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December 16, 2019

VIA ELECTRONIC MAIL

Chair Miadich and Commissioners Cardenas, Hatch, Hayward, and Wilson
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

**RE: Item 16 -- Request for FPPC to Sponsor Legislation regarding
Compliance with the Administrative Procedure Act**

Dear Chair Miadich and Commissioners:

As the Fair Political Practices Commission considers updating its governance and management protocols to ensure increased transparency and public accountability, we write to request that the Commission sponsor legislation clarifying that the FPPC is subject to the current requirements of the Administrative Procedure Act (APA) rather than the version of the APA that was in place in 1974 when the original Political Reform Act was adopted by California voters.

In 1979, after the adoption of the 1974 Political Reform Act, the APA was substantially revised by the Legislature, which found a need for a central state agency to review administrative regulations for clarity and consistency with statutory law. In response to what it felt was “an unprecedented growth of unclear and unnecessarily complex administrative regulations,” the Legislature established the Office of Administrative Law (OAL) to ensure that state agency regulations are written in a comprehensible manner, and are authorized by statute and consistent with other law.¹ Recent changes to the APA have also attempted to ensure transparency in the regulatory process by establishing procedural requirements and standards for agencies in the adoption of rules and regulations.

In 1992, the FPPC filed suit requesting declaratory and injunctive relief in superior court arguing that it was not bound by the post-1974 amendments to the APA, including provisions that granted the OAL authority to substantively review FPPC regulations. In an unpublished decision, the Third District Court of Appeal held that the post-1974 APA amendments do not apply to the Fair Political Practices Commission. The Court's reasoning was that the citation to the APA in Section 83112 was intended to reference

¹ *Fair Political Practices Commission v. Office of Administrative Law*, C010924, <https://caselaw.findlaw.com/ca-court-of-appeal/1852165.html>, California Court of Appeal, Third Appellate District (Sacramento), April 27, 1992 (Unpublished Opinion).

the specific statutory provisions in the APA rather than serve as a general reference to the APA, including amendments adopted after 1974. Additionally, the Court found that, because the Political Reform Act may only be amended by a 2/3 vote of the Legislature and the APA amendments were passed by majority vote, applying APA amendments to the PRA would violate the 2/3 vote requirement to amend the PRA.

The Court reached this determination despite what appears to be the clear intent of the voters to subject the Commission to the APA as stated in Gov. Code section 83112, which reads:

83112. The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission. These rules and regulations shall be adopted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 et seq.) and shall be consistent with this title and other applicable law.

(Emphasis added.)

In response to the unpublished court decision, the FPPC adopted 2 CCR §18312 providing that the Commission is subject to procedures in the APA “that were in effect as of June 4, 1974.” This regulation is in effect today and governs the Commission’s administrative procedures.

We are requesting that the Commission sponsor legislation to ensure that its processes and procedures for adopting rules, regulations, and other administrative materials comply with modern standards of transparency and public accountability that apply to nearly every other state agency except where there is an express statutory exemption. Compliance with the current APA would achieve legitimate public policy objectives. For example, it would provide more time for those who are affected by Commission regulations to review and analyze proposed regulations. Also, the APA requires an agency to respond to objections, recommendations, and proposed alternatives that are identified during public comment period. Finally, the APA requires proposed regulations to be reviewed by the Office of Administrative Law to ensure that they are clear, necessary, legally valid, and available to the public.

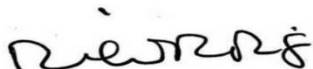
Compliance with these modern standards will improve the Commission’s rulemaking process by ensuring that its regulations are legally valid and responsive to legitimate public concerns. If the Commission is to demand transparency and accountability on the part of those who are regulated by the Political Reform Act, it too should be subject to the highest standards of transparency and accountability imposed on government agencies.

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We appreciate the Commission's consideration of this proposal. Please do not hesitate to contact me if you have questions or wish to discuss these matters further.

Very truly yours,

OLSON HAGEL & FISHBURN LLP

A handwritten signature in black ink, appearing to read "Rios", written over a light blue rectangular background.

RICHARD R. RIOS

Attachments

State of California

GOVERNMENT CODE

Section 83112

83112. The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission. These rules and regulations shall be adopted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 et seq.) and shall be consistent with this title and other applicable law.

(Added June 4, 1974, by initiative Proposition 9.)

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18312. Rulemaking Procedure.

(a) Definitions.

(1) Administrative Procedure Act: All references in this regulation to the "Administrative Procedure Act" are to the provisions of the "Administrative Procedure Act" that were in effect as of June 4, 1974 (former Government Code title 2, division 3, part 1, chapter 4.5, section 11371 et seq.).

(2) California Administrative Register: All references in this regulation to the "California Administrative Register" are to the California Administrative Register as set forth in Government Code section 11409 as that section existed on June 4, 1974, or to any successor publication of the Office of Administrative Hearings, as defined in subdivision (a)(4) of this regulation.

(3) Notice: The notice of the adoption, repeal, or amendment of any Commission regulation shall include all of the following:

(A) A statement of the time, place, and nature of the proceedings;

(B) Reference to the authority under which the regulation is proposed and reference to particular code sections or other provisions of law which are being implemented, interpreted, or made specific;

(C) Either the express terms or an informational summary of the proposed action.

(D) A cost estimate prepared as prescribed by the Department of Finance.

(4) Office of Administrative Hearings: All references in this regulation to the "Office of Administrative Hearings" are to the Office of Administrative Hearings as set forth in

Government Code sections 11371 et seq., as those sections existed on June 4, 1974, and to any state agency that succeeds the Office of Administrative Hearings, including the Office of Administrative Law.

(5) Regulatory Action: "Regulatory action" includes the adoption, repeal, or amendment of any Commission regulation.

(6) Trade or Industry Publication: "Trade or industry publication" includes the California Administrative Register.

(b) Adoption, Amendment, and Repeal of Regulations.

(1) The Commission or Commission staff may schedule a public "interested persons" meeting to solicit comment from the public on any topic within the jurisdiction of the Commission, in advance of either a prenotice hearing, if any, or an adoption hearing on a proposed regulation. Announcement of this meeting shall be posted on the Commission website and mailed (either in tangible form or electronically) to every person who has filed a request to be included on the applicable mailing list and to such other persons or groups the Commission believes may be interested in the matter.

(2) The Commission or Commission staff may schedule a prenotice hearing on any regulation that will be the subject of Commission regulatory action in the future. The purpose of the prenotice hearing is to permit the Commission to consider and accept public comment regarding regulatory action proposed by the Commission staff. Any regulatory action to be considered at a prenotice hearing shall be publicized consistent with Government Code sections 11120-11132.

(3) At least 30 days prior to the adoption, amendment, or repeal of any regulation, notice shall be provided as follows:

(A) Publication in a newspaper of general circulation or in a trade or industry publication as prescribed by the Commission.

(B) Filing with the Rules Committee of each house of the Legislature.

(C) Mailing (either in tangible form or electronically) to every person who has filed a request for notice thereof with the Commission. At the discretion of the Commission, notice may be mailed to other persons or groups the Commission believes may be interested in the proposed action.

(D) Delivered to the Office of Administrative Hearings for publication in the next issue of the California Administrative Register as prepared by that office.

The failure to mail notice to any person as provided in section 11423 as that section existed on June 4, 1974, shall not invalidate any action taken by the Commission.

(4) The Commission shall consider the regulatory action on or after the date and time designated in the notice, and shall afford interested persons an opportunity to comment. Written comments should be submitted to the Commission no later than 12:00 p.m. of the business day preceding the day of the hearing to afford them adequate time to fully consider the comments. Any regulatory action to be considered shall be publicized consistent with Government Code sections 11120-11132.

(5) Where consideration of Commission regulatory action is continued to another meeting date, announcement of the change in date shall be posted on the door of the hearing room or announced at the Commission meeting. No additional notice pursuant to subdivision (b)(2) of this regulation is required.

(6) The Commission or Commission staff may schedule additional Interested Persons Meetings, Prenotice Hearings, or Adoption Hearings on any given item.

(7) Once the Commission has approved the adoption, repeal, or amendment of any Commission regulation, the Commission shall submit to the Office of Administrative Hearings, for filing with the Secretary of State, one certified copy of any regulation adopted, repealed, or amended with a citation to the statutory authority pursuant to which the regulation was adopted, and four additional copies of the regulation. The Commission shall also submit one certified copy of the regulation to the Rules Committee of each house of the Legislature.

(8) The Commission shall retain a rulemaking file pertaining to each Commission regulatory action. The file shall contain the record of the hearing at which the Commission took the regulatory action and other materials pertinent to the regulatory action.

(c) Adoption of Emergency Regulations. The Commission may adopt, amend, or repeal regulations on an emergency basis. The procedures set forth below, and not the procedures contained in subdivision (b) of this regulation, shall apply to Commission emergency regulatory action.

(1) In order to adopt an emergency regulation, or to make an emergency amendment or repeal of a regulation, the Commission shall make a written finding of emergency, which shall include a statement of facts constituting the emergency and a statement that the Commission's regulatory action is necessary for the immediate preservation of the public peace, health and safety, or general welfare.

(2) The Commission shall file a copy of the emergency regulation and the documents set forth in subdivision (c)(1) of this regulation with the Office of Administrative Hearings, to be filed with the Secretary of State, and shall file a copy with the Rules Committee of each house of the Legislature.

(3) Unless otherwise provided by the Commission in a written instrument filed with, or as

part of, the regulation or order of repeal, any emergency regulatory action shall become effective upon filing and shall remain in effect for 120 days.

(4) The Commission may make the emergency regulation, amendment, or repeal permanent pursuant to subdivision (b) of this regulation. Where the Commission makes an emergency regulatory action permanent pursuant to subdivision (b) of this regulation prior to the expiration of the 120 days set forth above, the Commission shall transmit to the Office of Administrative Hearings and the Rules Committee of each house of the Legislature a certification that the action has been made permanent.

(d) Review by the Office of Administrative Hearings.

(1) The Office of Administrative Hearings shall review any Commission regulation subject to Commission regulatory action for compliance with the form and style requirements of the Secretary of State.

(2) If the Commission's regulatory action complies with the prescribed form and style requirements of the Secretary of State, the Office of Administrative Hearings shall file the regulation, amendment, or repeal promptly with the Secretary of State.

(e) Effective Date of Commission Regulatory Actions.

(1) Commission regulatory actions shall become effective 30 days after filing with the Secretary of State, except for the following:

(A) Where the Commission provides in a written instrument filed with, or as part of, the regulation or order of repeal, a specific effective date, the regulatory action shall be effective on that date.

(B) Any emergency regulatory action shall become effective upon filing with the Secretary of State and the Rules Committee of each house of the Legislature pursuant to

subsection (c)(2) of this regulation, unless subsection (e)(1)(A) of this regulation applies.

(C) Regulations prescribing the Commission's organization or procedures shall become effective upon filing with the Secretary of State, unless subsection (e)(1)(A) or (e)(1)(B) of this regulation applies.

Comment: On March 6, 1991, in the case of *Fair Political Practices Commission v. Office of Administrative Law and Linda Stockdale Brewer*, Sacramento County Superior Court, Case No 512795 (affirmed by Court of Appeal, Third District (April 27, 1992), Case No. C010924 [unpub. opn.]), the court determined that the Fair Political Practices Commission's procedures for adopting, amending, or repealing regulations are subject only to those provisions of the Administrative Procedure Act in effect on June 4, 1974, which was the date on which the voters adopted the Political Reform Act of 1974. This regulation is therefore based on the requirements of the provisions of the Administrative Procedure Act existing on that date. On June 4, 1974, the pertinent provisions of the Administrative Procedure Act were located in former Government Code, Title 2, Division 3, Part 1, Chapter 4.5, section 11371 et seq.

Note: Authority cited: Sections 81014 and 83112, Government Code. Reference: Sections 11371 et seq., Government Code, as those sections existed on June 4, 1974; Sections 81013, 81014, and 83112, Government Code; *Fair Political Practices Commission v. Office of Administrative Law and Linda Stockdale Brewer*, Sacramento County Superior Court, Case No. 512795 (affirmed by Court of Appeal, Third District (April 27, 1992), Case No. C010924 [unpub. opn.]).

HISTORY

1. Repealer and new section filed 2-5-93; operative 2-5-93 (Register 93, No. 6). For prior history, see Reg. 88, No. 41.
2. Editorial correction of History 1 (Register 2001, No. 34).

3. New subsections (b)(1) and (b)(6), subsection renumbering, and amendment of newly designated subsections (b)(2), (b)(3)(C), (b)(4) and (b)(5) filed 2-24-2003; operative 2-24-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 9).

4. Amendment of section and Note filed 12-18-2006; operative 1-17-2007. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2006, No. 51).