

FINAL TEXT OF REGULATIONS

TO TITLE 2 CALIFORNIA CODE OF REGULATIONS DIVISION 10

Chapter 5. Alternative Whistleblower System

Subchapter 1. General Provisions and Definitions

§ 61300. Purpose.

This chapter is adopted to implement, interpret, and make specific the provisions of Government Code section 8547.5, subdivisions (c) and (d), authorizing the establishment of an alternative whistleblower system for the investigation of allegations of improper governmental activities made against the State Auditor's Office or its employees.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61301. Act.

"Act" means the California Whistleblower Protection Act as set forth in Article 3 (commencing with Government Code section 8547) of Chapter 6.5 of Division 1 of Title 2 of the Government Code.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61302. Alternative Whistleblower System.

"Alternative whistleblower system" means a process to receive, keep confidential, and investigate only those allegations of improper governmental activities made against the State Auditor's Office or its employees under the Act and shall be limited to this purpose.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61303. Appropriate to Share.

"Appropriate to share" means the independent investigator may provide a report to entities or individuals outside the State Auditor's Office when either of the following is true:

(a) The evidence gathered by the independent investigator supports a conclusion that it is more likely than not that an employee engaged or participated in an improper governmental activity and, in response to receipt of the written report, the State Auditor's Office does not provide the independent investigator with an objectively reasonable explanation for not taking adverse action and otherwise implementing the independent investigator's recommendations; or

(b) The evidence gathered by the independent investigator supports a conclusion that an employee or employees of the State Auditor's Office are engaged in criminal or other activity that poses an ongoing threat to the integrity of the State Auditor's Office.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61304. Consistent With The Provisions of This Article Relating to Other State Civil Service Employees.

"Consistent with the provisions of this article relating to other state civil service employees" means that the independent investigator shall comply with this chapter and provide the State Auditor's Office and employees with the same rights and obligations as civil servants being investigated or interviewed by the State Auditor's Office pursuant to the Act. These rights and obligations include but are not limited to, matters of confidentiality, privacy, due process, and protection from retaliation.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61305. Department of Justice or DOJ.

"Department of Justice" or "DOJ" means the Employment and Administrative Mandate Section of the California Department of Justice, unless otherwise indicated.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61306. Employee or Employees.

"Employee" or "employees" means an employee or employees of the State Auditor's Office.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61307. Final Action.

"Final action" means the State Auditor's written notification to the independent investigator regarding any recommendations the independent investigator has made or the State Auditor's reasons for not taking adverse action pursuant to Government Code section 19570 et seq. in response to the independent investigator's final written report.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61308. Good Faith.

"Good faith" means the individual providing the information or report of alleged improper governmental activity has a reasonable basis in fact for reporting or providing the information.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61309. Improper Governmental Activity or IGA.

“Improper governmental activity” or “IGA” has the same meaning as set forth in Government Code section 8547.5, subdivision (c).

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61310. Independent Investigator.

“Independent investigator” means an individual who meets all of the requirements contained in California Code of Regulations, title 2, section 61318.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61311. Pending Matters Liaison.

“Pending Matters Liaison” means the State Auditor’s Office’s Chief Counsel unless the Chief Counsel is the subject of the submission, in which case it means the State Auditor’s Office’s Assistant Chief Counsel. If both the State Auditor’s Office’s Chief Counsel and Assistant Chief Counsel are the subject of a submission, the Pending Matters Liaison means the State Auditor’s Office’s Human Resources Manager.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61312. Promptly and Directly Delivered.

“Promptly and directly delivered” means that the State Auditor’s Office will transmit each submission to the Department of Justice without prior review by or disclosure of the particulars to the State Auditor, by:

(a) A website that captures the submissions and directly sends them via encrypted email to the Department of Justice email address it provides;

(b) Providing employees with a means of submitting submissions directly to the Senior Assistant Attorney General of the Department of Justice via email, U.S. mail, and telephone;

(c) Forwarding any written, verbal, or telephonic submissions directly to the Senior Assistant Attorney General of the Department of Justice within three (3) business days of receipt. For purposes of this subdivision, “receipt” means that State Auditor’s Office’s Chief Counsel, Chief of Investigations, or Human Resources Manager take actual possession or delivery of the submission.

(d) If circumstances arise that prevent transmittal of the submission, in whole or in part, within the allotted time period, the State Auditor’s Office shall contact the Senior Assistant Attorney General of the Department of Justice and arrange to transmit the submission as soon as practicable.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61313. State Auditor.

“State Auditor” means the California State Auditor appointed by the governor pursuant to Government Code section 8543.2 or held over in that position, or the Chief Deputy State Auditor when the State Auditor position is vacant.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61314. State Auditor’s Office.

“State Auditor’s Office” means the California State Auditor’s Office.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61315. Submission.

“Submission” means an allegation that the State Auditor’s Office or an employee engaged or participated in an improper governmental activity.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61316. Supports a Conclusion.

“Supports a conclusion” means that sufficient, reliable, and credible evidence gathered by the independent investigator establishes that it is more likely than not that the State Auditor’s Office or an employee engaged or participated in a substantiated IGA.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

Subchapter 2. Independent Investigator.

§ 61317. Standards and Procedures.

(a) Upon receiving a submission, the DOJ shall review it to determine whether, based on an independent, nonpartisan, and objective analysis of the information provided by the complainant, the submission constitutes a good faith allegation of an improper governmental activity. If the DOJ reasonably concludes that the submission contains sufficient factual information to warrant further investigation, the DOJ shall contract with an independent investigator to determine whether the employee or employees who are the subject of the submission engaged or participated in an improper governmental activity.

(b) (1) As required by Chapter 6.5 (commencing with section 8543) of Division 1 of Title 2 of the Government Code, in order to ensure the State Auditor’s statutory independence, uphold the

integrity of the audit and investigative process, prevent interference with ongoing audits and investigations, enable the State Auditor's Office to conduct its work in accordance with applicable audit and investigative standards, and make certain that no person is subject to criminal charges as a result of conducting an investigation or cooperating with the independent investigator, the independent investigator shall not commence any investigation of a submission relating to a pending audit, assessment, or investigation, and shall hold his or her investigation in abeyance until the pending audit, assessment, or investigation is complete. In addition, any time the Pending Matters Liaison notifies the independent investigator that an ongoing investigation relates to a pending audit, assessment, or investigation, the independent investigator shall cease his or her work on the ongoing investigation and shall hold the ongoing investigation in abeyance until the pending audit, assessment, or investigation is complete. Upon completion of the pending audit, assessment, or investigation, as indicated by a published report or closure of the matter, the independent investigator may commence or continue the applicable investigation.

(2) For purposes of this section, "relating to a pending audit, assessment, or investigation" includes, but is not limited to, an allegation arising out of, or substantively connected to, a particular audit, high risk assessment, or investigation, its assigned staff, objectives, scoping, field work, findings, recommendations, deliberative process, report writing or processing, and the application and interpretation of the audit standards applied during the State Auditor's Office's auditing, assessing, or investigating process.

(3) Notwithstanding paragraph (2) of subdivision (b) of this section, to the extent that the submission alleges and the independent investigator determines that there is reasonable cause to believe that an employee is engaged in ongoing criminal activity or fraud, subject to the limitations in Government Code section 8547.5, subdivision (b), the independent investigator may refer the allegation to the appropriate criminal or administrative law enforcement agency in lieu of conducting an investigation of the matter.

(4) Prior to commencing an investigation, the independent investigator shall contact the Pending Matters Liaison and provide the Pending Matters Liaison with the name of each employee who is the subject of the investigation and only enough information regarding the submission for the Pending Matters Liaison to determine whether the submission relates to a pending audit, assessment, or investigation. Any time the Pending Matters Liaison determines that a submission or an ongoing investigation relates to a pending audit, assessment, or investigation, the Pending Matters Liaison shall immediately notify the independent investigator and place a litigation hold on the pending audit, assessment, or investigation that will continue at least until such time as the independent investigator completes his or her investigation. The Pending Matters Liaison shall immediately inform the independent investigator when the pending audit, assessment, or investigation, as indicated by a published report or closure of the matter, is completed. The Pending Matters Liaison shall not disclose the particulars of any communication with the independent investigator to the State Auditor except to communicate the imposition and duration of any applicable litigation hold.

(c) An investigation conducted by an independent investigator shall not preclude the State Auditor's Office from conducting its own workplace investigation of allegations or subjects that are the same or similar to those being investigated by the independent investigator.

(d) Any final report written by an independent investigator shall set forth the allegations contained in the submission, the applicable legal and other criteria the independent investigator relied on to reach his or her conclusions, all of the evidence the independent investigator reviewed, mitigating factors, aggravating factors, and the independent investigator's conclusions as to whether or not the submission has been substantiated and supports a conclusion that the State Auditor's Office or an employee has engaged or participated in an IGA.

(e)(1) If the independent investigator finds that the facts support a conclusion that it is more likely than not that an employee of the State Auditor's Office has engaged or participated in an improper governmental activity, the independent investigator shall provide by secure means a copy of the independent investigator's written report and all evidence gathered during the investigation to the State Auditor, Chief Deputy State Auditor, Chief Counsel, and Human Resources Manager within 10 business days of finalizing the report.

(2) If the independent investigator finds that the facts support a conclusion that it is more unlikely than likely that an employee of the State Auditor's Office has engaged or participated in an improper governmental activity, the independent investigator shall provide by secure means a copy of the independent investigator's written report and all evidence gathered during the investigation to the State Auditor, the Chief Deputy State Auditor, Chief Counsel, and Human Resources Manager within 10 business days of finalizing the report. The independent investigator and the Department of Justice shall close the investigation, provide all records gathered to the State Auditor, and destroy all copies. Closing an investigation in this manner constitutes final action and no further action or updates are required by the independent investigator or the State Auditor.

(f) Within 60 business days of receiving a final written report from the independent investigator that supports a conclusion that an employee engaged or participated in an improper governmental activity, the State Auditor's Office shall either serve a notice of adverse action pursuant to Government Code section 19574 and implement other recommendations made by the independent investigator, or notify the independent investigator in writing its reasons for not doing so. This notification shall constitute the State Auditor's final action on the matter.

(g) The 60-day time period within which the State Auditor's Office is required to take specified actions after receipt of the independent investigator's final written report does not begin to run until the State Auditor's Office receives the final written report and all evidence gathered by the independent investigator during the investigation. For purposes of this subdivision, "receipt" means that State Auditor's Office's Chief Counsel, Chief of Investigations, or Human Resources Manager take actual possession or delivery of the report.

(h) Except as specifically provided in subdivision (i) of this section, under Government Code section 8547.5, subdivision (b), the identity of the person providing the information that initiated the investigation, or any person providing information in confidence to further an investigation, shall not be disclosed without the express permission of the person providing the information by anyone, including, but not limited to, all of the following:

(1) The independent investigator.

(2) Notwithstanding the definition of the Department of Justice set forth in California Code of Regulations, title 2, section 61305, the Department of Justice and the Employment and Administrative Mandate Section of the Department of Justice.

(3) Any person or entity connected to the alternative whistleblower system.

(4) Any person or entity reviewing submissions or investigating the State Auditor's Office or an employee that relate to an alleged violation of the Act.

(5) Any person receiving information from the independent investigator.

(i) If, in accordance with the terms of this chapter, the independent investigator files a request to file charges before the State Personnel Board pursuant to Government Code section 19583.5 or refers a matter to law enforcement, the independent investigator may disclose the name of the subject employee to the State Personnel Board or the specific law enforcement agency, as applicable.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61318. Qualifications

The DOJ shall retain independent investigators who possess all of the following qualifications:

(a)(1) Proficiency in conducting confidential workplace investigations relating to IGAs.

(2) Experience investigating matters where the applicable criteria included the California Civil Service Rules, State Personnel Board precedential decisions, and relevant state and federal employment laws.

(3) Knowledge about the Act and its application.

(b) Is outside of, and independent from, the State Auditor's Office and independent of the executive branch and legislative control in all of the following ways:

(1) Has not during the preceding 10 years been employed by or contracted with the executive, legislative, or judicial branch of the state government. For purposes of this section, "contracted with" means a contract to perform any service other than conducting independent workplace investigations.

(2) Has not during the preceding 10 years been employed by any entity the State Auditor's Office has audited or could audit.

(3) Has never been employed by the State Auditor's Office, including but not limited to temporary workers, retired annuitants, exempt employees, and those appointed to career executive assignment positions.

(4) Has never been an applicant for employment with the State Auditor's Office.

(5) Has never been a contractor, or an independent contractor, or employee of a contractor who has performed work for or on behalf of the State Auditor's Office.

(c) An independent investigator retained pursuant to Government Code section 8547.5 by the DOJ is deemed a consultant for the purposes of California Code of Regulations, title 2, section 18700.3 and shall file a statement of economic interests with the DOJ according to applicable law.

(d) An independent investigator retained by the DOJ shall maintain an errors and omissions insurance policy in the amount of at least one million dollars (\$1,000,000).

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61319. Cost Reimbursement

(a) The State Auditor's Office shall reimburse the Department of Justice for the costs of retaining an independent investigator under Government Code section 8547.5, subdivision (c)(4) at an hourly rate not to exceed \$500 and should not, except in exceptional circumstances, exceed a total amount of \$20,000 per completed investigation, as adjusted by the applicable Consumer Price Index. In the exceptional event that the total costs for a completed investigation will exceed \$20,000, as adjusted by the applicable Consumer Price Index, the independent investigator shall notify the State Auditor's Office of the total anticipated cost. In addition, in the exceptional event that the total costs for a completed investigation exceed \$20,000, as adjusted by the applicable Consumer Price Index, the State Auditor's Office may defer payment of the amount in excess of the \$20,000, as adjusted by the Consumer Price Index, to the subsequent fiscal year if necessary to maintain the State Auditor's statutory independence, uphold the integrity of the audit and investigative process, prevent interference with ongoing audits and investigations, and enable the State Auditor's Office to conduct its work in accordance with applicable audit and investigative standards.

(b) The State Auditor's Office is only required to reimburse the actual, necessary, and reasonable direct costs of the independent investigator's investigative services. Costs shall be supported by itemized invoices. Each invoice shall contain a detailed itemization of each service provided by the independent investigator, with the specific date of service, and the amount of time spent in providing the service without disclosing the identity of the whistleblower or witnesses. Invoices shall be submitted to the State Auditor's Office within 10 business days of the close of the investigation.

(c) Reimbursable costs to retain an independent investigator do not include any of the following:

- (1) Time devoted to preparation of invoices.
- (2) Costs for travel that exceed state government rates.
- (3) Routine administrative costs and overhead.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.

§ 61320. Confidentiality

(a) Notwithstanding California Code of Regulations, title 2, section 61317, subdivision (h), the independent investigator may disclose the identity of a person providing information for an investigation

as set forth in California Code of Regulations, title 2, section 61317, subdivision (h) to a law enforcement agency that is conducting a criminal investigation.

(b) Any report that is appropriate to share with any entity other than the State Auditor's Office as authorized by California Code of Regulations, title 2, section 61317, subdivision (e) shall be redacted to protect the identity of, and all identifying information relating to, the whistleblower, witnesses, and employee or employees.

(c) All draft reports, documents, materials, recordings, photographs, audit and investigative records, and similar evidence gathered in the course of the investigation shall be kept confidential.

(d) The independent investigator and the Department of Justice shall keep every investigation confidential, including any and all information in any form obtained from the State Auditor's Office, the State Auditor, any employee or contractor of the State Auditor's Office, or any auditee.

(e) Notices of adverse actions served by the State Auditor's Office at the recommendation of an independent investigation pursuant to this chapter become public records after their effective date and when filed with the State Personnel Board, or when appealed by the employee who was served, unless an Administrative Law Judge orders them to remain confidential, in whole or in part.

(f) The independent investigator's investigation is confidential and remains confidential even if the independent investigator determines that it is appropriate to share with law enforcement, the Attorney General, or the policy committees of the California State Legislature having jurisdiction over the subject involved.

Note: Authority cited: Section 8546, Government Code. Reference: Section 8547.5, Government Code.