



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION

1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel, Legal Division
Kevin Cornwall, Counsel, Legal Division

Subject: Pre-Notice Discussion of Regulation for Original Filing with Electronic Signatures

Date: September 3, 2021

INTRODUCTION

In numerous contexts, the Political Reform Act (“Act”) references the filing of “original” documents. With limited exceptions, however, the Act does not specify that original documents must take a particular form and includes almost no references to electronic signatures. Prior to personal computers, the internet and paperless transactions becoming ubiquitous, an original document under the Act was, by default, understood to mean a paper filing with a “wet signature,” distinguished from a copy of the document.

Today, access to a computer with appropriate software for electronically filling out, signing, and sending a document is often more readily available for filers than access to printer and postal supplies and services. While this was true prior to the global pandemic, it is even more accurate today, as a significant percentage of those filing documents under the Act continue to work outside of the office and COVID-19 continues to impact public safety and resources. Additionally, technology now exists that permits filers to include an “electronic signature” or “digital signature” with a filing, which allow reliable identification of the signor.

Accordingly, staff has drafted the attached proposed regulations for future amendment and adoption and presents them to the Commission for pre-notice discussion and further direction.

LEGAL BACKGROUND

Electronic Signatures

In 1995, in order to promote e-commerce and digital transactions with public agencies, California enacted Section 16.5, which authorizes use of a “digital signature” in any written communication with a public agency in which a signature is required or used, consistent with regulations to be adopted by the Secretary of State.

In 1999, California enacted the Uniform Electronic Transactions Act (Title 2.5 (commencing with Section 1633.2) of Part 2 of Division 3 of the Civil Code) (“UETA”), which provides that an “electronic signature” is valid and enforceable under any law that requires a signature in any transaction between two or more persons, including a government agency.

Because the definition of “digital signature” under Section 16.5 and “electronic signature” under the UETA were similar and neither statute included a cross-reference to the other, confusion resulted in the marketplace and among public agencies as to which law governed. Accordingly, in 2016, the Legislature amended both bodies of law to clarify that a “digital signature” authorized by Section 16.5 is one type of “electronic signature” that a public agency may choose to adopt under the UETA.

Digital signatures (under Section 16.5) are distinct from the broader category of electronic signature (under the UETA) in that digital signatures additionally require the use of specific technology to better ensure the verifiability of the signature. California Civil Code Section 1633.2(h) defines “electronic signature” as “an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.” Section 16.5(d) defines digital signature as “an electronic identifier, created by computer, intended by the party using it to have the same force and effect as the use of a manual signature.” Further, where a public entity elects to use a digital signature, Section 16.5(a) further specifies that the digital signature must be unique to the person using it, capable of verification, under the sole control of the person using it, linked to data in such a manner that if the data are changed, the digital signature is invalidated, and conforming with regulations adopted by the Secretary of State.

Put simply, where an “electronic signature” under the UETA could be something even simpler than the signor’s name written in cursive font, a “digital signature” under Section 16.5 requires an electronic signature to use technology that essentially creates a “digital fingerprint.” Adobe Sign and DocuSign are two well-known examples of software that meet the digital signature criteria.

The Political Reform Act

Section 81004(a) of the Act generally requires “[a]ll reports and statements filed under this title shall be signed under penalty of perjury and verified by the filer. The verification shall state that the filer has used all reasonable diligence in its preparation, and that to the best of his knowledge it is true and complete.” (Section 81004(a).) However, the Act currently has only one operative and express reference to “electronic signatures,” found in Section 84602(b)(2)(C), which requires that in developing the CAL-ACCESS Replacement System, or “CARS,” the Secretary of State shall “[d]evelop a procedure for filers to comply electronically with the requirement to sign under penalty of perjury pursuant to Section 81004. The electronic signature procedure shall allow the filer to file with the Secretary of State and shall not require an original signature to be filed.”

In 2018, the Legislature passed Senate Bill 1239 with the aim of modernizing various aspects of the Act in anticipation of the implementation of CARS. Though not yet operative, SB 1239 added subdivision (c) to Section 81004, which states, “[a] report or statement filed online or electronically shall include a secure electronic signature that is submitted under penalty of perjury and that conforms to subdivision (a) of this section and subdivision (b) of Section

1633.11 of the Civil Code.” Section 81004(c) will become operative once CARS is implemented and certified by the Secretary of State.

The Commission’s Administrative Authority

Section 83112 of the Political Reform Act (Act) states:

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.

As applicable to the Commission, the Administrative Procedure Act provides, “[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” (Section 11374.)¹

DISCUSSION

I. Regulation 18104 – Secure Electronic Signatures

Proposed Regulation 18104 would serve two primary purposes. First, subdivision (a) would clarify that an “original” report, statement, or other document does not necessarily mean “paper” document. Second, subdivision (b) would define the term “secure electronic signature.”

Subdivision (a)

Because technology allows certain forms of electronic signatures to be equally as trustworthy as handwritten signatures, subdivision (a) would specify that, generally, an original document can be submitted either (1) in paper format with a handwritten signature or (2) in electronic or online format with a secure electronic signature, if permitted by the filing officer. Subdivision (a) would specify, however, that this general rule does not apply “where otherwise provided by law.” Though the Act generally does not specify that an “original” report, statement, or other document must take a form, staff notes that Section 84215(a) requires that statewide elected officers “shall file the original and one copy of [a] campaign statement in paper format with the Secretary of State,” and Section 84615 requires local agencies go through a specific process, including the adoption of an ordinance, before accepting campaign statements in online or electronic format. Similarly, Section 86100 (d)(1) provides that lobbyist employers and lobbying firms must submit original registration statements, along with a copy, in paper format,

¹ As determined by Third Appellate District, the Fair Political Practices Commission’s procedures for adopting, amending, and repealing regulations are subject only to the pertinent provisions of the Administrative Procedure Act in effect on June 4, 1974, the date the voters adopted the Political Reform Act. (*Fair Political Practices Commission v. Office of Administrative Law* (April 27, 1992, 3 Civil C010924) [nonpublished opinion]).

until the Secretary of State certifies CARS. Thus, these types of original filings may not automatically be filed with a secure electronic signature. In the context of Section 84215(a) and Section 86100, once CARS is certified by the Secretary of State, paper format original filings will not be required and in the context of campaign statements filed with local agencies, a local agency may permit the online or electronic filing of an original statement pursuant to the process contained in Section 84615.

Given the general application of proposed Regulation 18104, amendment or adoption of additional regulations would be largely unnecessary. For example, Regulation 18944 requires that a Form 801 (Payments to Agency Report) include “[t]he signature of the agency head.” (Regulation 18944(c)(3)(D).) While this regulation and similar provisions could be amended to expressly reference the use of handwritten or secure electronic signatures, the general applicability of proposed Regulation 18104 would make this superfluous. To be clear, the proposed regulations would make specific that the following original forms may include secure electronic signatures:

- Form 801 (Payments to Agency Report)
- Form 802 (Agency Report of Ceremonial Role Events and Ticket Distributions)
- Form 803 (Behested Payment Report)
- Form 804 (Agency Report of New Positions)
- Form 805 (Agency Report of Consultants)
- Form 806 (Agency Report of Public Official Appointments)

Original statements of economic interests (Form 700s) could also permissibly include secure electronic signatures, as discussed in greater detail with respect to proposed Regulation 18757.

Subdivision (b)

As noted above, the term “secure electronic signature” was incorporated into a new subdivision (c) of Section 81004 of the Act, but that subdivision is not yet operative. Incorporating the term into proposed Regulation 18104 would be beneficial because it would (1) immediately help clarify the acceptable forms of an “original” document and (2) eliminate the possibility of any confusion or uncertainty once Section 81004(c) becomes operative, given that the term “secure electronic signature” is not otherwise defined in the Act or elsewhere.

Proposed subdivision (b) defines “secure electronic signature” in two ways. The first form of a “secure electronic signature” is an electronic signature that is submitted through a certified electronic filing system, such as a local agency’s electronic Form 700 filing system that has been approved by the Commission, or CARS, once it has been certified by the Secretary of State. This is to ensure that proposed Regulation 18104 and its references to “secure electronic signatures” do not inadvertently create new requirements for electronic filing systems that are already working securely and effectively.

The second method of defining “secure electronic signature” incorporates the same requirements for use of a “digital signature” under Section 16.5, which would help verify the

identity of the signor for recordkeeping and potential litigation purposes. Specifically, under proposed Regulation 18104(b)(2), the secure electronic signature must be:

- (A) Unique to the person using it;
- (B) Capable of verification;
- (C) Under the sole control of the person using it;
- (D) Linked to the data in such a manner that if the data are changed, the digital signature is invalidated; and
- (E) Conforms to Title 2, Division 7, Chapter 10 of the California Code of Regulations, as applicable.

Subdivision (E) refers to the regulations the Secretary of State has adopted regarding digital signatures pursuant to Section 16.5 and, in relevant part, specifies the type of technologies that are acceptable for satisfying the above requirements. In practice, the above requirements can be satisfied using digital signature software and services such as Adobe or DocuSign, as noted above.

II. Regulation 18757 – Statements of Economic Interests; Filing an Original Statement of Economic Interests in Electronic Format Without a Certified Electronic Filing System

Staff notes that while proposed Regulation 18104 specifies that, as a general rule, a handwritten or secure electronic signature may be used in an original filing, the Act includes additional requirements in some contexts. With respect to statements of economic interests, original filings in electronic format with secure electronic signatures are permitted in many instances. Section 87500.3 permits the Commission to develop an electronic filing system for Form 700s, subject to certain development requirements, such as the implementation of different security safeguards. The Commission has done so and, today, the Commission’s electronic filing system is accessible by filers whose Form 700 is ordinarily forwarded to the FPPC. This includes Section 87200 filers, certain multi-county filers, and some state officials. The Commission’s electronic filing system is *not* used by most Section 87300 filers, most state employees, or most local city, county, or board employees.

Section 87500.4(a) permits the Commission to specify which categories of filers may use the Commission’s electronic filing system. While this would hypothetically allow the Commission to permit all Form 700 filers to use its electronic filing system, this would not be logistically feasible at this time, as Section 87500.4(b)(1) would additionally require the Commission to take on the role of filing officer for each filer within each permitted category of filers upon authorization from the original filing officer. Those duties would also apply whether the filer elects to file a statement of economic interests electronically or on paper with the Commission. Given the limited resources of the Commission in comparison to the number of Form 700 filers, particularly at the local level, this would currently not be feasible.

However, for purposes of filings other than those filed with the Commission, the Legislature has already enacted Section 87500.2, which provides that “[a]n agency may permit the electronic filing of a statement of economic interests required by Article 2 (commencing with

Section 87200) or Article 3 (commencing with Section 87300), including amendments, in accordance with regulations adopted by the Commission.” (Section 87500.2(a).) Section 87500.2 also requires, “[i]n consultation with interested parties, the Commission shall use common database integration features in developing database design requirements for all electronic filings that may be used.” (Section 87500.2(b).) Further, “[a]n agency that intends to permit electronic filing” must go through a specific development process, including (1) the submission of a proposal to the Commission, (2) review, approval and certification by the Commission, and (3) a \$1,000 fee to the Commission for the costs of approving and certifying the proposal, among other requirements. (See Section 87500.2(c)-(d).)

Currently, some 54 state agencies, 47 county agencies, 189 city agencies, 2 court agencies, and 65 other agencies (e.g., JPAs, special districts), use electronic filing systems certified by the Commission. While this represents a significant number of filers covered by either the Commission’s electronic filing system or their agency’s Commission-certified electronic filing system, the majority of state and city agencies, and a significant number of county agencies still require Form 700s to be submitted in paper format with a handwritten signature. As the Commission is aware, this has led to difficulty for many Form 700 filers during the COVID-19 pandemic, as the Commission has had to advise Form 700 filers, based on prior interpretations of the Act’s requirements, that those without access to a certified electronic filing system mail their Form 700s rather than submit them in person in order to limit their risk of exposure to the deadly virus.

As with proposed Regulation 18104, which would modernize the Commission’s interpretation of the term “original” as used throughout the Act, proposed Regulation 18757 would similarly modernize the Commission’s interpretation of the term “electronic filing” as used throughout Sections 87500.2 and 87500.3. Rather than interpreting the term to broadly refer to all potential methods of filing a statement of economic interests in an electronic format, proposed Regulation 18757 would interpret the term as specifically referring to filing of a statement of economic interests through a certified electronic filing system, as described in Sections 87500.2 and 87500.3. This interpretation would permit agencies to continue to use (or develop) a certified electronic filing system, but would also recognize that alternative methods of filing an original statement of economic interests in electronic format are widely available and sufficiently secure for data integrity, recordkeeping, and potential litigative purposes.

Under proposed Regulation 18757, a Form 700 filer who does not wish to file their statement of economic interests in paper format would be required to use the applicable electronic filing system if one is available to the filer. Where no certified electronic filing system is available, a Form 700 filer would be permitted to file their original Form 700 with a secure electronic signature, provided that the official’s agency permits the submission of an original statement with secure electronic signature. In practice, this would effectively translate to an agency being permitted to accept emailed Form 700s from their internal filers where the agency does not already have a Commission-certified electronic filing system in place, but with additional responsibilities for filing officers and filing officials, as detailed further below.

Both proposed Regulation 18104 and Regulation 18757 would specify that individual agencies *may* permit this alternate form of filing original statements of economic interests where the agency does not already have a certified electronic filing system in place, but such filings would not be permitted without the agency’s permission. This would ensure that agencies are not suddenly required to accept Form 700s in a manner they are not prepared for but would also harmonize with proposed Regulation 18104 in recognizing that an “original” statement, report, form, or other document is not inherently a paper document.

III. Regulations 18115, 18115.2, and 18723.1

Staff additionally proposes amending Regulations 18115 and 18115.2, both of which pertain to the duties of filing officers and filing officials, to account for proposed Regulations 18104 and 18757.

The proposed amendments to Regulation 18115.2 include: (1) retitling the regulation to further distinguish that submissions via certified electronic filing system are not the only acceptable form of electronic submission; (2) replacing references to “digital signatures” to “secure electronic signatures” to harmonize with the proposed regulations and Section 81004(c) once it becomes operative; (3) deleting language in current subdivision (c), given that proposed Regulation 18104(a) would serve the same purpose of clarifying that a statement may be considered an “original” if properly submitted in either paper or electronic format; and (4) adding language detailing the retention and forwarding requirements for electronic statements not submitted through electronic filing systems. Similarly, the proposed amendment to Regulation 18115 clarifies that the regulation applies to all statements submitted electronically, as opposed to only those statements submitted through an electronic filing system certified by the Commission.

Lastly, Regulation 18723.1, pertaining to “expanded statements of economic interests” for officials with multiple positions, would also be amended to address statements filed with a secure electronic signature outside of an electronic filing system certified by the Commission.

CONCLUSION

In an era where the use of a secure electronic signature is just as verifiable as a handwritten signature (if not more so) and a global pandemic continues to pose a threat to public health and safety, proposed Regulations 18104 and 18757 would adopt modern interpretations of the terms “original” documents and “electronic filing” and recognize that a document with a secure electronic signature, along with additional requirements in the context of statements of economic interests, is a sufficiently secure and dependable alternative method of creating and filing an “original” document. The proposed amendment of Regulations 18115 and 18115.2 would account for the new regulations and provide guidance to filing officers and officials regarding the receipt of statements of economic interest via paper format, certified electronic filing system, or where no certified electronic filing system is in place, an electronic statement submitted with a secure electronic signature. Amendment of Regulation 18723.1 would similarly harmonize the regulation with the other proposed changes, so as not to unnecessarily require the

use of paper or an electronic filing system for submission of an expanded statement of economic interests.

These proposed regulations would implement the Commission’s previously expressed policy objective of modernizing its interpretation of the Act’s filing requirements, including how to best interpret the term “original” in light of technological developments. Staff requests direction from the Commission regarding potential changes to the proposed regulations. Likewise, staff requests input from state and local agencies as well as the regulated community regarding the proposed regulations and any additional considerations the Commission and its staff should take prior to the Commission potentially voting on the proposed regulations.