



STATE OF CALIFORNIA  
**FAIR POLITICAL PRACTICES COMMISSION**  
1102 Q Street • Suite 3050 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

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

**From:** Dave Bainbridge, General Counsel, Legal Division  
John M. Feser Jr., Senior Counsel, Legal Division

**Subject:** Adoption of Proposed Amendments to Regulation 18361.1; Administrative Subpoena Procedure

**Date:** June 5, 2023

---

### **Executive Summary**

Staff recommends adopting the proposed amendments to Regulation 18361.1<sup>1</sup> regarding the administrative subpoena procedure. The proposed amendments would provide an objective standard under which Commission staff would be required to wait at least 21 days from making a request for voluntary disclosure of information before issuing an administrative subpoena, except when authorized by the Executive Director to forego seeking voluntary disclosure. The 21 days would begin when staff communicates in writing the request for voluntary disclosure to the recipient.

The proposed amendments were provided for prenotice in April and no public comment was received. Three changes, however, have been made to the draft amendments since their presentation to the Commission in April. These changes are discussed further below.

### **Reason for Proposed Regulatory Action**

The Commission has asked the Legal Division staff to analyze the administrative subpoena procedure and prepare a proposed regulation that addresses the undefined time frame for the Commission to seek voluntary disclosure of information before issuing an administrative subpoena under Regulation 18361.1. The Enforcement Division has found that the existing Regulation, which requires “reasonable efforts” to obtain voluntary disclosure but provides no guidance as to what constitutes reasonable efforts, creates confusion for the parties and causes uncertainty and delay in the investigation process.

---

<sup>1</sup> 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**

The Commission has “primary responsibility for the impartial, effective administration and implementation of [the Act].” (Section 83111.)<sup>2</sup> The Commission has authority to initiate investigations of possible violations of the Act under Section 83115, which states: “Upon the sworn complaint of any person or on its own initiative, the commission shall investigate possible violations of this title relating to any agency, official, election, lobbyist or legislative or administrative action....”

In conducting investigations, the Commission has the statutory power to compel the production of documents or the attendance of witnesses by administrative subpoena under Section 83118, which provides: “The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission’s duties or exercise of its powers.”

In addition to the specific provisions of the Act, the Government Code provides general authority for all state agencies to investigate matters under their jurisdiction. (Sections 11180-11191.) These provisions apply to subpoenas issued under both the general investigative power of a state agency (Section 11181) and statutes specific to the Commission. (See *People ex rel. Franchise Tax Bd. v. Sup.Ct.* (1985) 164 Cal.App.3d 526, 536-540 [subpoena issued by FTB enforced under statutes relating to FTB investigations] (disapproved on other grounds by *Dana Point Safe Harbor Collective v. Sup.Ct.* (2010) 51 Cal.4th 1, 11.)

The Commission has the general investigative power to issue subpoenas in connection with any investigation under Section 11181(e), which provides:

In connection with any investigation or action authorized by this article, the department head may . . . [i]ssue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, any writing as defined by Section 250 of the Evidence Code, tangible things, and testimony pertinent or material to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state.

Neither the Act nor the Government Code provide a requirement to seek voluntary disclosure of information before issuing an administrative subpoena. This requirement is created by Commission regulation.

## **Proposed Amendments**

Regulation 18361.1 sets forth the requirements for obtaining an administrative subpoena, which provides that Commission staff, under the direction of the Executive Director, must seek to obtain voluntary compliance with the Act and shall investigate possible violations of the Act. The Regulation requires that staff make reasonable efforts to obtain information voluntarily before issuing an administrative subpoena. The Executive Director has the discretion to forego

---

<sup>2</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated.

this procedure for an investigation in progress.<sup>3</sup> Staff is required to periodically report on the status of all investigations to the Commission members, including the reasons for the issuance of any administrative subpoena without first making reasonable efforts to obtain the information voluntarily, but failure to do so does not affect the validity of any administrative subpoena.

The proposed amendments would replace the “reasonable efforts to obtain information voluntarily” standard with a specific requirement that staff request voluntary production of information in writing 21-days before serving an administrative subpoena on a prospective recipient. The 21 days would begin when staff communicates in writing to the prospective recipient requesting voluntary disclosure of information prior to the issuance of an administrative subpoena. The choice of 21 days is based on similar requirements in civil law, as well as input from Enforcement Division staff regarding what would be a reasonable amount of time for a person to respond to a voluntary request for records or information.

Eliminating the subjective requirement that staff make “reasonable efforts” to obtain voluntary disclosure, with a clear, objective requirement would: eliminate any confusion and undue delay caused by attempts to comply with an undefined subjective requirement; make it easier for potential subpoena recipients and their counsel to understand and follow; and provide a clearly defined time frame that would promote and facilitate compliance with staff’s efforts to obtain voluntary disclosure.

Three changes have been made to the draft amendments since their presentation to the Commission in April. First, the term “reasonable efforts” in the description of the 21-day requirement was removed because the time requirement itself would constitute the requisite requirement under the amended regulation, therefore including that term in the requirement is unnecessary and potentially confusing. Second, the 21-day requirement was restated to clarify its meaning. Finally, the requirement that staff report to Commission members on the status of all investigations was removed to clarify that Regulation 18361.1 requires that staff report to the Commission on matters involving an administrative subpoena sought without voluntary disclosure. This is consistent with the current and longstanding practice of Enforcement to report to the Commission on those instances where staff did not seek voluntary compliance before issuing a subpoena. Conversely, it has not been the practice of Enforcement staff to report to the Commission on “the status of all investigations.” Such a report is not related to the purpose of Regulation 18361.1 and would be inconsistent with the Commission’s overall approach of avoiding involvement with pending Enforcement cases.

### **Summary of Public Comment & Responses**

The proposed amendments to Regulation 18361.1 were presented to the Commission for prenotice discussion at the April 20, 2023, meeting. No comments have been received from the public to date.

---

<sup>3</sup> Typical situations where the Executive Director authorizes staff to issue a subpoena without first seeking voluntary compliance include where the recipient requests a subpoena, a subpoena is required by law or a recipient’s internal policy, or there is concern about loss or destruction of evidence.

### **Education/Outreach Efforts**

Commission staff will distribute the regulation to interested parties by means of the “Newly Adopted, Amended or Repealed Regulations” email list and update the “Newly Adopted, Amended or Repealed Regulations” page on the website.

### **Conclusion**

The proposed amendments to Regulation 18361.1 would provide a clear, objective standard for seeking to obtain voluntary disclosure of information before issuing an administrative subpoena. An objective standard would improve efficiency by providing greater clarity to the parties involved in prospective enforcement matters regarding the timelines applicable for the voluntary disclosure of information.

Staff recommends adoption of the proposed amendments.

**Attachment:**  
**Proposed Regulation 18361.1**