

1 Amend 2 Cal. Code Regs., Section 18361.4 to read:

2 **§18361.4. Probable Cause Proceedings.**

3 (a) Probable Cause. Under Sections 83115.5 and 83116, probable cause exists when the
4 evidence sufficiently supports a reasonable belief or strong suspicion that the Act has been
5 violated.

6 (ba) Probable Cause Report. If the Chief of the Enforcement Division decides to
7 commence probable cause proceedings pursuant to Sections 83115.5 and 83116, he or she the
8 Chief of Enforcement shall direct the Enforcement Division staff to prepare a written report,
9 hereafter referred to as “the probable cause report.” The probable cause report that shall contains
10 a written summary of the law and evidence that supports a finding of probable cause that each
11 alleged violation of the Act has occurred, as well as a description of any exculpatory evidence
12 indicating a violation alleged in the report did not occur, gathered in connection with the
13 investigation, including any exculpatory and mitigating information of which the staff has
14 knowledge and any other relevant material and arguments. The probable cause report may
15 include hearsay evidence, The evidence recited in the probable cause report may include hearsay,
16 including declarations of investigators or others relating the statements of witnesses or
17 concerning the examination of physical evidence.

18 (cb) No probable cause hearing will take place until at least 21 calendar days after the
19 Enforcement Division staff provides the following, by service of process or registered or
20 certified mail with return receipt requested, to all proposed each respondents:

21 (1) A copy of the probable cause report;

22 (2) Notification that ~~the proposed~~ each respondents ~~has~~ have the right to respond in writing
23 to the probable cause report and to request a probable cause conference at which the ~~proposed~~

1 respondent may be present in person and represented by counsel, notification of all deadlines to
2 file a written response, and request a probable cause conference ~~and;~~

3 (3) If the Commission met in executive session on this matter pursuant to Regulation
4 18361.2, a copy of any staff memoranda submitted to the Commission at that time along with the
5 recording of any discussion between the Commission and the staff at the executive session as
6 required in subdivision (b) of Regulation 18361.2.; and

7 (4) A probable cause checklist form which includes information regarding a respondent's
8 options for a probable cause conference, written response, and evidence, as well as the
9 respondent(s) best contact information, available dates, and preferred method of service.

10 (de) Response to Probable Cause Report; Request for Probable Cause Conference;
11 Waiver.

12 (1) Not later than 21 calendar days following service of the probable cause report, or the
13 date records were sent pursuant to (d)(3), a respondent may submit a written response to the
14 probable cause report. The response may ~~should~~ contain a summary of law and evidence that
15 supports a finding that the probable cause report fails to establish probable cause that any or all
16 of the alleged violations of the Act occurred. ~~evidence, legal arguments, and any mitigating or~~
17 exculpatory information. Any proposed respondent who submits a response ~~must~~ shall be filed it
18 with the Commission Assistant by electronic mail at CommAsst@fppc.ca.gov or U.S. mail, who
19 will ~~forward the response to the General Counsel or an attorney in the Legal Division (the~~
20 “hearing officer”) and send provide a copy, by service of process or registered or certified mail
21 with return receipt requested, to all ~~other proposed respondents~~ parties listed named in the
22 probable cause report within 2 business days, ~~not later than 21 days following service of the~~
23 probable cause report.

1 (2)(A) Not later than 21 calendar days following service of the probable cause report, or
2 the date records were sent pursuant to subdivision (d)(3), Within 21 calendar days following the
3 service of the probable cause report, a ~~any proposed~~ respondent may request a probable cause
4 conference which shall be filed with the Commission Assistant by electronic mail at
5 CommAsst@fppc.ca.gov or U.S. mail, who will provide a copy to all other parties named in the
6 probable cause report and forward the request to the hearing officer assigned to the matter from
7 the Legal Division within two business days. The Commission Assistant shall schedule the
8 probable cause conference and if the probable cause checklist has not been returned, make
9 efforts to obtain the information from the respondent(s).

10 (B) If a respondent requests a probable cause conference later than 21 days following
11 service of the probable cause report or the date records were sent pursuant to subdivision (d)(3),
12 the assigned hearing officer may grant the request based on good cause, including a showing by
13 respondent that he or she did not timely receive the probable cause report after it was served, or
14 some other circumstance reasonably justifying respondent's failure to timely request the hearing.
15 However, no late request for a probable cause conference shall be granted if the assigned hearing
16 officer has already issued an order for an Accusation to be served on the respondent.

17 (C) The conference shall proceed no later than 75 days after receipt by the Commission
18 Assistant of the filed request for a probable cause conference, or 75 days after the date records
19 are sent pursuant to subdivision (d)(3), unless the assigned hearing officer extends the time for
20 good cause based on an extension request filed by any party with the Commission Assistant. If
21 respondent requests a probable cause conference but the probable cause conference does not
22 timely proceed, the Commission Assistant shall set a probable cause conference to occur within
23 14 calendar days and provide notice of the conference to all parties. The hearing officer shall

1 ~~conduct the conference informally. discovery of evidence in the possession of the Enforcement~~
2 ~~Division. This request must be sent by registered or certified mail to the Commission Assistant.~~
3 ~~Upon receipt of the request, the Enforcement Division shall provide discovery of evidence relied~~
4 ~~upon by the Enforcement Division sufficient to lead a person of ordinary caution and prudence to~~
5 ~~believe or entertain a strong suspicion that a proposed respondent committed or caused a~~
6 ~~violation, along with any exculpatory or mitigating evidence. This is not a right to full discovery~~
7 ~~of the Enforcement Division file. The Enforcement Division shall provide access to documents~~
8 ~~for copying by the Respondent, or upon agreement among the parties, the Enforcement Division~~
9 ~~will provide copies of the requested documents upon payment of a fee for direct costs of~~
10 ~~duplication. The Enforcement Division shall provide such evidence by service of process or~~
11 ~~registered or certified mail with return receipt requested to all respondents, with a copy to the~~
12 ~~Commission Assistant. A respondent may submit a written response to the probable cause report~~
13 ~~described in subsection (1) no later than 21 calendar days after service of discovery.~~

14 (3) Within 21 calendar days following the service of the probable cause report, a
15 respondent may request by electronic mail at CommAsst@fppc.ca.gov or U.S. mail a copy of all
16 records in the possession of the Enforcement Division obtained for purposes of that investigation
17 that are not publicly available or otherwise in the possession of the requesting respondent, except
18 records that it claims are confidential, were received in response to an administrative subpoena,
19 or otherwise contain protected information, as required in subdivision (d)(3)(B).

20 (A) The Enforcement Division will provide copies of the requested documents upon
21 payment of a fee for direct costs of duplication or provide electronically without cost. The
22 Enforcement Division shall provide such evidence by electronic mail or U.S. mail to all
23 respondents, with a copy to the Commission Assistant. A respondent may submit a written

1 response to the probable cause report described in subsection (1) no later than 21 calendar days
2 after the records are sent. The evidence produced by the Enforcement Division pursuant to this
3 subdivision shall be considered the final production at the Probable Cause level and is not
4 appealable.

5 (B) If requested by respondent, the Enforcement Division shall provide a privilege log or
6 other detailed description of records withheld, which shall include the following information:

7 (i) the date of the record;

8 (ii) the identity of the author(s);

9 (iii) the identity of the recipient(s);

10 (iv) the specific ground for which the objection to produce the record is made; and

11 (v) the current location of the record.

12 ~~(3) The Commission staff may submit any evidence or argument in rebuttal to the~~
13 ~~response. When the Commission staff submits evidence or argument in rebuttal to the response,~~
14 ~~it shall provide a copy, by service of process or registered or certified mail with return receipt~~
15 ~~requested, to all proposed respondents listed in the probable cause report not later than 10~~
16 ~~calendar days following the date the response was filed with the Commission Assistant. The~~
17 ~~hearing officer may extend the time limitations in this section for good cause. At any time prior~~
18 ~~to a determination of probable cause, the hearing officer may allow additional material to be~~
19 ~~submitted as part of the initial response or rebuttal.~~

20 (4) If a respondent fails to file a timely response, make a timely request for a probable
21 cause conference, or appear for a probable cause conference, the respondent waives the right to
22 further probable cause proceedings under Section 83115.5, and the Enforcement Division may
23 transmit copies of the Probable Cause Report, Request for a Finding of Probable Cause, and

1 Order that an Accusation be Prepared to the Commission Assistant requesting that a hearing
2 officer from the Legal Division find probable cause based on the information provided. Upon a
3 finding of probable cause, the hearing officer will issue an Order Finding Probable Cause and
4 serve it on all parties.

5 (5) The hearing officer may extend any of the time limits in subdivision (d) if good
6 causes exists.

7 (e) Rebuttal. Not later than 14 calendar days following the date the response was filed
8 with the Commission Assistant, Enforcement Division staff may submit any evidence or
9 argument in rebuttal to the response which shall be filed with the Commission Assistant by
10 electronic mail at CommAsst@fppc.ca.gov who will provide a copy to all parties. These are the
11 only briefings to be considered by the hearing officer when making the determination of
12 probable cause.

13 ~~(f) Probable Cause Conference. Any proposed respondent may request a probable cause~~
14 ~~conference. The request shall be served upon the Commission Assistant and all other proposed~~
15 ~~respondents not later than 21 days after service of the probable cause report unless the hearing~~
16 ~~officer extends the time for good cause. The Commission Assistant shall fix a time for the~~
17 ~~probable cause conference and the hearing officer shall conduct the conference informally. The~~
18 ~~conference shall be closed to the public unless a proposed respondent requests, and all other~~
19 ~~proposed respondents agree, to a public conference. If the conference is not public, then only~~
20 ~~members of the Commission staff, any proposed respondent and his or her legal counsel or~~
21 ~~representative~~ the parties named in the probable cause report, their legal counsel or
22 representative and Enforcement Division staff shall have the right to be present and participate.
23 Any party may send a request to the Commission Assistant at least 7 days before the probable

1 cause conference that ~~The hearing officer may allow witnesses to attend and participate in part~~
2 ~~or all of the probable cause conference. The request shall identify each witness and summarize~~
3 ~~the subject of the witness's testimony, and be sent to all parties. The hearing officer, in making~~
4 ~~this determination, the hearing officer shall consider the relevancy of the witness' proposed~~
5 ~~testimony, whether the witness has a substantial interest in the proceedings, and whether fairness~~
6 ~~requires that the witness be allowed to participate. Representatives of any civil or criminal~~
7 ~~prosecutor with jurisdiction may attend the conference at the discretion of the hearing officer if~~
8 ~~they agree to respect the confidential nature of the proceedings. If the conference is not open to~~
9 ~~the public and none of the parties and the presiding officer object, then~~ the conference may be
10 conducted in whole or in part by telephone or video conference. The Enforcement Division shall
11 record the probable cause conference ~~shall be recorded~~. The hearing officer may determine
12 whether there is probable cause based solely on the probable cause report, any responses or
13 rebuttals, filed evidence submitted, and any arguments presented at the probable cause
14 conference by the interested parties. ~~If the hearing officer requires additional information before~~
15 ~~determining whether there is probable cause, he or she may~~ The hearing officer may, based on a
16 showing of good cause, permit any party to submit additional evidence at or after the probable
17 cause conference.

18 (g) Finding of Probable Cause. ~~The hearing officer may find there is probable cause to~~
19 ~~believe a violation has occurred if the evidence is sufficient to lead a person of ordinary caution~~
20 ~~and prudence to believe or entertain a strong suspicion that a proposed respondent committed or~~
21 ~~caused a violation. A finding of probable cause by the hearing officer does not constitute a~~
22 finding that a violation ~~has actually~~ occurred. The hearing officer shall not make a finding of
23 probable cause if ~~he or she~~ is presented with clear and convincing evidence that, at least 21

1 working days prior to the alleged violation, the respondent requested written advice from the
2 Commission staff pursuant to Section 83114(b), a time prior to the alleged violation, the violator
3 consulted with the staff of the Commission in good faith, disclosed truthfully all the material
4 facts, and committed the acts complained of either in reliance on formal the advice of the
5 Commission staff or because of the Commission staff's failure to provide advice. If the hearing
6 officer makes a finding of probable cause, then the Enforcement Division shall prepare an
7 Accusation pursuant to Section 11503 and have it served upon the person or persons who are
8 subjects of the probable cause finding. The hearing officer shall publicly announce the finding of
9 probable cause. The announcement shall contain a summary of the allegations and a cautionary
10 statement that the respondent is presumed to be innocent of any violation of the Act unless a
11 violation is proved in a subsequent proceeding. The Chief of the Enforcement Division shall be
12 responsible for the presentation of the case in support of the Accusation at an administrative
13 hearing held pursuant to Section 83116.

14 Note: Authority cited: Section 83112, Government Code. Reference: Sections 83115,
15 83115.5 and 83116, Government Code.