



California Political Attorneys' Association

Outline & Comments

FPPC Task Force on Enforcement Priorities and Procedures June 8, 2018

The California Political Attorneys' Association supports the Commission's decision on May 17, 2018 to establish a Task Force on Enforcement Priorities and Procedures and has agreed to participate directly by tasking two CPAA members, one representing the Democratic Party and one representing the Republican Party, to participate as members of the Task Force. CPAA commits to participate actively in the task force efforts and believes the proposed timeline for Task Force review and recommendations is appropriate and achievable.

A. CPAA's Longstanding Work with the Commission on Enforcement Issues and Priorities

CPAA was formed in 1988 as a vehicle for a broad-based group of political law practitioners who represented clients in enforcement proceedings to provide useful insights to the Commission on its enforcement policies and processes. Through the years, CPAA has provided insights through formal and informal presentations to Commissioners and Enforcement Division staff. CPAA promoted the McPherson Commission project, which led to the 2002 McPherson Commission Report. CPAA monitored Commission and legislative implementation of that Report and made follow-up recommendations to the Commission on unfinished report subjects. CPAA members also participated in then-Secretary of State McPherson's 2005 Task Force, in Chairman Ross Johnson's enforcement regulatory projects, and in Chairman Dan Schnur's task force project in 2010. In 2015, CPAA's Enforcement Committee submitted a list of specific recommendations to Chair Jodi Remke about additional matters of more recent concern. All of these efforts focused on helping to educate Commissioners about the enforcement process and their central role in supervising and implementing the process.

B. The Record of Successes and Partial Successes in Cooperation With the Commission

Many recommendations proposed by CPAA and others over the years have been adopted by the Commission and the Legislature, among them most notably the adoption and expansion of the Commission's "streamlined enforcement" program, which expedited resolution of more routine campaign, lobbying and public official economic interest filing cases; the Commission's adoption of improved due process procedures that allow persons who are subject of FPPC complaints to receive prompt notice and a corresponding prompt opportunity to respond to such

complaints; the Commission's 2015 correction of subpoena issuance practices to conform to FPPC regulations; and the Commission's efforts to rationalize its fine and penalty level practices with respect to specific violations. Some CPAA recommendations such as dealing proactively with complaints which require the Commission to act promptly or default to private attorney general enforcement, have yielded good results but no clear Commission policy to address the subject of past abuses of the private attorney general civil litigation process. In some instances, Commission policy may have been changed, but the policy was not publicly crystallized to reflect Commission direction given to Enforcement Division personnel.

B. CPAA's Outline of Recommendations for Task Force Subjects

The following is an outline of the CPAA's recommendations for the Task Force's consideration. Some of these subjects were addressed in the McPherson Commission Report, and the particular McPherson Commission recommendations are referred to herein by their recommendation number and "MPC." Other elements were addressed in the CPAA Enforcement Committee's March 10, 2015 letter to Chair Remke, and are referred to herein as "RL." Other subjects have been brought up informally over the years. Some of these subjects are of recent vintage or discussion by the Commissioners.

Proposed Subject Matter of Review:

Overall Process Issues

- MPC - Rec 24 – Commission should adopt Statement of Enforcement Principles.
- RL - Regulation by Enforcement, including de facto policy by enforcement in pre-election matters; de facto precedential effect to enforcement cases without formal Commission action; effect of warning letters issued without opportunity for comment in the letter (*e.g.*, similar to audit reports) on statements that person warned violated the law. Review policies on Enforcement "making new law" with enforcement cases, where no other commission advice or materials has articulated an interpretation of law or regulation.
- RL - Streamlined Enforcement Policies, including expansion of the areas of coverage by streamlined enforcement, warning letter and advisory letter.
- Topics for Streamlined Enforcement expansion: increase the threshold amounts (*e.g.*, for major donors); small amounts of cash contributions received, or cash expenditures made; one bank account violations; sender identification violations; slate mailer organizations campaign statements and identification violations; recordkeeping violations; smaller gift limit violations; and technical disqualification violations (conflict of interest).

Complaint Intake/Investigation Commencement

- Complaint Review Process – Review Enforcement Division's complaint intake and preliminary steps leading to decisions to undertake or decline to undertake investigations. With regard to non-sworn complaints, the Enforcement Division is no longer consistently following a process which allows Respondents a chance to reply

to complaints within 14 days before opening an investigation. Also, the new electronic complaints system should be reviewed to see if it is validating complaints about laws outside the Act through its automated text population complaint system.

Investigative Process

- Expedite Enforcement Investigations: Speed up investigative timeline.
- Review Enforcement Division Interaction with Legal Division - There is supposed to be a firewall between Legal and Enforcement, except where an advice letter is requested by a Respondent on the specific facts of an open enforcement case. It appears from recent cases that Legal Division may be punishing Respondents for exercising their administrative due process rights by requesting advice for unrelated upcoming decisions in their jurisdiction.
- RL - Subpoena Power and Practice -- Review current policy toward issuance of subpoenas in response to CPAA's March 2015 letter. Review of policy toward issuance of subpoenas to attorneys.
- RL - Review of Enforcement Division policy toward joint administrative/criminal investigations which affects persons' willingness to cooperate where there may be criminal jeopardy to do so.

Resolution

- Review Warning and Advisory Letters – Recently, we have seen a dramatic reduction in the number and types of cases which are considered for warning and advisory letters. A review of the policies establishing mitigating factors (*e.g.*, looking at the overall context of a committee's activities) and categories of violations that are eligible for warning letters should be undertaken. A number of cases that arise from minor FTB audit findings should be resolved with warning letters.
- Closure letters – Review and develop consistent policy toward content of closure letters. The Commission has previously provided guidance on closure letters to the Enforcement Division which provide that, if a violation is articulated in a closure letter, administrative due process must be provided.
- MPC Rec 29 – Consider Statutory Amendment of PRA to allow for informal enforcement dispositions without hearing.
- MPC Rec 31 – Fine ranges should relate to seriousness of the violation. Review and develop general policy toward ensuring comparability of administrative fines.
- RL – Review and develop Commission Enforcement “Equity” Policy, to address perception of harsher treatment of unrepresented persons.
- RL – Review Commission policy concerning Defaults, negotiated default settlements, and No Contest settlements, including use of consent decrees.
- Disgorgement within certain time parameters should be a cure for over the limit contributions.
- Proportionality should be considered in evaluating whether or not to pursue enforcement and what type of resolution is warranted.

Other Issues

- MPC Rec 26 – Consider Statutory Amendment of PRA to allow Respondents who prevail in Private AG action to get attorneys’ fees.
- MPC Rec 27 & Rec 28 – Consider Statutory Amendment of PRA to limit Private AG civil actions if FPPC is prosecuting administratively or has issued warning letter.
- MPC Rec 34 – Recruitment and retention of enforcement attorneys and investigators.
- RL - Review current Enforcement Division policy toward destruction and non-production of materials obtained in administrative investigations upon settlement and prior to availability for public records requests.
- RL - Review current approach to Commissioner Supervision of AB 800 Audit Policies.
- Recommend Commission policy to separate FPPC’s audit function from its investigative function. CPAA believes that the Commission has placed too much focus on using audits solely to support prosecutions, instead of identifying issues and assisting with correcting them. FTB auditors are completely separate from FPPC investigations, but FPPC auditors should have some degree of separation to support the FPPC’s “assistance” functions.
- Review adoption of an enforcement diversion program to allow candidates and treasurers to attend training classes on compliance instead of a fine for appropriate violations, and avoid having an ethics “conviction” on their record.