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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich and Commissioner Hayward

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Subject: Law and Policy Discussion of Proposed Amendments to Regulations 18360,
18361.4, 18361.5, 18361.9, 18361.11 & 18404.2

Date: July 3, 2020

Proposed Commission Action

Staff seeks direction from the Law and Policy Committee concerning proposed amendments to several regulations governing enforcement matters. The proposed amendments to these regulations will be noticed for adoption at the Commission's regularly scheduled meeting in August 2020.

Background and Reasons for Proposed Regulatory Action

Staff from both the Legal and Enforcement Divisions have identified several areas of improvement to multiple regulations governing enforcement matters including revised procedures and requirements for probable cause proceedings, administrative hearings, briefing procedures associated with proposed decisions, and administrative terminations. These recommended improvements would modify existing regulations in accordance with governing statutes to promote and facilitate compliance with, and enforcement of, the Political Reform Act ("the Act"), while ensuring fairness and due process for persons subject to enforcement proceedings. The proposed amendments, which incorporate Commissioner recommendations from past meetings, also include numerous non-substantive changes intended to clarify existing regulations.

At its June 2020 meeting, the Commission discussed and provided direction for certain provisions that staff proposed to amend. This memorandum addresses those discussion points and the proposed changes to the specified provisions, highlighted for ease of reference, based on direction provided by the Commissioners. For a complete overview of all amendments originally proposed, a copy of the memorandum submitted by staff for the June 2020 meeting is attached.

Regulatory Proposals

18360 – Enforcement Complaints

At the June 2020 meeting, staff proposed repeal and adoption Regulation 18360. The proposed regulation addresses the relatively new Electronic Complaint System (“ECS”), which allows members of the public to electronically file complaints with the Commission on its website and directly access information concerning pending Enforcement complaints and cases. Several technical changes to clarify and improve the existing provisions were also proposed.

One suggested change that prompted discussion was a provision in proposed subdivision (e) authorizing the Enforcement Division to reject without notice complaints deemed by the Executive Director to be harassing. Members of the Commission expressed concern that the term “harassing,” without further definition, was too broad and unworkable. According to the Chief of Enforcement, the provision was proposed to deal with sworn complaints filed with the Commission typically alleging that numerous public officials have been harassing the complainant. As a result of these allegations that fall outside the scope of the Act, the Enforcement Division has been forced to perform the laborious task of providing notice to all of the subjects of the complaint.

In order to rectify the situation just described, staff proposes to delete the term “harassment” and instead permit the Enforcement Division to reject without notice complaints deemed by the Executive Director “to address only issues outside the jurisdiction of the Act.”

18361.4 – Probable Cause Proceedings

The Act and its regulations provide persons accused of violating the Act certain procedural protections beyond those provided by the Administrative Procedures Act found in Sections 11500, et. seq. (“APA”). Among them are the requirements that the Commission make a finding of probable cause and respondents have the right to be heard at a probable cause proceeding. (Section 83115.5.) Under existing Regulation 18361.4 (e), the Enforcement Division must provide evidence sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed a violation at the probable cause conference in order for the Commission to make a finding of probable cause against a respondent. (Regulation 18361.4 (e).)

As stated in the memo at the June 2020 meeting, the proposed amendments generally would: rearrange the regulatory provisions to correspond with the sequence of events that occur in a probable cause proceeding; rephrase the existing probable cause standard; clarify and simplify filing deadlines, service requirements and scheduling procedures; and eliminate existing regulatory procedures and requirements that, in practice, provide little or no benefit to the parties and make the process less efficient.

At the June meeting, the Commission discussed certain provisions proposed by staff but did not request any changes. However, staff has further considered the regulatory changes concerning the situation where respondent either fails to request a probable cause conference or after making a request for the conference or fails to schedule it within 75 days after the Commission Assistant

receives the request. Staff originally proposed that in those situations, a respondent would waive the right to further probable cause proceedings under Section 83115.5, and the waiver would automatically constitute a finding of probable cause. After further consideration, staff believes the finding of probable cause should not be automatic. Instead, the process currently in place for finding probable cause in these situations should remain the same so staff proposes adding that process to the regulation. Therefore, when a respondent waives his or her right to further probable cause proceedings:

...the Enforcement Division may transmit copies of the Probable Cause Report, Request for a Finding of Probable Cause, and Order that an Accusation be Prepared to the Commission Assistant requesting that a hearing officer from the Legal Division find probable cause based on the information provided. Upon a finding of probable cause, the hearing officer will issue an Order Finding Probable Cause and serve it on all parties.

(Proposed subdivision (d)(4).)

In sum, even in those situations where no probable cause conference is held, a hearing officer from the Legal Division will still be required to find probable cause on the papers before an accusation is prepared and served on a respondent.

18361.5 – Administrative Hearings.

Section 83116 authorizes the Commission to hold a hearing once it determines there is probable cause to believe a violation of the Act has occurred. Sections 11512(a) and 11517(a)¹ authorize agencies, including the Commission, to determine whether an Administrative Law Judge will hear the case alone or together with the agency.

When the Executive Director determines that an administrative hearing should be conducted before an administrative law judge alone, subdivision (b) requires the Executive Director to provide a copy of the accusation and a memorandum describing the issues involved to each Commissioner. However, subdivision (b) also permits the Commission itself to hear the matter if, at the next regularly scheduled meeting after the Executive Director's determination, two or more Commissioners vote to participate in the hearing.

Staff proposed a requirement that three or more Commissioners, rather than two, vote to have any contested matter heard by the Commission itself. (Proposed subdivision (a).) As stated at the meeting, holding a meeting in front of the Commission itself changes a significant aspect of the actual hearing (ALJ alone v. ALJ and full Commission), while also necessarily committing significant amount of the agency's time and resources. Therefore, requiring three or more Commissioners to vote to hold a hearing before the Commission itself appeared consistent with

¹ These two statutes are part of the Administrative Procedures Act ("APA"), which governs Commission hearings.

Regulation 18327, which requires the votes of three or more Commissioners to take any formal action such as granting a petition for rehearing or issuing “any decision, order or declaration pursuant to Government Code Section 83116.”²

The Commissioners discussed using language that did not necessarily require a certain “number” of Commissioners to vote to have the hearing in front of the Commission. One suggestion was that the provision should state the hearing will be in front of the Commission itself if the Commission votes to do so at the next meeting. Another suggestion was to state that the requirement should be a majority of Commissioners to account for those times when there are only three Commissioners available to vote.

Staff has incorporated language providing that if the Commission votes to do so at the next meeting, the hearing will be held in front of the Commission. In this way, the proposed requirement is both clear and flexible.

18361.9 – Briefing Procedure of Proposed Decision by an Administrative Law Judge; Reconsideration.

As stated in the memorandum for the June 2020 meeting, the vast majority of contested cases are heard by an ALJ sitting alone. When this occurs, the ALJ must prepare a proposed decision within 30 days after the case is submitted by the parties. Within 100 days of receipt by the agency of an ALJ’s proposed decision, the agency may act on the decision in one of five statutorily prescribed ways set forth in Section 11517(c)(2) of the APA.

Subdivision (b)(1) Regulation 18361.9 requires the Enforcement Division to file an opening brief no later than 14 days after the date of service of the proposed decision and provides that the brief *may* consider addressing specified issues.

During the meeting, the Commission discussed the requirement that administrative decisionmakers are limited to consideration of the evidence in the record pursuant to Government Code section 11425.50(c) of the APA, which states “[t]he statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding.”

In light of this statutory requirement, staff believes it should be made clear that the Enforcement Division’s opening brief *may only* address the specified factors in subdivision (b)(1). By limiting the issues in this way, staff also believes it would be logical to eliminate the catch-all factor in subdivision (b)(1)(E) permitting “[a]ny other issue the Enforcement Division determines to be relevant.”

The proposed amendments also added subdivision (b)(6) to set forth the Commission process for considering proposed decisions. Specifically, the Commission would consider any proposed decision in a closed session where it could take any action authorized by Government

² Section 83116 provides, in part, that after probable cause has been found in any matter, the Commission may hold a hearing to determine if a violation has occurred.

Code section 11517, subdivision (c), such as adopting the proposed decision in its entirety, adopting the proposed decision and making technical or other minor changes, etc.

Staff proposed a provision prohibiting oral argument at the meeting to consider the proposed decision as parties are not legally entitled to an opportunity to make oral arguments before an agency to support or oppose an ALJ's decision (*Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 314), and the prohibition would help ensure that the Commission does not inadvertently consider new evidence when making its determination about the proposed decision.

The Commission requested that a prohibition against public comment also be incorporated. Government Code section 11125.7, subdivision (a), requires that state bodies provide an opportunity for members of the public to directly address the state body on each agenda item. However, that requirement is "not applicable to closed sessions held pursuant to Section 11126." (*Id.*, § 11125.7, subd. (e).) Therefore, public comment would also be prohibited.

Finally, in light of the requirement that decisionmakers are limited to consideration of the evidence in the record, subdivision (b)(6) would clarify that "the Commission shall only consider evidence in the underlying administrative record when taking any action authorized by Government Code section 11517, subdivision (c)."

Conclusion

The changes proposed above are intended to incorporate direction from the Commission at the June 2020 as well as additional staff proposals based upon further review. Staff welcomes input and direction from the Law and Policy Committee.