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October 6, 2020

Richard Miadich, Chair  
Fair Political Practices Commission  
1102 Q Street, Ste. 3000  
Sacramento, CA 95811

Re: Amendments to Regulations Governing Enforcement Processes

Dear Chair Miadich:

This letter is submitted on behalf of the California State Association of Counties (CSAC) to oppose the Proposed Amendment of Regulations Governing Enforcement Processes, Agenda Item No. 12. The proposed amendments would significantly curtail the rights of Respondents in Commission proceedings and force those accused to face a public hearing if probable cause is found, even if there is exculpatory or mitigating evidence available. CSAC appreciates the recent staff changes to the proposal. However these changes have not fully resolved the issues in the amendments.

Moreover, the due process regulations in question were adopted in 2011 and went through a gradual development, which included gathering input through interested persons meetings. Now, staff is proposing to eliminate these regulations and bypass the developmental process. It is especially crucial to allow enough time for feedback and participation as counties are faced with continued challenges from the COVID-19 pandemic. County Boards of Supervisors and other public officials have not been provided adequate time to consider and weigh in on the proposed amendments. It is also important to note that as a result of the pandemic, other judicial and administrative bodies are giving parties additional time to resolve matters.

The current amendments present several due process issues that stem from staff's inclusion of two exceptions to the required full evidence disclosure afforded Respondents in a Probable Cause hearing. Any evidence that is publicly available or obtained through an administrative subpoena is excluded. The proposed amendments vest sole discretion on what is included in and excluded from discovery with the Enforcement Division, with no mechanism for resolving discovery disputes.

And evidence may be submitted by either party after the Probable Cause hearing, with no opportunity for the other side to offer a rebuttal. Taken together, these changes to how evidence is treated at this preliminary stage represent due process concerns that must be addressed to ensure a fair process for Respondents at the Probable Cause hearing.

Specifically, CSAC is concerned with the following current proposed amendments to Regulation 18361.4:

### 1. Exceptions to Full Discovery

The proposed amendments contain two exceptions to full discovery for any information that is either publicly available or obtained through an administrative subpoena. There is no caveat for exculpatory or mitigating evidence, meaning that even if the Enforcement Division has such evidence, it is under no duty to disclose. Staff has suggested these exceptions are necessary to protect privileged information around a lack of clarity as to whether a Probable Cause hearing is part of the larger administrative hearing process. Further, staff reasoned that since any publicly available information is public, Respondents can easily obtain such evidence outside of discovery.

As a preliminary matter, the Political Reform Act states that the service of a Probable Cause Report, issued at the close of the Probable Cause Hearing, is the start of the administrative hearing process. (Government Code section 91000.5). Records obtained through an administrative subpoena before the report is issued are not subject to public disclosure laws, and therefore do not need an additional layer of protection, especially not one so overly broad as to exclude even exculpatory or mitigating evidence. CSAC respectfully maintains that privileged information can be provided to Respondents while ensuring confidentiality and preventing public disclosure of such records.

The same overly broad approach was taken with regards to publicly available information. At the September meeting referenced above, staff indicated this exception was created with publicly available campaign statements in mind. However, this exception applies to *all* publicly available information, not just the campaign statements. Due to its expansive nature, the amendment could be read to include information available through Public Records Act requests. Respondents have just 21 days to file a response at the Probable Cause hearing stage, making such records effectively unavailable. The FPPC has the authority to charge for duplication, which is all that would be needed to be done to ensure a full and fair discovery process that does not limit Respondents' access to exculpatory and mitigating evidence.

### 2. No Right to Appeal a Discovery Determination

The amendments further hamper Respondents' rights at the Probable Cause hearing by eliminating the Hearing Officer's role in discovery. Currently, the Hearing Officer may direct the Enforcement Division to provide required discovery during the Probable Cause hearing where appropriate.

The proposed amendments would leave the determination of when discovery is appropriate and what to include solely with the Enforcement Division. This determination would be final, leaving no room for objections or appeals on discovery issues.

This presents several problems. First, the proposed amendments limit the role of the Hearing Officer whose responsibility it is to resolve disputes related to the Probable Cause hearing. When viewed alongside the two exceptions to full disclosure, this amendment would vest all decision-making authority over discovery with the Enforcement Division. This one-sided approach is deeply unfair to not just Respondents, but also the hearing process. Due process considerations demand Respondents have an enforceable right to discovery of the evidence entered against them.

### 3. Allows Evidence to be Submitted Without Rebuttal

The proposed amendments would allow for either party to submit evidence after the close of the Probable Cause hearing, with no opportunity for rebuttal by the other side. With a robust and fair discovery process in place, this amendment would not be necessary. All relevant information should be disclosed as part of discovery during the briefing process so the other side may respond. To allow additional information to be disclosed after the Probable Cause hearing has concluded without a chance for rebuttal would severely disadvantage Respondents, especially when combined with the two exceptions to full discovery and the Enforcement Division's monopoly on discovery decisions. Allowing the Enforcement Division to make such sweeping and unilateral decisions as to what is disclosed and when Respondents can meaningfully rebut evidence against them deprives Respondents their due process and heightens the risk exculpatory or mitigating evidence will be missing from the factual record.

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We appreciate staff's efforts to resolve administrative cases in a timely manner, but considerably restricting the administrative due process rights of Respondents is not the way to accomplish this goal. We would welcome the opportunity to work with staff to develop regulatory language that could accomplish both goals.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura E. Hirahara", with a stylized flourish at the end.

Laura E. Hirahara  
Associate Counsel  
California State Association of Counties