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

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Subject: Delegation of Commission Authority to the Executive Director:
Settlement of an Order for Monetary Penalties

Date: September 27, 2023

Executive Summary

Proposed Regulation 18318 delegates the Commission's authority to the Executive Director to settle an order for monetary penalties for a lesser sum, establishes a process, and provides the factors for consideration to determine when a settlement is warranted. The regulation requires the Executive Director to describe the factors justifying the action in the settlement agreement and to report executed settlements to the Commission. Proposed Regulation 18318 is presented for adoption by the Commission.

Reason for Proposed Regulatory Action

The Commission and staff are currently reviewing the Commission's Collection Program and updating policies in accordance with the Commission's direction. To make the Collection Program more effective moving forward and to address current outstanding collection matters, staff recommends that the authority, process, and criteria for considering settlement agreements be clarified by regulation. The proposed regulation provides the Executive Director with this authority, establishes a process, factors for consideration, and provides for Commission guidance and feedback on the process while enabling the Executive Director to obtain collection payments in a cost-effective manner.

Background and Current Law

Enforcement Matters: Resolutions that Result in Commission Collection Actions

The Commission has primary responsibility for the impartial, effective administration and implementation of the Act.¹ (Section 83111.) In this capacity, the Commission has the authority to enforce the Act and, where warranted, initiate an administrative action to seek monetary penalties of up to \$5,000 per violation. (Sections 83115.5, 83116(c), 91000.5.) Enforcement matters may be

¹ All statutory references are to the Government Code, unless otherwise indicated.

resolved by stipulation, a full hearing, default proceeding, or through settlement where the FPPC is a party within another agreement, and, where appropriate, include an “Order for Monetary Penalties.”² The following discussion and proposed regulation apply only to orders for monetary penalties arising from a full hearing, default proceeding, or settlement involving the FPPC within another agreement. Collection actions do not occur in matters resolved by stipulation because the respondent must pay the fine at the time of execution. The majority of collection matters result from default proceedings.

Commission’s Collection Program

Monetary penalties due by a respondent (hereinafter “debtor”) that remain unpaid are an account receivable or “AR” payable to the state’s General Fund. It is the purpose of the Commission’s Collection Program to collect the penalties imposed by the Commission to achieve compliance with the Act, deter non-compliance, and collect debts due to the state as required by state law and administrative procedures.

1. The Accounts Receivable Management Act

The Commission’s Collection Program is governed by the Accounts Receivable Management Act (“ARMA,” Sections 16580-16586), enacted in 1994 and applicable to all state agencies. The ARMA requires a state agency to allocate its collection resources with the highest priority given to accounts with the highest expected return. (Section 16583.) The ARMA sets the requirements for an agency to assign or sell ARs to a private debt collector (Section 16584); and authorizes agencies to charge a reasonable fee, not to exceed costs, to recover collection costs on past due ARs. (Section 16583.1.) Additionally, it requires all state agencies to submit an annual report to the State Controller’s Office (“SCO”) detailing ARs and “discharged accounts.” (Section 16583.2.)

2. Duties of the State Controller

The SCO has the authority to discharge the Commission from its duty to collect a debt that is “uncollectable or the amount of the debt does not justify the cost of its collection.” (Section 12433.) Under these circumstances, the Commission may apply to the SCO for a “discharge” from the duty to collect a debt. (Section 12434.) The SCO audits the application and allows the Commission to “close its book on that item” if the SCO determines the following applies: no credit exists to offset the debt, the collection is improbable for any reason, and³ the cost of recovery does not justify the collection. (Section 12435.)

² See Regulation 18361.5, Administrative Hearings, 18361.5(f), Stipulated Orders, and Regulation 18361.11, Default Proceedings. See also Section 91001, Responsibility for Enforcement.

³ Although the last two factors are part of a list of items the Controller must determine, it appears this should be read as “or” instead of “and,” given the language in Section 12433 allowing discharge of the debt if the “debt is uncollectible or the amount of the debt does not justify the cost of its collection” and in Section 12435(e), that for debts exceeding \$10,000 it may be discharged if the Attorney General advises that “collection is not justified by the cost or is improbable.”

For amounts exceeding the monetary jurisdiction of the small claims court, currently \$10,000, the Attorney General must additionally provide written advice to the SCO that the collection is “not justified by the cost or is improbable for any reason” for the SCO to discharge the debt. (Section 12435.)⁴ Note that the discharge of the debt is relevant to the agency’s collection duties only; it does not release or extinguish the debtor’s obligation for the debt to the state. (Section 12437.) Additionally, an agency may refrain from collecting ARs that total less than \$500 for the debtor, as discussed further below. (Section 12438.)

2. *State Administrative Manual: Collection Procedures*

The Commission’s Collection Program is further governed by the State Administrative Manual (“SAM”), “Accounts Receivable” provisions applicable to all state agencies. (SAM Sections 8291-8296.)⁵ The SAM requires that ARs are “followed-up promptly and in a manner that is cost-effective to the state” (SAM Section 8293) and, in accordance with the ARMA requirements noted above, the Commission is directed to “select the collection actions that are likely to generate the highest net income and do not compromise future state income collections.” (SAM section 8293.1.) The collection practices should be cost-effective and consistent with program goals and legal authority. (SAM Section 8293.)

A. Initiating Collection Actions: Demand Letters, Offsets, Court Judgments, and Contracting Out ARs

As a first step, the SAM requires that an agency send a sequence of three demand letters to collect the penalty at a minimum of 30-day intervals, for a total 120-day time period.

Where the debt remains unpaid following the demand letters, SAM Section 8293.1 requires that the agency then determines the most efficient and effective collection method using a cost-benefit analysis and initiates *one or more* of the following to satisfy the AR:

- “Offset” procedures with other state departments.
- Court judgments and settlements. This includes:
 - Obtaining an Abstract of Judgment-Civil and Small Claims against the debtor from the court to proceed with real and personal property liens, wage garnishments, or levies on bank accounts.
 - Entering into settlement agreements. So long as the agency remains “the judgment creditor” on record, the agency may enter into a settlement agreement to accept a lesser sum from the debtor in full satisfaction of a judgment.⁶

⁴ The SCO provides the application, STD 27, to the Attorney General for this review and decision.

⁵ The Department of Finance, Fiscal Systems And Consulting Unit (“FSCU”) has jurisdiction over the interpretation of the fiscal/accounting sections of the SAM.

⁶ Civ. Pro. Code section 724.10(a) states: “A money judgment may be satisfied by payment of the full amount required to satisfy the judgment or by acceptance by the judgment creditor of a lesser sum in full satisfaction

- Contract with a state department’s collection unit or private collection agency.⁷ (SAM Section 8293.1.)

“Offsets” from other state departments for purposes of the Commission’s collections would be from the Franchise Tax Board (“FTB”) Intercept Program with access to FTB refunds, State Lottery winnings, or unclaimed property with the state.⁸

B. Reclassification of ARs: Settlement Agreements

The SAM directs agencies to review ARs and “reclassify” or adjust the AR where: legal authority does not exist to bill for the amount owed, the documentation does not exist to substantiate the AR, or the validity is disputed. When an agency enters a settlement agreement in full satisfaction of the debt, there would no longer be legal authority to bill for the amount owed, and the AR would be reclassified down to the amount collected. (See SAM Section 8295.)⁹

C. Uncollectable ARs: SCO’s Discharge of the Agency from Accountability

The SAM directs agencies to review ARs at least quarterly to identify receivables eligible for a “discharge” from the duty to collect a debt and file an Application for Discharge from Accountability form, STD. 27, with the SCO. (SAM Section 8293.5 and see discussion of SCO duties above.) The application must state the estimated cost of collection, collection efforts (letters issued, offset attempts, legal actions pursued), facts warranting the discharge (e.g., bankruptcy, statute of limitations, debtor deceased, or other factors), and a statement that the debt is uncollectible and the amount of the debt does not justify the cost of further collection actions. (See STD 27.) As noted above, the discharge of the debt is relevant to the agency’s collection duties only; it does not release or extinguish the debtor’s obligation for the debt to the state.

D. Refraining from Collection: ARs Less Than \$500

Additionally, as noted above, an agency may refrain from collecting ARs that total less than \$500 for the debtor. (Section 12438.) When doing so, the SAM requires that the agency

of the judgment.” Civ. Pro. Code section 680.240 defines “judgment creditor” as “the person in whose favor a judgment is rendered or, if there is an assignee of record, means the assignee of record.”

⁷ Section 16584 authorizes an agency to contract with a private debt collector by assignment or sale of ARs where it is determined that it is likely to generate more net revenue or value than state efforts and will not compromise future state revenue collections. The debtor must be notified in writing that the AR will be turned over to a private collection agency unless the debt is paid or appealed. (*Ibid.*) Note that where the debt is sold or assigned, the agency would likely no longer be the “judgment creditor” and would no longer have the authority under the Civil Procedure Codes noted in footnote 6, above, to settle the debt for a lesser sum.

⁸ Offsets from the state Department of Tax and Fee Administration and the Employment Development Department as well as offsets against SCO payments to cities and counties may be available, in limited situations. (SAM section 8293.4.)

⁹ The DOF’s FSCUHotline confirmed this process by email, stating “[p]er CCP Section 680.240 and 724.010, as long as FPPC is the judgement creditor, then a lesser sum can be accepted.” The AR is then adjusted down to the amount collected pursuant to SAM Section 8295. (FSCUHotline email, April 14, 2023.)

first attempt to collect the ARs following the SAM Section 8293.1 procedures described above and determine that the debt is uncollectible or is not cost-beneficial to continue collection efforts. (SAM Section 8293.5.)

3. Commission's Collection Procedures

Set forth in the Commission's Collection Procedures Manual, the Commission's current collection process begins in the Enforcement Division, which establishes a collections file, sends the first demand letter, obtains a judgment from the Sacramento Superior Court,¹⁰ and conducts a skip trace or search of the county index to locate the debtor's real property interests.

The Enforcement Division transfers the matter to the Administrative Division if the payment is not made. The Administrative Division sends the second and third demand letters, offers reasonable opportunities for the debtor to pay the debt, and (in the third demand letter) states the actions that may be taken to collect the debt. Updating its practices this year, staff's actions will include the continued use of offsets while adding, as a matter of practice, seeking liens for new judgments and renewals of judgments. Priority will be given to matters identified as serious violations. ("FPPC Collections," April 20, 2023, Commission meeting presentation.)¹¹

To address collection matters where settlement of the AR may be warranted for consideration, staff recommends that the authority, criteria, and process be clarified by regulation. The Executive Director has had some historic delegated authority to oversee collection activities, including the authority to refer unpaid penalties to a collection agency, approve proposed compromises of outstanding debts, and seek the discharge fines. (Commission Resolution, dated May 5, 2000.) However, the negotiated settlement of outstanding ARs has not occurred under recent administrations. A regulation delegating authority to the Executive Director to enter into a settlement agreement in full satisfaction of an order for monetary penalty, with guidelines on the circumstances that will warrant such action and the required reporting to the Commission, would clearly define the Commission's process for settling collection matters.

Proposed Regulation

Proposed Regulation 18318(a) delegates authority to the Executive Director to settle monetary penalties for a lesser sum where these requirements are met: the monetary penalty order is final, the three demand letters have been issued, staff has made reasonable efforts to collect the debt, and the Executive Director has determined that the settlement is appropriate considering four factors, discussed below. (Regulation 18318(a)(1)-(4).) "Reasonable collection efforts by staff" is defined as seeking offsets from the FTB or other state departments and, if

¹⁰ The Commission has the authority to collect penalties by obtaining a civil judgment (Section 91013.5) or through an expedited procedure by application to the clerk of the court for judgment to collect penalties (Section 91013.7). A civil action brought under either section must be commenced within four years after the date the monetary penalty was imposed. (See Sections 91013.5(b) and 91013.7(e).)

¹¹ The Commission's collection process has varied over the years and previously relied primarily on seeking offsets with the FTB to satisfy outstanding ARs. As a result, not all of the current outstanding collection matters have a judgement or are eligible for obtaining a judgement, which reduces staff's ability to file liens, levies or garnishments to collect the AR.

legally permissible, obtaining a court or court clerk's judgment followed by using an appropriate judgment enforcement method, including filing real property or personal property liens, bank levies or wage garnishments against the debtor's assets. (Proposed Regulation 18318(a)(3)(A)-(B).)

The four factors for the Executive Director to consider in determining that the settlement is appropriate are whether the settlement amount exceeds the amount likely to be collected within a reasonable time period, the debtor's ability to satisfy the full debt or a greater amount of the debt within a reasonable time, the extent that the debt includes interest accrued, and the severity and nature of the violations for which the penalties were assessed. (Proposed Regulation 18318(a)(4)(A)-(D).)

So that the Commission is apprised of settlement agreements and the agreements are in accordance with the above requirements, subdivision (b) requires the settlement agreement to include a brief description of the factors that justified the settlement and that the Executive Director report a settlement agreement to the Commission after its execution. This allows the Commission to provide input and guidance on the process for future settlement agreement considerations while enabling the Executive Director to obtain collection payments in a cost-effective and timely manner.

Summary of Public Comment & Response Thereto

No public comment has been received at this time.

Education/Outreach Efforts

Staff will distribute the regulation to interested parties via the Newly Adopted, Amended or Repealed Regulations email list and update the "Newly Adopted, Amended or Repealed Regulations" page on the Commission's website. Additionally, staff will update the Commission's internal Collection Procedures Manual to reflect these changes.

Conclusion

Proposed Regulation 18318 provides authority for the Executive Director to enter into a settlement agreement in full satisfaction of an order for monetary penalties where staff has made reasonable collection efforts and the Executive Director determines that the settlement is appropriate considering the prescribed factors. The regulation requires the Executive Director to describe the factors justifying the action in the settlement agreement and to report the executed agreement to the Commission. The proposed regulation is in accordance with state law and policies requiring the Commission's prompt and ongoing action for the collection of ARs in a manner likely to generate the highest net income in a cost-effective manner consistent with program goals and legal authority.

Attachment: Proposed Regulation 18318