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April 8, 2013

BY HAND DELIVERY

Hon. Ann Ravel, Chair
Hon. Commissioners Sean Escovitz,
Gavin Wasserman, Patricia Wynne
and Eric S. Casher
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Re: **Special Meeting of April 10, 2013 -- Legislation Expanding Commission's Enforcement Powers**

Dear Chair Ravel & Commissioners:

Prior to the Commission's February 2013 meeting, I had requested that the Commission 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 ("PRA" or "the Act")'s enforcement provisions. (Copy of letter attached.)

Subsequent to that time, several other bills have been introduced in the Legislature that contain variations on the same enforcement subject. These bills are on the special meeting agenda with a recommendation from staff that the Commission support the legislation and give the Chair authority between meetings to negotiate amendments to these bills.

As discussed in my February 2013 letter, the common thrust of these bills is to 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. Second, the measure would give the FPPC new authority to seek injunctive relief under Gov. Code § 91003. The bills would also change existing civil procedure rules with respect to stays of mandatory injunctions on appeals related to FPPC enforcement matters. These are major expansions of the FPPC's enforcement powers.

Background

A. Structure of the PRA – Diffusion of Enforcement Powers

The enforcement powers of the PRA reflect the principles of (1) diffusion of enforcement powers between different agencies of government and the people themselves, and (2) limitations of the Commission's powers of enforcement to make room for the exercise of these diffuse powers, whether to avoid partisanship in enforcement or avoid interference with the electoral process itself. These principles are drawn from the structure of the law, its limitations, as well as prudential considerations about the public interest. Moreover, the PRA itself contains an injunction that the Commission shall not take actions to abridge constitutional guarantees of freedom of speech, due process and equal protection of the laws. (Gov. Code, § 83111.5.)

Proposition 9, which the people enacted in 1974, remains in its essential form today with respect to enforcement provisions. The authors of Proposition 9 diffused power to administer the PRA between different government agencies and the people. The FPPC (the lead agency) was given administrative and civil enforcement authority in addition to its broad powers to interpret the PRA. (Gov. Code, §§ 83115, 83116, 91001, 91004.) The Attorney General and local district attorneys and city attorneys were given criminal and civil prosecution authority. (Gov. Code, §§ 91000, 91001, 91001.5.) Voters within the jurisdiction affected were given civil prosecution authority to bring actions for civil damages and injunctive relief as "private attorneys general," and were provided with the carrot of potential sharing of damage awards with the State. (Gov. Code, §§ 91003, 91007, 91012.) The Secretary of State was given the responsibility to serve as filing officer for campaign reports and lobbying reports for campaign and lobbying filers. (Gov. Code, §§ 84100 et seq., 84600 et seq.) The Franchise Tax Board was authorized to conduct audits of designated filers. (Gov. Code, §§ 90000 et seq.) The FPPC was given discretionary audit authority. (Gov. Code, § 90002.) Thus, the principle of diffusion of authority was provided as a check on aggregation of political power and authority in a single agency such as the FPPC, and incentives were established by the law to promote citizen initiation of civil litigation and injunctive relief.

Moreover, as noted in my February 2013 letter, the original structure of the PRA limited the FPPC's and the Franchise Tax Board's audit authority above to commence only after an election at which a person or committee to be audited was engaged in putatively illegal activity, and gave 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.

B. Limitation on FPPC's Powers Better Protects Against Partisan Abuse and Governmental Interference With Popular Elections

While the principle of diffusion of enforcement power is clear from the statutes, 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 audit or injunction action prior to the election that might affect the outcome[1]; and (2) the drafters wanted to avoid potential partisan misuse of the Commission's enforcement processes.

With respect to partisan abuse, the Act's Commissioner selection process quite consciously provided for a modicum of bipartisan balance. The Act assumed that at a minimum, bipartisan 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 bipartisan questioning of potential actions that might be viewed as partisan. To be fair, there are examples of circumstances in which this didn't work in the past.

C. Enforcement History Demonstrates Wisdom of Diffusion of Powers

Over the years, this diffuse system has resulted in criminal, civil and administrative enforcement, including citizen-initiated injunctive relief and "private attorney general" civil damage actions. The predominant mode of enforcement has been Commission administrative enforcement. The Commission has prosecuted or reached stipulated settlements of hundreds of enforcement matters, and more recently, hundreds more "streamlined enforcement" actions that resulted in more nominal administrative fines for less significant campaign report and statements of economic interest filing matters. Citizen-initiated "private attorney general" actions are the second most numerous category of actions, followed by a relatively small number of Attorney General-, district attorney-, or city attorney-prosecuted criminal and civil actions.

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[1] The Bipartisan Commission on the Political Reform Act of 1974's 2001 Report concerning enforcement stated, with respect to general enforcement principles: "The goal of enforcement should be to bring about optimal compliance with the Political Reform Act while minimizing intrusion into the political process." (Report, p. 40) (http://www.fppc.ca.gov/News/McPherson.htm.)

D. No Demonstrated Record of Need to Enhance FPPC's Enforcement Powers

Of the three formal and informal Special Commission or task force reports surveying the Commission's strengths and weaknesses (The Bipartisan Commission on the Political Reform Act of 1974's 2001 Report (*Id.*); the McPherson Secretary of State Task Force (2005) (http://www.fppc.ca.gov/taskforce/pdf/ mcpherson_report2005-2006.pdf), and former Chairman Dan Schnur's Chairman's Task Force (2010)(http://www.fppc.ca.gov/taskforce/), none suggested that the Commission lacked sufficient enforcement tools.

Only on one occasion prior to 2012 to my knowledge has the Commission sought to use Gov. Code § 91003 to obtain injunctive relief to compel filing (in 2003). The question of the Commission's statutory authority did not arise in that case. The issue of pre-election "audits" did not arise prior to 2012, because the Commission has uncontestably wide latitude to commence enforcement investigations at any time. Such investigations were not considered to be "audits," and the Commission under the Administrative Procedure Act has the ability to seek court enforcement of administrative subpoenas for records in such investigative proceedings. However, the Commission generally has not inserted itself publicly into the middle of ongoing campaigns so as not to be viewed as taking sides.

Thus, the Commission's decision to sponsor new legislation to give the Commission pre-election audit authority and civil injunctive relief authority is a big deal. Some would say it is an unprecedented power grab. The legislation also may raise questions about whether particular provisions "further the purposes of the Act" as required of any legislative amendment. (Gov. Code, § 81012, subdiv. (a).)

In light of the foregoing, the staff memorandum is silent on the subject of the need for the expansion of the Commission's enforcement powers. What weaknesses exist in the structure of powers that the proposed legislation would address? What public harm has occurred to warrant the proposed changes? How do the proposed changes affect the ability of other agencies to which the Act delegated enforcement powers, or the people themselves, to perform their assigned enforcement responsibilities? Finally, is the legislation narrowly tailored to serve a sufficiently important governmental interest, and does it apply equally to all filers and potential filers? At a minimum the staff and the Commission should ask and answer these questions before embarking on sweeping changes to the Act's enforcement provisions.

Pending Legislation Expanding the Commission's Enforcement Powers

AB 800

AB 800, among other proposed amendments not discussed here, enlarges the FPPC's and the FTB's powers in the following ways:

(1) Eliminates entirely subdivision (c) of Gov. Code § 90002, which prohibits either the FPPC or the FTB from commencing audits of any candidate, controlled committee or primarily formed candidate or measure committee prior to an election involving such committees. By eliminating the entire subdivision, the legislation also eliminates the limitations on what may be audited (the existing statute contained temporal limitations for both primarily-formed and other committee audits).

(2) Amends Gov. Code § 90003 to allow the FPPC and the FTB similarly to audit or investigate "any reports or statements… required by [the PRA]." The statute also provides for additional reports to be filed or maintained by filers, as do other bills introduced in the current legislative session, so this amendment potentially opens the door to other, wide-ranging investigations by these agencies.

(3) Adds a new section, proposed Gov. Code, § 90008 which establishes a new "intent" of the Legislature that the people have timely access to information concerning contributions and expenditures of "all committees, corporations and individuals," and that "this information be provided before the election, when it is relevant." Curiously, AB 800 subjects corporations but not labor unions to these provisions, in apparent conflict with the equal protection injunction of Gov. Code § 83111.5. The amendment contains a liberal construction clause which expresses the intent that "any judicial process be expedited to achieve this purpose." Proposed subdivision (b) of 90008 would authorize the FPPC and the FTB "at the direction of the [FPPC]" to audit "any record required to be maintained under [the PRA] to ensure compliance prior to an election, even if the record is a report or statement that has not been filed."

(4) Adds a new section, proposed Gov. Code, § 90009, that authorizes the FPPC to seek injunctive relief to compel disclosure consistent with [the PRA], and provides for expedited review in a superior court, with an expedited hearing and briefing schedule.

Proposed subdivision (c) of 90009 provides discretionary superior court or appellate court stay of any order granting injunctive relief under the section.

AB 45

(1) As discussed in my February 2013 letter, specifically authorizes the Commission and the FTB to undertake audits of campaign records under Chapters 4, 5 and 6 of the Act, by deleting the limitation in current Gov. Code § 90003.

(2) Specifically provides the Commission with authority to conduct pre-election audits, and require the targets of the audits to make records "immediately available to the Commission. (Proposed §90003(b)(1).)

(3) Provides that in the case of an audit, the audit target has the power to go to court 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, and narrows the grounds for defense against an audit under the standards for obtaining a writ of mandate (*Id.*)

(4) Modifies the traditional rules of civil procedure concerning the automatic stay on appeal from issuance of a mandatory injunction in cases arising under the Act. (*Id.*)

Apart from the greatly enlarged authority given to the FPPC and the FTB under these two bills, which is itself the main policy issue, both pieces of legislation contain some troubling provisions reversing long standing precepts, and give the FPPC a "roving commission" to demand records from any person at any time.

From the standpoint of a campaign treasurer as well as counsel to many other treasurers and committees over the past thirty three years, I can envision no greater intrusion into the political process than being subjected to a time-consuming, attention-diverting audit by the Commission's enforcement staff in the last weeks of an election campaign, in a manner that is unconstrained by any limitations. This kind of audit is possible under the proposed legislation.

At a minimum the Commission ought to convene a working group on the enforcement process. It need not be drawn into the current legislative scramble without a more thoroughly thought-out, vetted process, because its sponsorship of legislation, and its decision not to sponsor hastily-drafted, and poorly thought-out legislation, is also important to the process.

Respectfully Submitted,

Charles H. Bell, Jr.

CHB: ak

Attachment

Cc: Chair & Executive Committee
California Political Attorneys Association

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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.

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]

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[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

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,

Charles H. Bell, Jr.

CHB:ad
cc: Chair & Executive Committee
California Political Attorneys Association

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