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VIA EMAIL

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

Re: Comment Letter on FPPC Law and Policy Committee Agenda Item No. 3

Dear Chair Miadich:

The California Political Attorneys Association (CPAA) offers comments on Agenda Item No. 3. While we appreciate the consideration of our previous comments, the current version of the proposed regulatory amendments continues to have provisions which, if enacted, would significantly reduce the due process protections of those accused of violating the Political Reform Act (the Act).

As we have noted in our previous letter, many respondents, regardless of the merit of their defense, must enter into stipulations because they cannot afford the great expense of litigating their matter through an administrative hearing. Therefore, the probable cause hearing is often the 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 Enforcement Division's prosecution becomes public. A fair probable cause hearing with due process rights is the only way to avoid these harms.

CPAA supported the Law and Policy Committee's proposal to provide full evidence disclosure to respondents during probable cause hearings, excluding privileged information. However, the current staff proposal contains two exceptions to the requirement of full disclosure that would severely and unfairly reduce the required production of full discovery by the Enforcement Division. First is an exception for "publicly available information," and second is an exception for any evidence obtained through an administrative subpoena.

The remaining issues regarding discovery disputes and the submission of additional evidence following the probable cause hearing should also be resolved. CPAA does not have concerns with the other proposed regulatory changes, however, and appreciates FPPC staff

addressing previous concerns regarding the timing of the probable cause hearing and the allowance of oral argument before the Commission.

Specifically, here are CPAA's current 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 two exceptions that will severely hamper due process rights.**

First, the exclusion of all records "received in response to an administrative subpoena" is an exception that would swallow the rule, resulting in no exculpatory evidence in the possession of the Enforcement Division 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. It should be narrowed to protect privileged information only.

Two reasons were raised by staff at the September Law and Policy Committee Meeting that, in their view, necessitated this exception. First was the protection of privileged information from disclosure to respondents. Second was the impact of the disclosure of evidence obtained by an administrative subpoena under the public records disclosure laws because of a lack of clarity as to whether a probable cause hearing was part of the administrative hearing process.

CPAA respectfully contends that "privileged information" must be limited to truly confidential information (e.g., bank account numbers, medical information, and personal addresses) and there must be a mechanism—such as redaction of the privileged information within a document—by which the Enforcement Division can nonetheless provide an exculpatory document to respondents while preserving confidential information. However

With regard to the contention that disclosure of evidence obtained through an administrative subpoena would cause confusion under public records disclosure laws, the Political Reform Act already specifically states that the service of a Probable Cause Report is the start of administrative proceedings (Government Code Section 91000.5). Thus, there should be no confusion over the ability to protect records obtained via administrative subpoena from public disclosure because administrative proceedings have not commenced. Once a probable case report has been issued, they have.

Second, CPAA objects to staff's asserted "publicly available" records exception. This exception is also overly broad and imposes an unnecessary burden on respondents to obtain such information where the FPPC already has it in its possession. At the

September Law and Policy Committee meeting, staff said the exclusion was aimed at disclosure of publicly available campaign statements. If the exception were narrowed to these records only, CPAA would have no objection. But the current broad wording could be read to include any records available through public records act requests made by respondents—or indeed anything found anywhere on the internet.

Even if the Enforcement Division identified these records in a privilege log, the short timeframe to file a response with the FPPC, 21 days, would effectively make the evidence unavailable. This is unnecessary as the records would already be in the possession of the Enforcement Division and would simply need to be duplicated and produced. Further, the FPPC has the authority to charge for its duplication.

We urge you to revisit these exclusions.

- 2. Eliminates the ability of respondents to appeal a discovery objection to the Hearing Officer.** Currently, the Probable Cause Hearing Officer has the ability to direct the Enforcement Division to provide required discovery when appropriate. This has allowed respondents to ensure they received required discovery. Under the proposed amended regulation, whatever the Enforcement Division provides at its sole discretion is final. This will eliminate any check on the Enforcement Division and severely limit 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?

With the two exceptions to full disclosure proposed by staff, there must be a mechanism to resolve disputes. It would be fundamentally unfair to let one side in a hearing unilaterally decide what must be produced under the regulations.

- 3. Allows for additional information to be submitted without rebuttal after probable cause hearing.** This proposed change would allow evidence to be submitted after the hearing by either party. It does not, however, allow for rebuttal of the additional evidence by either party. If either party is in possession of relevant evidence, then they should produce it during the briefing process or at the hearing so the other party may respond. With a discovery process in place, the ability of the Enforcement Division to provide an opening and a reply brief, and the opportunity for both parties to present argument and evidence at the hearing, there is no reason to allow either party to submit additional evidence after a hearing where no rebuttal to the evidence can be provided. The combination of allowing the Enforcement Division to conceal evidence from the respondents through two exceptions to the full disclosure rules, prohibiting the Hearing Officer from ordering required discovery, and permitting the Enforcement Division to inject un rebutted evidence after the hearing creates an unacceptable risk of abuse of the process and manipulation of the factual record.

For the foregoing reasons, the CPAA respectfully urges the Commission to reject or modify staff's proposed exceptions to the full discovery production requirement. CPAA also requests the Committee reject or modify the staff proposals to ban the probable cause hearing officer from resolving discovery disputes, and allow evidence to be submitted after the probable cause hearing without rebuttal.

CPAA appreciates the Law and Policy Committee's willingness to consider these comments. We welcome further discussion on these issues with Committee 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