



## California Political Attorneys Association

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Honorable Jodi Remke, Chair  
Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814

Dear Chair Remke:

On behalf of the California Political Attorneys Association (“CPAA”), the members of its FPPC Enforcement Committee thank you for the opportunity to meet with you and FPPC Executive Director, Erin Peth, on January 15, 2015, to introduce ourselves and to discuss concerns about FPPC enforcement policy. We appreciate your gracious and forthright response and your request that we provide you a list of our concerns in greater detail.

CPAA has participated cooperatively with the Commission since 1989 to promote better understanding of legal and constitutional issues related to its enforcement function. Over the years, CPAA periodically has urged the Commission to review and update its understanding of the enforcement process and objectives. These reviews have helped new commissioners understand the process and their role in that process. All commissioners have welcomed this opportunity. CPAA urges the Commission to schedule such a meeting when the full complement of commissioners is on board. The meeting would focus on enforcement policy and process, with a presentation by your enforcement staff, and the opportunity for comments by regulated community attorneys and others.

Here are some enforcement issues CPAA urges the Commission to review, in addition to our suggestions for regulatory action to implement due process standards for AB 800 audits, which are set forth in more detail below at pages 3-5.

### General Enforcement Concerns and Recommendations

#### 1. Subpoenas.

A. Review the FPPC Enforcement Division’s practice of issuing of subpoenas for records on the declaration of the Chief of Enforcement when the FPPC in 2007 by regulation provided that the Executive Director or her designee (but not the Chief of Enforcement) should have such power. See 2 Cal. Code Regs., §§ 18361(a) & 18361.7. When the Chief of Enforcement exercises such power, a vital check and balance on enforcement conduct is lost.

B. Review the FPPC Enforcement Division's recent common practice to issue overbroad, blanket subpoenas for records.

C. Review the FPPC Enforcement Division's recent issuance of subpoenas for records to attorneys, in disregard of the attorney-client privilege.

2. Regulation by Enforcement.

A. Review regulation by enforcement, where the Enforcement Division makes regulatory policy through demands for report amendments and issuance of warning letters that rely on the Enforcement Division's view of the law and regulations and mark a filer as a violator of the law.

B. Review policy of creating *de facto* precedential enforcement decisions without Commission authorization. The process of Commission authorization is set forth in 2 Cal. Code Regs., §18361.10.

C. Consider allowing filers who receive warning letters that are published by the Commission to post responses to such warning letters, when the warning letter results in accusation of a violation that the filer disputes.

3. Streamlined Enforcement Policies.

A. The Commission's streamlined enforcement policies and process, which the CPAA advocated for and supports, have not been updated formally for many years, or if they have been updated informally, the update has not been publicly released.

B. Review and update streamlined enforcement policies.

4. "Equity" – Disparate Treatment of Represented and Unrepresented Parties.

A. CPAA members have observed that respondents in enforcement cases who are not represented by counsel do not get comparable or as favorable treatment in settlements as do those represented by counsel.

B. Review possible steps to evaluate and improve the equity of treatment of unrepresented respondents in enforcement proceedings and settlements.

5. Default vs. No Contest Settlements.

A. Review Commission enforcement policy not to accept no contest settlements, while in practice the Enforcement Division (in the past few years) accepting *de facto* no contest "settlements" through negotiated defaults.

B. Review standards for negotiated no contest/default settlements and stated policy of not accepting no contest settlements.

6. Miscellaneous Issues.

A. Review Enforcement Division's policies concerning whether and when to include or exclude criminal prosecutors in enforcement investigations (which can affect potential targets' or witnesses' willingness to cooperate with administrative enforcement investigations when potential self-incrimination issues become relevant for defense counsel).

B. Review Enforcement Division's standards for redacting or not producing enforcement records in closed enforcement cases, including its standards for production and/or destruction of interview tapes prior to closing the file.

C. Review Enforcement Division's use of the term "money laundering" which is not found in the PRA or FPPC regulations, and which appears to be used for prejudicial publicity purposes in enforcement negotiations and publicity about Commission enforcement accomplishments.

D. Review Enforcement Division's practices in enforcing the disgorgement remedy provided in Gov. Code, § 85704. Because disgorgement is a remedy and not a discrete violation of the PRA, it must be pleaded as a remedy in an enforcement case, and if the case goes to an ALJ, due process requires ALJ approval (subject to Commission adoption) to enforce. In a non-ALJ case, it should be part of the remedial order, and parties subject to such an order should be named as Real Parties in Interest for the purpose of affording them due process.

Commission Oversight and Management of AB 800 Audit Process

The CPAA was the principal public opponent of adoption of AB 800, mainly because this legislation gave the Commission unprecedented power to initiate enforcement investigations characterized as audits at any time, including the middle of an election campaign. CPAA's misgivings about the bill were heightened by some of the concerns about due process issues described on pages 1-3 above that impact the fairness of the enforcement process. AB 800 became law. Notwithstanding that, CPAA believes the commissioners should establish policy relative to implementing AB 800, because the commissioners have the principal responsibility to enforce the Political Reform Act and Chapter 3 of the Act. While the Commission and the staff have distinct responsibilities in the enforcement process as provided in more detail in Chapters 3 and 9, the Commission should not cede its responsibility entirely to the staff, but should act to ensure Commission policies are fair and implemented in accordance with due process. While the Commission has the duty under the PRA to "inhibit improper practices" concerning elections, and better to ensure proper disclosure to benefit the voters in such circumstances, it also has the duty, consistent with the Constitution, administrative law principles and the structure of the Political Reform Act itself, not to abuse its enforcement powers to tip the scales of an election for partisan or ideological political purposes.

While the Enforcement Division claims it used AB 800 in only one pre-2014 election matter, its annual report notes a number of interventions initiated by Enforcement Division staff that resulted in filers filing amendments to campaign reports, or campaign advertising disclaimers. In statewide advertising disclaimer matters, CPAA observes that the Enforcement Division reviewed all such matters. In most instances, however, both the volume of campaign activity as well as the nature of pre-election review, suggest that AB 800 audits necessarily will be selective. Thus, for the reasons set forth above, CPAA believes that the Commission should establish standards and policy for the Enforcement Division to follow, to better ensure due process and inhibit improper selective action, to avoid, for example, potential partisan or ideological biases or case selections by Enforcement staff.

1. AB 800 audit policy standards should be adopted by the Commission, through the regulatory process, to guide the Enforcement Division to select appropriate cases for which this special audit process would be employed.

2. The Commission should define the highest priorities for AB 800 audit selection. This may require determining what types of cases are the most appropriate for such audits, and those that may be handled in a more routine, even if proactive, manner, including pre-election matters.

A. Cases involving the Enforcement Division's review and attempt to correct facial non-compliance, as in the advertising disclaimer compliance matters, should not be subject to these special audit provisions.

B. "Audits" should be limited to factual situations identified in AB 800's preamble or where there are credible reasons to believe allegations of non-disclosures, and where access to committee filer/or potential filer documents may be necessary to review whether the Enforcement Division's demands for correction of the public record are appropriate or necessary.

3. The AB 800 procedure should provide for expedited Enforcement Division notice to potential audit targets to afford voluntary compliance opportunities prior to invoking AB 800 audit process.

4. Prior to issuing an AB 800 audit demand to an audit target, the Enforcement Division should obtain a commissioner's authorization to commence an audit, supported by the Enforcement Division's reasons to believe special audit is necessary.

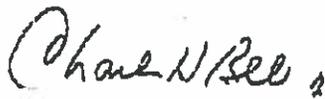
A. Notification should preserve, to the extent possible, the anonymity of the target auditee to commissioners at this stage of the process. If the matter is public already, this would not be required.

B. The Enforcement Division and Commission should ensure the confidentiality of the processes with respect to the Enforcement Division's initial effort to obtain voluntary compliance prior to requesting authority to conduct an audit, the request for audit authority to the Commission and the Commission's authorization to audit.

5. After the commissioners' audit authorization is obtained, if the Enforcement Division believes it necessary to seek injunctive relief to enforce its audit authorization pursuant to Gov. Code, § 90009 before an election to enforce its audit power, the Enforcement Division through the Executive Director should full comply with all the requirements for seeking and obtaining Commission approval for the initiation of civil action under 2 Cal. Code Regs., § 18361.2.
6. Where pre-election AB 800 audits are involved, the regulation should provide for expedited notice and expedited commissioner consent. For post-election or 'anytime audits,' more relaxed time frames should be allowed for the audit request and approval processes and if required, for authorization to initiate civil action to obtain injunctive relief as provided in Gov. Code, § 90009.
7. The Commission should conduct annual reviews of such audits conducted during the previous year to ensure its procedures were followed and to evaluate whether other changes to its procedures are warranted.

We thank you for the opportunity to submit these recommendations and look forward to meeting with you and your staff to discuss them. We will also be prepared to participate in any Commission hearing at which enforcement policy and practices are discussed for the benefit of all the commissioners.

Very truly yours,



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