subject to audit by a local agency or the Commission.

Regulation 18993 – Contain in Detail

As stated above, the Commission shares responsibilities for performing audits under the Act with the FTB in that the FTB performs audits of campaigns mandated by Section 90001 while the Commission audits the Controller’s office and the Board of Equalization pursuant to

⁶ Prior to amendment of former Regulation 18996, the FTB had contacted the Commission to advise that it skips local jurisdictions randomly selected for audit if the local jurisdiction has their own local audit program or if the Commission conducts those audits.

Section 90006,⁷ due to potential conflicts of interest for the FTB. The Act also authorizes both Commission and the FTB to perform discretionary audits and investigations under Section 90003, and prelection audits under Section 90008.

Section 90007 requires the Commission to adopt guidelines and standards for audits performed by the FTB. These guidelines and standards must accomplish specific purposes enumerated in Section 90007 and must consider relevant standards and guidelines of the American Institute of Certified Public Accountants. In response to the requirements of Section 90007, the Commission adopted Regulations 18994-18996 governing audits performed by the Franchise Tax Board pursuant to Section 90001.⁸ While those regulations do not explicitly apply to Commission staff when performing mandatory audits in lieu of the FTB pursuant to Section 90006, Commission staff has historically applied those guidelines, standards, scope and reporting requirements when conducting mandatory audits.

As a result, Regulation 18998 was adopted in 2019 to codify Commission staff's long-standing practice of performing mandatory audits consistent with the guidelines, standards, scope and reporting requirements employed by the FTB and states, in part:

To the extent applicable, Commission staff shall apply the same auditing guidelines, standards, and scope when performing audits pursuant to Section 90006 as the Franchise Tax Board when performing audits pursuant to Section 90001. These guidelines, standards, and scope are enumerated in Section 90002 and Regulations 18994-18995. Commission staff shall prepare reports consistent with the requirements in Section 90004 and Regulation 18995.

(Regulation 18998(a).) The regulation also codified the guidelines and standards for discretionary investigations and audits performed by Commission staff pursuant to Section 90003, as well as pre-election audits performed by Commission staff pursuant to Section 90008. (Regulation 18998(b).)

Section 90004 addresses the requirement that the FTB periodically prepare reports:

The reports of the Franchise Tax Board shall be public documents and shall *contain in detail* the Franchise Tax Board's findings with respect to the accuracy and completeness of each report and statement reviewed and its findings with respect to any report or statement that should have been but was not filed....

⁷ These are audits in the traditional sense of the term, meaning the auditors perform a systematic review of campaign financial records during an election cycle for candidates of the office being audited, and prepare a report detailing the findings of each audit.

⁸ As mentioned, after the legislature codified the provisions of Regulation 18996, with the exception of subdivision (d), the Commission repealed Regulation 18996 in its entirety.

(Section 90004(c), emphasis added.) In turn, Regulation 18993 provides the definition for the term “contain in detail” as follows:

The term “contain in detail” as used in Government Code Section 90004 means that the report of the Franchise Tax Board shall include specific findings of noncompliance, if the Franchise Tax Board determines that the noncompliance is material.

Therefore, to make it clear that Regulation 18993’s definition of the term “contain in detail” also applies to Commission audit reports, and to make the regulation expressly consistent with the existing requirements of Regulation 18998, staff recommends adding express references to the Commission within the regulations.

Regulation 18994 – Auditing and Investigations

Regulation 18994 states:

Audits and investigations conducted by the Franchise Tax Board pursuant to Government Code Sections 90000, et seq. shall be made as follows:

(a) To the extent applicable, in accordance with generally accepted auditing standards as prescribed by the authoritative bodies of the accounting profession; and

(b) To the extent necessary, using other tests of accounting records and auditing procedures appropriate under the circumstances of each audit or investigation.

As above, to clarify the requirements under Regulation 18994 apply to Commission audits and investigations, and to make the regulation expressly consistent with the requirements of existing Regulation 18998, staff recommends adding express references to the Commission within the regulation.

Conclusion

The proposed amendments to Regulation 18991 will serve to avoid duplicative audits by restoring the former provision that provided the Commission with the authority to exclude from the selection of jurisdictions required under Regulation 18991(c) any jurisdiction that is subject to audit by a local agency or the Commission. In addition, the amendments to Regulations 18993 and 18994 will serve to clarify their application to audits performed by the Commission by adding express references to the Commission.

Attachments:

Proposed Amendments to Regulations 18991, 18993 and 18994