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October 14, 2020

VIA EMAIL

Richard Miadich, Chair  
California Fair Political Practices Commission  
1102 Q St #3000  
Sacramento, CA 95811

**Re: Comment Letter on October FPPC Agenda Item No. 12**

Dear Chair Miadich:

The California Political Attorneys Association (CPAA) offers comments on Agenda Item No. 12. While we appreciate the consideration of some of our previous comments in the Law and Policy Committee meetings, the current version of the proposed regulatory amendments continue to have provisions which, if enacted, would significantly reduce the due process protections of those accused of violating the Political Reform Act (the Act).

CPAA has participated cooperatively with the Commission since 1989 to promote better understanding of the legal and constitutional issues related to its enforcement function. We offer these comments today on these specific issues, but would also welcome the opportunity to have a broader discussion of enforcement policies and issues with the full Commission, as we have done with previous Commissions. The ability to have all interested parties comment fully on these major changes to the Enforcement process has been limited due to the Commission's consideration of these amendments less than 30 days from the November General Election. We respectfully request postponing these proposed changes until after the election when a full deliberative process can occur.

The proposed regulatory changes that will substantially restrict the right to exculpatory and mitigating evidence in probable cause hearings and eliminate the ability for respondents to object to discovery violations by the Enforcement Division. CPAA does not have concerns with the other proposed regulatory changes and appreciates the changes made already to the original staff proposal.

The probable cause administrative due process rights the proposed regulatory changes are seeking to undo were added in 2011, under then-Chair Ann Ravel, with the input of many parties, including CPAA. Some of the proposed changes will effectively eviscerate the purpose

of the probable cause hearing process, which is in place to ensure that the FPPC has sufficient facts and the proper interpretation of the law to proceed to an administrative hearing.

Many respondents enter into stipulations because of the great expense of an administrative hearing. The probable cause hearing is therefore often the most or only affordable way for respondents to make their case. It is also the only opportunity for respondents to challenge the case against them before the administrative prosecution becomes public. As you are aware, findings of probable cause are made public in the Executive Director's Report at the Commission meeting immediately following the finding. The request for the Commission to authorize a hearing before the Office of Administrative Hearings (or before the Commission itself) is an issue that is placed on the agenda and discussed at a public Commission hearing. These public findings and actions have a negative effect on respondents before they have a full opportunity to exercise their administrative due process rights. A fair probable cause hearing is the only way to avoid this.

Further, the FPPC has not always prevailed in administrative hearings. This demonstrates that there are cases where the Enforcement Division's facts and/or legal interpretation have not been supported by neutral hearing officers. A couple of recent examples include: In the Matter of George Alai FPPC Case No. 13/1135 and In the Matter of Frank Burgess 12/516. There are other instances where the FPPC has declined to pursue an administrative hearing due to exculpatory and mitigating information that was revealed at a probable cause hearing. The probable cause process will be severely weakened if the proposed regulatory amendments are adopted.

Specifically, here are CPAA's remaining concerns with the proposed amendments:

**Probable Cause Hearings (Amendments to Regulation 18361.4):**

- 1. Although the Law and Policy Committee discussed providing full disclosure of evidence to respondents, the staff proposal has an exception that will severely hamper due process rights.**

The Law and Policy Committee recognized the fundamental unfairness of the original staff proposal to simply not provide exculpatory and mitigating information, as is currently required. In response, the Committee directed staff to draft regulations that require the production of full discovery to respondents. The subsequent modifications of the Committee's full discovery direction by staff have again put respondents in a position where exculpatory and mitigating evidence can be withheld

Staff's proposed exclusion of all records "received in response to an administrative subpoena" is overly broad and could result in no exculpatory evidence being provided to the respondent. In the most serious cases, which are also the cases more likely to go to a probable cause hearing, evidence is frequently obtained by the Enforcement Division by administrative subpoena. Allowing this broad exclusion will eliminate a significant amount of evidence from discovery, including exculpatory and mitigating evidence.

CPAA respectfully contends that the protection of privileged information—the basis of staff’s concern—must be limited to truly confidential information (i.e. bank account numbers and personal addresses) and there should be a mechanism by which such information can be provided to respondents to ensure that confidentiality is preserved, as is common in other legal proceedings.

We urge you to revisit and narrow this exclusion.

**2. Eliminates the ability of respondents to appeal a discovery objection to the Hearing Officer.**

Currently, the Probable Cause Hearing Officer can direct the Enforcement Division to provide required discovery when appropriate. This has allowed respondents to ensure they received required discovery. But Staff’s proposed regulations would prohibit the hearing officer from resolving discovery disputes. If enacted, this would mean that whatever the Enforcement Division provides at its sole discretion would be final. This will eliminate any check on the Enforcement Division, creating a situation that invites abuse and severely limiting the function of the hearing officer—who is supposed to be neutral and resolve disputed issues regarding the hearing and the case. What would be the value of a right to notice and an opportunity to be heard without an enforceable right to the evidence against you?

Staff noted at the October Law and Policy Committee that hearing officers couldn’t perform this function because they did not have sufficient training. Aside from the obvious solution that hearing officers could easily obtain such training, there are numerous situations where state lawyers serve as neutral hearing officers and make such decisions. In fact, the current proposed regulations require the hearing officer to decide many issues, including what constitutes good cause for scheduling of hearings beyond the proposed deadlines and whether additional evidence can be submitted after the probable cause hearing. A similar exercise of judgment could be made for discovery disputes

A rule that includes the exceptions to full disclosure proposed by staff must have a mechanism to resolve disputes. It would be fundamentally unfair to let one side in a hearing unilaterally decide what must be produced to the other.

\* \* \*

For the foregoing reasons, the CPAA respectfully urges the Commission to reject or modify staff’s proposed exceptions to the full discovery production requirement and the proposal to ban the probable cause hearing officer from resolving discovery disputes. At a minimum, CPAA requests the Commission to put over these proposed changes until after the November election so all affected parties can have a chance to provide comment on them.

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CPAA appreciates the Commission's willingness to consider these comments. We welcome further discussion on these issues with Commission members and staff.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Elli Abdoli', with a stylized flourish at the end.

Elli Abdoli  
CPAA Enforcement Committee Chair,  
on behalf of the CPAA Board