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VIA ELECTRONIC MAIL: JFeser@fppc.ca.gov

Chair Silver and Commissioners Brandt, Ortiz, Wilson, and Zettel
California Fair Political Practices Commission
ATTN: John Feser
1102 Q Street, Suite 3000
Sacramento, CA 95811

RE: **Proposed Amendments to Regulation 18361.4**

Dear Chair Silver and Commissioners:

The California Political Attorneys Association ("CPAA") writes to comment on the proposed amendments to Regulation 18361.4 regarding the Commission's Probable Cause proceedings. These proposed changes would severely weaken core protections for respondents accused of violating the Political Reform Act ("the Act"), and CPAA requests the Commission direct staff to reconsider the fundamental due process considerations raised by the proposed changes.

CPAA attorneys have decades of experience representing all types of respondents accused of violating the Act and collectively have great historical familiarity with the formal and practical aspects of the FPPC's administrative processes. In our experience, although the Enforcement Division generally acts within its legal authority in interpreting the provisions of the Act, the Probable Cause process provides an essential forum for respondents to demonstrate before a neutral hearing officer where exculpatory evidence or legal insufficiency has either been ignored or downplayed, prior to moving to an administrative hearing. Further, even where a finding of probable cause has been found, administrative cases have been dismissed or resulted in greatly modified settlements as legal and factual deficiencies have been laid bare in the face of Enforcement Division claims.

An important fact overlooked in the Staff Memo presented to the Commission at the October meeting is that the Probable Cause process is the last opportunity for a vetting of the evidentiary issues ***before enforcement action is made public***. This greatly heightens

the importance of a fair hearing at the Probable Cause stage as most respondents will face great reputational harm and media scrutiny once the existence of the enforcement action is made public. Staff concludes that "[b]ecause the hearing officer does not conduct a trial, find facts, or decide whether a violation of the Act occurred, records produced in addition to the Enforcement Division's summary of evidence are unnecessary to determine probable cause."

We vehemently disagree with this conclusion.

As Staff confirms, the hearing officer's role is limited to determining whether the Enforcement Division's summary of evidence is sufficient to establish a strong suspicion that a respondent committed a violation of the Act. While the hearing officer does not weigh evidence, the presentation of evidence is crucial for determining whether the evidence summarized by the Enforcement Division establishes a strong suspicion that the Act was violated. If respondents do not have the opportunity to provide evidence and witnesses to inform this determination, the hearing officer's role is reduced to a rubber stamp for the Enforcement Davison's allegations.

Moving from a confidential Probable Cause proceeding to a public Administrative Procedures Act ("APA") hearing is a key step in the enforcement process for respondents, particularly those who are elected officials that face reputational harm as soon as any alleged violations of the Act become public. Thus, it is extremely important that unsubstantiated or overreaching allegations are identified and addressed before they become public. This can only happen at a Probable Cause hearing. Further, the prohibitive expense of conducting a full Administrative Hearing after the Probable Cause process has concluded also makes the Probable Cause hearing the only practical fiscal option for identifying these issues and reaching the appropriate resolution in an enforcement case for many respondents.

While we appreciate Staff's concern regarding unduly burdensome and costly proceedings for all the parties, our experience, in practice, is that addressing evidentiary issues at the Probable Cause stage is much more efficient and cost effective than going through the formal APA hearing process.

Due process is an essential right. As Judge Learned Hand stated in *United States v. Coplon,* 185 F.2d 629 (2d Cir. 1950) "(a)ll governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by

the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism." In other words, it is easy for government to prioritize expediency and efficiency over providing a fair hearing. Here, the proposed amendments do just that and should be rejected.

Providing a fair hearing consistent with the right to due process includes providing discovery to respondents, allowing witnesses to testify and conducting the hearing in a timeframe considerate of party's and counsel's schedules and circumstances. "(W)here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959), *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). ***It is impossible to conduct a fair hearing without providing the evidence upon which the FPPC Enforcement Division is relying and allowing the respondent to provide their own evidence.*** Even if this is inconvenient for the Enforcement Division, the right of respondents to a fair hearing must take precedence. However, it should not be inconvenient for the Enforcement Division, which only conducted three Probable Cause hearings in 2025 (the rest were conducted via paper only).

The sentiment that respondent's Due Process rights should be protected is also reflected in the Act itself in Government Code section 83115.5, which articulates the requirement for the Commission to provide for a Probable Cause hearing. This section specifically states that a respondent has the "right to be present in person and represented by counsel at any proceeding of the commission held for the purpose of considering whether probable cause exists for believing the person violated this title." The right to be heard and be represented by counsel is meaningless if the respondents can't review and challenge the evidence gathered or produce their own witnesses.

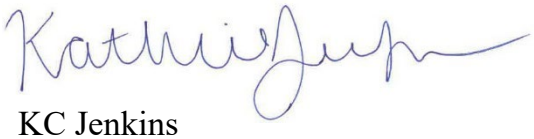
In addition, adoption of these regulatory changes would be inconsistent with the conduct of preliminary hearings in similar contexts. For example, the Federal Elections Commission ("FEC") has a similar process to the FPPC and provides respondents a Probable Cause hearing. The FEC provides discovery to its respondents as part of this preliminary hearing process. Further, Penal Code section 1054.1 provides discovery to criminal defendants in California before preliminary hearings are conducted. Just as with the FPPC's Probable Cause process, the purpose of a criminal preliminary hearing is to determine if there is enough evidence to warrant a full trial on the merits. And just like the preliminary hearings in the criminal context, the FPPC's Probable Cause hearings should also provide discovery to its respondents.

Probable Cause hearings are beneficial to both sides. If a respondent has a full opportunity to point out deficiencies in the Enforcement Division's case, a more appropriate resolution of the matter can be reached without the additional time and expense of a full administrative hearing. Administrative hearings are costly and timely for the Enforcement Division as well as respondents. Further, with no discovery or witnesses at the Probable Cause stage, respondents are more limited in the information they have available to them to decide whether an administrative hearing is needed. Therefore, discovery can also work in the Enforcement Division's favor by showing respondents the full scope of the evidence they are facing and potentially supporting an expeditious case settlement.

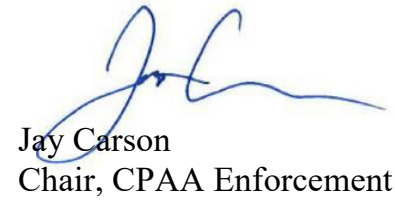
Last, the proposed regulation seeks to eliminate any ability for the hearing officer to extend the 75-day timeframe for the conduct of the hearing, even if good cause is shown. Eliminating the ability of the hearing officer to determine if good cause exists to extend the timeframe for a hearing is a solution in search of a problem and ignores the scheduling and practical realities many attorneys face on both sides of an enforcement matter. For CPAA members, granting us sufficient time to provide our clients with a rigorous defense is the most common reason why an extension would be requested, and the amended regulation would eliminate the ability of the hearing officer to determine whether good cause exists to grant such an extension. This would place a thumb on the scale in favor of the Enforcement Division and create an unfair advantage that could be exploited. Eliminating this discretion of the hearing officer does not serve any equitable purpose.

CPAA appreciates the Commission's willingness to consider its perspective on this issue. Please do not hesitate to contact us if we may be of service.

Respectfully submitted,



KC Jenkins
Chair, CPAA Regulatory Committee



Jay Carson
Chair, CPAA Enforcement and Filing Officer Oversight Committee