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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Baker, Commissioner Wilson, and
Commissioner Wood

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Prenotice Discussion of Proposed Amendments to Regulation 18361.1;
Administrative Subpoena Procedure

Date: April 10, 2023

Executive Summary

Existing Regulation 18361.1 requires Commission staff to make “reasonable efforts to obtain information voluntarily” before issuing an administrative subpoena. The proposed amendments would provide an objective standard for “reasonable efforts” under which Commission staff would not be permitted to serve an administrative subpoena sooner than 21 days after making a written request for the voluntary disclosure of information from a prospective recipient. These proposed amendments are scheduled to be presented for adoption at the June Commission meeting.

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 provides no definition for “reasonable efforts” to obtain voluntary disclosure, causes delay in the investigation process that may unduly burden people subject to an investigation, creates confusion for the parties involved in an investigation about what constitutes “reasonable efforts.”

Background

The Commission has “primary responsibility for the impartial, effective administration and implementation of [the Act].” (Section 83111.) 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.

Proposed Regulations

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 this procedure for an investigation in progress. 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 establish a specific definition of “reasonable efforts to obtain information voluntarily” by requiring that Commission staff seek to obtain information requested in an administrative subpoena on a voluntary basis by imposing a 21-day period before which an administrative subpoena may be served 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.

These proposed amendments would replace the existing subjective requirement, that staff make “reasonable efforts” to obtain voluntary disclosure, with a clear, objective definition of what constitutes “reasonable efforts.” This 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.

Conclusion

The proposed amendments to Regulation 18361.1 would provide a clear, objective standard for implementing the Commission’s direction that staff use “reasonable efforts” 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.

Attachment:
Proposed Regulation 18361.1