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

From: Dave Bainbridge, General Counsel
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Subject: **Pre-Notice Discussion of Regulation 18360 Amendments Regarding Public Information and Records Requests for Pending Enforcement Matters**

Date: April 8, 2022

INTRODUCTION

Regulation 18360¹ addresses how the Commission handles the complaints and referrals it receives, as well as the matters it pursues proactively. The regulation's provisions include how to file a complaint or referral, the procedural rights of a sworn complainant, handling of Commission-initiated cases, and handling of complaints rejected without notice to the respondents.

Regulation 18360, subdivision (d)—the subject of staff's proposed amendments—details how the Commission responds to public requests for information and records regarding a pending Enforcement Division matter. Generally, subdivision (d) identifies the information and records the Commission can provide to the public and the circumstances in which it may be provided.

Staff proposes three primary amendments to improve the regulation: (1) shorten the delay period between providing notice to the subject of an Enforcement matter and making information and records available to the public; (2) make express that, aside from certain records and general information or confirming which step of the administrative process the case is in, the Commission will not comment on the specifics of a pending Enforcement matter; and (3) re-organize the subdivision to make its provisions more clear to the public and regulated community.

LEGAL BACKGROUND

In December 2015, the Commission amended Regulation 18360 to specify the Commission's policies for handling requests from the public, including media, for records and information related to ongoing Enforcement matters. In 2020, Regulation 18360 was significantly amended, resulting in the current version of the regulation.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 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.

Today, Regulation 18360(d) provides that the Commission will post on its website and respond to requests for information about specified matters in a particular fashion. The regulation states, in relevant part, the Commission *may*:

1. Confirm receipt and provide a copy of any document received from a complainant or referring agency five calendar days after a copy of the complaint or referral has been sent to the subject(s) of the complaint or referral;
2. Provide a copy of the complaint or referral within five days of receipt if the Enforcement Division has decided to take no action on the complaint or referral;
3. Confirm a case has been opened and provide a copy of documents reviewed by the Enforcement Division in making a determination to open a case five calendar days after a copy of the information, or a notification that a case has been opened, has been sent to all persons alleged to have violated the Act.
4. Withhold any document, identity of any person providing information, or the existence of a complaint or case if the Enforcement Division Chief determines that disclosing the information would jeopardize the matter, or the information is privileged, private or confidential.

In contrast to the above permissive actions, Regulation 18360(d) also provides that the Commission *may not* disclose any action the Enforcement Division intends to take, other than no action, until after the notice to the complainant of intended action has been sent and five days have passed.

The above provisions are consistent with other laws relating to the dissemination of records and information. Under the California Public Records Act (“CPRA”), every person has a general right to inspect any public record, and public agencies are generally required to assist members of the public who have made a public records request. (Sections 6253, 6253.1.) However, records may be withheld where a public agency is able to justify the withholding of the records “by demonstrating that the record in question is exempt under express provisions of [CPRA] or that on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (Section 6255.)

Additionally, the California Rules of Professional Conduct—applicable to members of the California Bar—state:

A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(Rule 3.6, subdivision (a), “Trial Publicity.”) Notwithstanding this general requirement, the Rules of Professional Conduct permit a member to state, in relevant part:

- (1) The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) Information contained in a public record;
- (3) That an investigation of the matter is in progress;
- (4) The scheduling or result of any step in litigation; and
- (5) A request for assistance in obtaining evidence and information necessary thereto.

(*Id.*, subdivision (b).) The rule further specifies, “[n]o lawyer associated in a law firm *or* government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).” (*Id.*, subdivision (d).)

DISCUSSION

Regulation 18360(d) specifies the Commission’s approach to handling public requests for records and information regarding ongoing Enforcement matters. In general, the regulation balances the need for transparency with the need to protect the integrity of a case, including individuals’ due process rights. The amendments proposed today are aimed at further specifying the Commission’s approach to respecting that balance. The proposed amendments would:

- (1) Shorten the timeframe between providing notice to the subject of a pending Enforcement matter and making certain information and records available to the public;
- (2) Specify that, aside from the information and documents expressly permitted for release, the Commission will not comment on specific facts or legal issues relating to a pending Enforcement matter; and
- (3) Re-organize the regulation to clarify its provisions, including the records and information potentially available to the public and the circumstances in which they are made available.

Shortened Period Between Providing Notice and Releasing Information to the Public

The Commission’s website contains a “Media FAQs” page that explains:

The FPPC is protecting the due process rights of those complained against. It is only fair for those involved to have a chance to see the complaint firsthand before hearing about it in the media. Others may release complaints or information to the media and it’s their right to do so. But as an enforcement agency, our regulation and policy is to ensure due process, maintain fairness and allow for the investigatory process to be thorough and unbiased.

(“Media FAQs,” available at <https://www.fppc.ca.gov/media/media-faq.html>.) This same reasoning applies to the release of other information and records specified in Regulation 18360, including the confirmation of the existence of a complaint, a copy of a referral, a document accompanying a complaint or referral, or a document reviewed by the Enforcement Division in making a determination to open a case.

With the above concerns in mind, Regulation 18360 currently includes a five-day delay before the Commission may provide any of the above information or records. While a five-day delay may have served the Commission well in the past, staff now proposes shortening that delay period to two days. Previously, a five-day delay served a more useful purpose, as it provided a “buffer” period between the day notice was physically mailed to the subject of an Enforcement matter and the day it was received by the subject. Today, however, most complaints, and other types of notice, are provided to the subjects via email, rather than physical mail, making a five-day timeframe unnecessary.²

A two-day delay between notification and release of information and records to the public would maintain fairness to the subject of the Enforcement matter while also allowing us to

² Of the 29 complaints processed and opened into cases between January 1 and March 25 of this year, 28 of 29 potential respondents received notice either solely by email or a combination of email and physical mail.

respond to the public more immediately and transparently. A shortened delay period would also help protect the Commission's credibility by preventing scenarios where certain information or materials have already been made public (by the complainant, for instance), but the Commission is unable to provide any time of confirmation for another five days.

No Commentary on Pending Enforcement Matters

Currently, Regulation 18360 states the circumstances in which information and records relating to pending Enforcement matters will be released to the public, but it does not specify that the Commission will not provide additional comments relating to those matters. As our website explains:

We try to answer as many questions as thoroughly as possible, but in many cases we are unable to comment on specific situations. The reason for this is fairness. First, absent a full investigation, we do not know all the facts and most situations are very fact specific. Second, we want to avoid any public comment that would impede an ongoing investigation. And lastly, until there is a final resolution of a case, we do not want to accuse or exonerate someone based on based on an *alleged* violation of the Act. That's one reason why "fair" is part of our name. We will conclude whether or not a violation has occurred only after a thorough investigation and a determination by the Commission. With these principles in mind, we often provide answers in general terms.

We also try to provide guidance and point to sections of the law and regulations that are relevant to your questions.

("Media FAQs," available at <https://www.fppc.ca.gov/media/media-faq.html>.)

Consistent with the above reasoning, staff proposes amending Regulation 18360 to codify its current practices of: (1) providing available public records, information regarding the current stage or recent results of an Enforcement matter (e.g., whether a probable cause hearing has been conducted and probable cause found), as well as general information relating to specific provisions of the Act or Section 1090 (e.g., what a "conflict of interest" means under the Act); and (2) refraining from providing additional commentary regarding a pending Enforcement matter.

Re-Organization of the Regulation

Finally, staff proposes amending Regulation 18360 to re-organize subdivision (d) into five sections to more clearly list the circumstances in which the Commission may respond to requests for information and records pertaining to ongoing Enforcement matters. The first section would list actions the Commission may take in responding to public requests for information and records relating to pending Enforcement matters. The second section would clarify that the Commission generally may not comment on the Enforcement Division's intended actions until after notice of the intended action has been sent to the complainant. The third section would make express that the Commission may disclose the scheduling or result of any step in an administrative action. The fourth section would make express that the Commission will not provide commentary regarding ongoing Enforcement matters. The final section would remain unchanged, apart from re-numbering and correcting a typographical error, and explain that, consistent with CPRA's balancing test, the Commission may withhold certain documents or

information if the Enforcement Division Chief determines that disclosing the information would jeopardize the matter, or the information is privileged, private, or confidential.

CONCLUSION

For the above reasons, staff proposes amending Regulation 18360 to: (1) shorten the timeframe between providing notice and making certain information and records available to the public; (2) clarify that aside from certain records and general information, or which stage of the administrative process a case is in, the Commission will not provide commentary regarding pending Enforcement matters; and (3) re-organize subdivision (d) to make its provisions clearer to the public and regulated community. Staff is prepared to answer questions the Commission may have, as well as take direction on further amendments prior to potential adoption at the June Commission meeting.