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February 27, 2013

Hon. Ann Ravel, Chair
& Commissioners
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Re: Legislative Report – AB 45

Dear Chair Ravel & Commissioners:

This is to request that you schedule a public discussion at the next meeting before considering whether to support AB 45 (Dickinson), one of the elements of which would substantially change the Political Reform Act's ("PRA" or "the Act") enforcement provisions.

AB 45 would change the Act in two significant ways with respect to the FPPC's enforcement powers. First, the measure would give the FPPC explicit authority to conduct pre-election audits.¹ Second, the measure would give the FPPC new authority to seek injunctive relief under Gov. Code § 91003. These are major changes to the FPPC's enforcement powers that merit a thorough discussion as to the necessity of making such changes.

The original and current provisions of the 38-year old PRA limit the FPPC and the Franchise Tax Board's audit authority to commence after an election at which a committee (or putative committee) to be audited, and give private citizens, but not the Commission the power to engage in pre-election litigation under section 91003, part of the "private attorney general" provisions of the Act.

There is no legislative history that clarifies why the drafters of the Act limited the FPPC's powers in this manner. However, the plain language of the Act (and what powers were provided to or withheld from the Commission) suggests two reasons why the drafters did not give the Commission either pre-election audit authority or section 91003 injunctive relief authority: (1) the drafters did not want the FPPC to become an arbiter of elections, by commencing a public

¹ The measure would allow persons subject to these audits the right to seek a writ of mandate in Superior Court to block the audit. The grant of authority to the FPPC to initiate an audit, together with allowing the target to seek a writ to challenge the audit, also would reverse the burden of proof that would apply were the FPPC required to obtain injunctive relief, and narrow the grounds for defense against an audit under the standards for obtaining a writ of mandate.

Letter to Hon. Ann Ravel, Chair
& Commissioners
Fair Political Practices Commission
Re: Legislative Report -- AB 45
February 27, 2013
Page 2

audit or injunction action prior to the election that might affect the outcome; and (2) the drafters wanted to avoid potential partisan misuse of the Commission's enforcement processes.

There is little question that publicity around the filing of a complaint by a private party has some electoral effects. However, the announcement that the FPPC is investigating or prosecuting a party in the heat of a pending election has even more dramatic effects. This is why the FPPC for the most part has been careful to ensure that its enforcement publicity policies make clear that the filing of a complaint should not be viewed prejudicially. This approach does not eliminate the potential prejudice problem. When former Chair Dan Schnur announced his intention to act as a sheriff with respect to pre-election activities in this area, he was roundly criticized for this because of the inherent prejudice such activity portended.

With respect to partisan abuse, the Act's Commissioner selection process quite consciously provided for a modicum of partisan balance. The Act assumed that at a minimum, partisan balance would best prevent such abuse whether in the regulatory or the enforcement process. Whether this approach really accomplishes such purposes, it is some evidence that the opportunity was created for minority party questioning of potential actions that might be viewed as partisan. To be fair, there are examples of circumstances in which this did not work in the past.

The context of the AB 45 proposals appears to be the Arizona donor case that arose in October 2012. At that time, as I understand it, the Commission's enforcement staff commenced an investigation that it characterized as an audit. When the targets resisted (or at least objected to the rapidly changing timetable for responding to the audit demand), the FPPC went to court to seek injunctive relief to compel compliance. To my knowledge, the Commission staff has never publicly discussed the matter with the full Commission. The respondents raised legal questions about whether the Commission had authority under the Act to engage in a pre-election audit and could go to court to commence civil litigation without a vote of Commissioners at a Myers – Milias – Brown Act noticed meeting. To my knowledge, neither the Superior Court nor the appellate courts addressed these legal issues in the ensuing case either, and court resolution of that issue has not occurred, and may not be given the posture of the case and further, pending enforcement activity. However, it does not appear that these issues are discussed in the Enforcement Division's report that is on your agenda. Many of us in the political law bar question whether the Enforcement Division had the authority to go forward with the audit or the injunction action as was done. Thus, we believe the following can be said of the state of the law: AB 45 extends the FPPC's powers and is not "declaratory of existing law."²

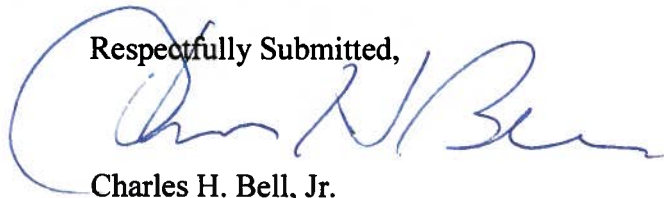
² AB 45, as noted above, would allow the target of an audit to block it, but this mechanism would reverse the presumption that normally is accorded to defendants that the prosecution be required to prove at least a substantial likelihood of success on the merits. AB 45 also would

Letter to Hon. Ann Ravel, Chair
& Commissioners
Fair Political Practices Commission
Re: Legislative Report -- AB 45
February 27, 2013
Page 3

The other provision of AB 45 that would allow the FPPC to explicitly seek injunctive relief under section 91003 to require a person to file reports that allegedly should have been filed, also would extend the Commission's enforcement authority. Moreover, it would take this process out of the normal political arena, where a private citizen can bring such an action. Private citizens' or private attorneys general lawsuits do not carry the presumptive authority of a lawsuit bearing the Commission imprimatur.

Now that the Commission has a new composition, the Commissioners should review a variety of matters that you are likely to confront. With respect to this and other legislative proposals you may consider supporting, the Commissioners should have the benefit of a careful review of its past actions, and a justification of the necessity of seeking to extend its powers as proposed in AB 45.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Charles H. Bell, Jr.", is written over the typed name.

Charles H. Bell, Jr.

CHB:ad

cc: Chair & Executive Committee
California Political Attorneys Association

modify traditional rules of civil procedure concerning the automatic stay on appeal from issuance of a mandatory injunction in cases arising under the Act.