

**California Department of Food and Agriculture
Supplemental Cease and Desist Findings and Order
Pursuant to Food and Agricultural Code Sections 78641 through 78644**

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Procedural History:

On September 11, 2006, the department began a limited scope fiscal and compliance audit of the California Tomato Commission (CTC) pursuant to Food and Agricultural Code section 78668. The department incorporated the audit into a cease and desist order issued September 19, 2006, pursuant to Food and Agricultural Code sections 78641 and 78644. The audit was completed and a preliminary audit report issued on or about December 13, 2006. The Commission was afforded 30 days to comment, extending to February 15, 2007 due to the complexity and number of audit findings. On February 20, 2007, the department received the CTC response to the draft preliminary audit report. CTC shipped the response by federal express the previous Friday. The audit is as of this writing final and public.

Because of the nature of the final audit findings and the viewpoints expressed in the CTC response, incorporated into the final audit and attached, the department hereby brings up-to-date its determinations under Food and Agricultural Code sections 78641 and 78644 and makes further orders pursuant to section 78641. The CTC may, of course, seek judicial relief from these orders pursuant to section 78642. Although CTC states in its audit response CTC “voluntarily will agree to the majority of the department’s recommendations” that would be CTC’s right under the Act. The department begins with a discussion of CTC’s Audit Response.

Discussion of CTC Audit Response:

The department will take in order CTC’s general arguments concerning the audit and then examine some of the specifics.

1. *CTC argues it has been “singled out in hindsight for a purported failure to comply with government standards to which it reasonably did not understand it was subject.” [Page 4].*

First, the department has already completed another special audit of another Commission. Second, the department has a third audit of a third Commission

already scheduled. Third, the department has put in motion regular and routine proactive full fiscal and compliance audits of all Commissions, the implementation of which awaits only the completion of the special audits now being conducted.

Fourth, CTC is government and its argument concerning the reasonableness of its understanding it was not subject to governmental standards is flawed.

CTC describes itself as follows:

“The Commission’s mandate to promote a commercial product ... and open new markets, of course, *distinguishes it from a traditional government agency.* (italics added) It is virtually undisputed in the agricultural industry that commissions generally ... have operated, in a business-like environment that is different from that in a government agency or a marketing order ... it appears that the Commission is being held to strict standards applicable to a government agency, funded by general tax revenues instead of by assessments from the industry itself ... ”

The department does not doubt that this is a sincerely held view and is aware generally that others share this view, but the department, charged with the oversight of Commissions pursuant to Title 22 of the Food and Agricultural Code and CTC’s enabling Act, never-the-less believes the view is inaccurate. Food and Agricultural Code section 78640 (attached as 1) begins, “There is in the state government the California Tomato Commission.” Can’t be much plainer than that. These are the same words by which the department is described by the Legislature (see Food and Agricultural Code section 101).

But if there remains doubt, consider the following, beginning with section 63904, (attached as 2) which applies to all Commissions including CTC:

“The Legislature finds and declares that the ... commissions operating pursuant to this division are *duly constituted authorities of this state* for purposes of subdivision (i) of section 610 of Title 7 of the United States Code.” (italics added)

Subdivision (i) of Section 610 of Title 7 of the United States Code authorizes the Secretary of the United States Department of Agriculture to act in several ways on the request of such duly constituted authorities “in order to obtain uniformity in the formation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities ...” Section 63901 (attached as 3), which also applies to all Commissions including CTC, provides:

“The programs conducted by these commissions ... are among the broad range of state-mandated *regulatory* programs that are *funded by the*

public through user fees assessed in accordance with each person's relationship to a particular program." (italics added)

While CTC cites only the Public Records Act and Bagley-Keene as giving statutory notice of CTC's status as a government agency, not only are the above sections found in CTC's enabling Act and general provisions of Title 22 of the Food and Agricultural Code, section 78609 of CTC's enabling Act cites section 87103 of the Government Code, evidencing the applicability of the Political Reform Act to CTC (see attached 4 and 5).

Moreover, Food and Agricultural Code section 14 (attached as 6) applies the Administrative Procedures Act to all Commissions making rules based upon authority conveyed by the Food and Agricultural Code. All of CTC's authority to make rules is conveyed by the Food and Agricultural Code (see Food and Agricultural Code section 78661, which seems to squarely bring CTC within the scope of Food and Agricultural Code section 14). While Marketing Orders have been exempted by case law (see attached 7, *Henry Voss v. Superior Court of Tulare County*, a 1996 opinion of the 5th District of the Court of Appeal) there has been no similar holding with respect to Commissions. The Administrative Procedures Act by its own terms applies to State Agencies as defined (see Government Code section 11346, attached as 8 and Government Code section 11342.50, attached as 9). Whether or not a court might extend the logic of *Voss* (above) to rules made by CTC, it is clear from the plain language of Section 14 and the Administrative Procedures Act that any agency authorized by the Code to make rules based upon the Food and Agricultural Code was looked upon by the Legislature as a state agency. This concept is incorporated into the department's policy manual for Commissions.

CTC does have an argument that CTC is not a state agency within the meaning of Government Code section 11000. Food and Agricultural Code section 78652 provides that CTC is a corporate body in its own right, with the power to sue or be sued, including *versus* the department. Food and Agricultural Code section 78664 authorizes the hire of private counsel, a provision arguably inconsistent on its face from the statutes requiring a State Agency within the meaning of Government Code section 11000 to utilize the Attorney General as the State's attorney. These provisions would seem inconsistent with viewing CTC as a "state agency" within the meaning of Government Code section 11000, a construction of significance in subsequent discussions of the Public Contracts Code. Additionally, Food and Agricultural Section 78660 describes the CTC's powers and duties as including "but are not limited to" all those contained in this article. On its face this provision is inconsistent with the general rule applicable to state agencies that they only have powers expressly granted. Although this principle is varied with health and safety statutes, CTC's statutory role is economic, related to marketing (regardless of broad sweep of the words used in Food and Agricultural Code section 78606).

For this reason the audit does not apply SAM and PAM (the State Administrative Manual and Purchasing Authority Manual) or the Department of Personnel Administration standards for travel to a number of the expenditures to which the audit draws attention. These expenditures are highlighted in order to daylight them to the assessment payer, rather than identified as an audit exception. CTC's choices to fly charter jet rather than coach, to pay for \$250 to \$500 a night hotel rooms rather than reimburse government rates at \$85 to \$150 a night, to buy \$250 bottles of wine for dinners would draw an audit exception under the rules applicable to the department. However, the department acknowledges the argument that Commissions are not State Agencies within the meaning of Government Code Section 11000 and that the board is there to supervise the expenditure of funds within legal parameters. The audit seeks only to daylight these choices to the assessment payers who pay the bills and ask CTC to develop and vet policies in these areas.

While CTC has an argument it is not subject to exactly the same rules as the department, CTC does not have an argument that it is not "traditional" government. Whether or not CTC is a state agency within the meaning of Government Code section 11000, it is clearly a governmental Agency to which the principles of public accountability expressed in the Administrative Procedures Act, the Public Records Act, the Political Reform Act, the Bagley-Keene Open Meeting Act apply. Moreover, CTC's behavior is expressly subject to review by Writ of Mandate, the tool for review of government actions (found at several sections of CTC's enabling act and the general sections of Title 22 of the Food and Agricultural Code).

Whatever CTC means by use of the qualifier, "traditional" (and CTC does not enlighten with citations to any court opinion or code section), it is difficult for the department to envision a more "traditional" form of government in our American system of government than one in which those who pay the assessments have direct voice in the fundamental decisions to authorize and levy the assessments, as is the case with CTC, and where its governing body is elected on a district basis from the assessment payers (see Food and Agricultural Code section 78640, attached as 1).

CTC is a Commission like other agricultural Commissions and varies only in a few respects from Marketing Orders, the rules and form of which have existed for almost 70 years and affected 3 generations of farmers. That, too, seems to the department to be "traditional." Commissions began as an offshoot to Marketing Orders during the 1980s to escape the micromanagement of the department applying to the commodity board rules that apply to the department, not to escape accountability to its assessment payers (see George Soares, *Agriculture in Crisis: What California Must Do to Protect its Most Precious Industry*, San Joaquin Agricultural Law Review 2001, attached as 10). This history of Commissions is consistent with the department's view and the audit's approach that CTC is a State Agency, but not a State Agency within the meaning of

Government Code Section 11000, and therefore subject to general statutory limits but not the detailed standards and procedures promulgated by control agencies for entities like the department.

While a more lengthy discussion of the law here is possible, the department is not setting out to write a legal treatise or to be top tree killer in the exchange of correspondence, but to make clear that CTC is a government agency in general, and a state institution in particular. Subsequently the department will discuss in greater detail how this affects CTC in general and in relation to specific audit findings and CTC's response to those findings.

2. *CTC argues that the department is somehow at fault for the way CTC behaved because of the "virtual absence of any meaningful guidance from CDFA since the Commission's inception ..."* [Page 4]

CTC elaborates:

"... no comprehensive or clear mandates from the CDFA to inform commissions as to the government standards with which they are expected to comply ... statute ... expressly requires compliance with the Public Records Act and the Bagley-Keene (open meetings), but is silent as to a vast array of other government-related laws and regulations ... never been any material objections by the CDFA specific to ... programs during the entire audit period ... On the contrary, the CDFA routinely has been represented at ... meetings and, without exception, the Secretary or his representative, Lynn Morgan has concurred with the Commission's budgets ... CDFA representative was present at all but the most recent ... meetings where issues or decisions which now are being criticized were not questioned ..."

The department recognizes that it has not micromanaged CTC and that representatives have not forcefully objected or have sometimes been silent when present at meetings at which they presumably heard of CTC conduct to which the audit took exception, but submits that these general facts far from exonerate the Commission from discharging its responsibilities or make the department responsible for CTC's own conduct. That responsibility cannot be defused or displaced to the department.

First, even taking CTC's statements at face value, the fact remains CTC is a separate public corporation with the right to sue or be sued, including to sue the department (see Food and Agricultural Code sections 78652 and 78642, attached as 11 and 12). CTC may hire, and in fact does hire, its own CEO. CTC may hire, and in fact does hire and has hired more than one of its own private, outside counsel to advise it on applicable law and responsibilities. Mr. Manderfield and Mr. Yost confirm that they more than once told Employee A they would not comment on a matter because CTC was represented by its own,

private counsel and CDFA only had concurrence authority with respect to annual budget and statement of activities. Finally, the department's recourse when it disagrees is limited (see below).

The department's power is limited.

The department may concur (or not) in the annual budget, and that concurrence is a precondition to expenditures other than personnel related (section 78677, attached as 13). The department may concur (or not) in the Commission's annual statement of contemplated activities (section 78678, attached as 14). Both of these are general documents that do not set out either budget or activities in the detail that would reveal or draw attention to most of the expenditures and activities about which the audit makes findings (see attachment 15 and 16 for examples of each). Moreover, even this power is limited. The department must register any objection within 15 days (section 79643), a very short time frame for a state agency to review, analyze, ask clarifying questions and respond. By comparison, consider that CTC had from mid December until mid February to respond to the Preliminary Draft of the audit and still had to take a couple extra days. While CTC throughout its response had a lot to say about what department staff did or did not say at meetings, the department's concurrence authority is limited to these two instances. The department is not even required to be at meetings, much less comment, and is not entitled to attend Executive Sessions (see section 78654).

Moreover, as exemplified by the alleged discussion with department staff concerning the Tomato Exchange, department staff has to depend on the briefings of CTC staff. CTC, for instance, asserts that the arrangement between CTC and the Tomato Exchange was discussed in the presence of Marketing Branch Economist Manderfield, who allegedly did not object but rather expressed a view that the department would find it acceptable. On Page 20, CTC says that on March 24, 1997 Glenn Yost reviewed the proposed MOU. According to CTC: "At no time did the department express any concern related to Employee A's dual-role responsibility."

However, according to both of these staff persons, they were left by those briefings with the understanding that the relationship between CTC and the Exchange was that Employee A managed them both in an arrangement like the arrangement between Momfort Management and several boards and commissions managed by that company. CTC's response notes this itself at page 20: "Policy C107.1, as noted by Mr. Manderfield, while Branch policy was for associations that would manage a mandated program, the reverse situation would also be governed by the Branch policy." (Policy C107.1 can be read for itself at attachment 17). Clearly from the statements of Mr. Manderfield, the statements of CTC, and a fair reading of the policy document itself, Mr. Manderfield thought he was dealing with the Momfort Management situation. Momfort Management manages several marketing boards that do their separate

thing with separate commodities, engaged by each board separately under separate contracts. The Momfort model is a management service, not the co-management of two entities, one public and one private, that affected the same commodity, that had contractual relations with each other on which basis money flowed from the public agency to the private agency and back, that used the same accounting systems, that used the public agency's credit to front the expenditures of the private agency, that were managed by boards composed of many of the same people, that were organized such that the private agency was composed of a subset of the assessment payers of the public agency, that were bound by agreements where the same parties entering into the agreement for both the public and the private agency. It is these factors to which the audit drew attention.

CTC asserts that the "*formality* of the relationship between the Exchange and the Commission were fully disclosed at all meetings ... *where the subject arose* ... Nor did the Department object to the terms of the compensation, *in that the budgets of the Commission were concurred in by Marketing Branch Chief Lynn Morgan on an annual basis.*" (italics added) The department is unclear what CTC means by the qualifier "formality." Does CTC mean to avoid being inaccurate about the absence of discussion of the informalities of the relationship? The relationship between the Exchange and the Commission was either fully disclosed or not. And what does the qualifying phrase "where the subject arose" signify? What in either a disclosure of the formality of the relationship or the inclusion of the compensation in the annual budget put Ms. Morgan on notice of the issues raised by the audit with respect to this arrangement, which is what CTC seems to suggest they did? Moreover, the email from Mr. Manderfield to which CTC calls attention was written long after the "dual responsibility" was formulated, was a response to a question from Employee A prompted by discussion of a department policy, and was intended by Mr. Manderfield to communicate the policy, not OK the un-audited transaction. Particularly when understood in relation to the department's limited power and limited time in which to ask questions and object, CTC's statement seems to the department to suggest a lot while evidencing little to support the inference implied.

The auditors were not concerned with the fact that employee A worked for two organizations, but that he was on both sides of the deal making the arrangement, the deal with the Exchange was arguably beyond the Commission's authority to make, that this employee operated both fiscally like one company, and that the auditors were handed multiple documents purporting to explain that either differed or purported to be the same document but were obviously signed at different times.

To digress a bit from the subject of what the department knew when and did or did not say, it does not surprise the department that staff may have been under the wrong impression about the arrangement. Even after the CTC response to

the audit, Employee A's "dual role" remains unclear. Consider the following comments that appear to the department to together be internally inconsistent:

"Thus, while Employee A's role at the Commission was broad, the same cannot be said for Employee A's role at the Exchange ..." [note, page 19]

However, while CTC on page 19 describes Employee A as a consultant to the Exchange and not its Executive Officer, as with the Commission, his role is described differently in a different section:

"Employee A's role is *not unlike that of* Mr. Reggie Brown, who is the *Executive Director* of the Florida Federal Marketing Order ... *Executive Director* of the Florida Exchange ... *manager* of the Florida Tomato Growers Exchange ... "

But on page 24 ... "no pack out data access by Employee A."

While on page 21:

"As in Florida, the California fresh tomato industry is small in scope and most of industry participates in multiple organizations and is accepting of the dual role. In California, *the dual management role* had been supported by industry without any formal or otherwise objection ... until 2005—four years after such an arrangement first began."

But then there is page 22:

"... *not within Employee A's role to participate in the decision making process of the Exchange related to any activity contained in the Operational Policies.*"

Again, qualifiers seem to be very carefully drawn (i.e., Employee A in this last quote is carefully described as not participating in decision making related to "any activity contained in the Operational Policies" of the Exchange. What is an activity contained in an operational policy as compared to one that is not? The so-called "dual role" with the Exchange and the Commission remains unclear, inconsistent with what the former employee told the auditors, inconsistent with what the MOUs set out in plain language, and Employee A's 2001 Form 700 which describes Employee's role as that of "President" of the Exchange (see final audit). It warrants further investigation, as does what, if any, influence the employee had on the Commission entering into the contract with the Exchange and the Exchange entering into the contract with him, especially in light of the fact so many board members were members of both boards.

Back to the limited authority of the department to object to the conduct of the CTC, apart from the concurrence authority, the department has no authority to intervene *sue spondeo*. It is true that the department may issue a cease and desist order if the Commission acts against the public interest or in violation of

the Act (section 78641, attached as 18), but note that the department's actions are subject to judicial review on petition of the Commission (section 78642), and if a court finds the department acted capriciously CTC may be relieved from paying the department's legal costs (see section 78644). The department may also ask the Commission to discipline an employee the department believes has acted against the public interest and to take direct action if the Commission fails to act (see section 78664). The department shall hear appeals of an aggrieved assessment payer not satisfied by the CTC's disposition of their grievance if the grievant has first brought the grievance to the CTC, subject to judicial review, under section 78711 (attached as 19). The department may also call for a full fiscal and compliance audit of the California Tomato Commission pursuant to Food and Agricultural Code section 78668. Each of these procedures has been in the past triggered not by routine or sue spondeo departmental intervention, but by a verified complaint. In the absence of a verified complaint the department would not intervene.

Nevertheless, the Marketing Branch does offer general guidance to CTC, despite CTC's contentions. First, the Branch has for many years published a set of policy guidelines (attached as 20), developed with the cooperation of representative leadership from all marketing programs. Second, the Branch has attended meetings and given guidance predicated on the governmental nature of the Commission. In that regard, Sr. Economist Glenn Yost, quoted by CTC in its audit, in fact discussed with Employee A CTC's "lavish lifestyle" and informed Employee A he would not participate in it. Mr. Manderfield, while less direct, also refused to attend the distant and expensive CTC conferences or stay in the expensive locations of those conferences. So, it appears, the department did guide, whether or not CTC followed.

Consequently, while CTC believes the "draft Audit Report fundamentally unfair" [Page 5] in light of the department's alleged failure to communicate and the "widespread" belief in the industry that CTC is not a "traditional" government, in fact, CTC is well equipped on its own to understand the nature of its responsibilities and on a fair volume of notice as to its governmental nature. Moreover, as illustrated in CTC's own statement, CTC's CEO was not all that unfamiliar with the rules of the road:

"As Mr. Manderfield can attest, when subject matter arose at a Commission meeting that was that of the Exchange or in any fashion related to the Exchange, *Employee A* promptly closed discussion, *warning members that such matter was not appropriate* for Commission meetings."

3. *CTC next argues that the findings were "immaterial by most standards."*
[page 5]

"During the time period covered by the audit, approximately 44 months, total expenditures ... roughly \$7 million. Of that amount ... only 1% of

those expenditures are actually at issue ... immaterial by most standards but, in any event, is hardly an indicia of a pervasive misuse of funds as implied in the Audit Report.” [Page 5]

The term “immaterial” must flow from the earlier discussed misapprehension that CTC is not a “traditional” government entity. However, the department is unsure whose “most” would evaluate the auditor’s findings “immaterial” even in a private setting. As CTC must be aware, the 1% to which CTC draws attention was a sampling. **It is not fair to say that the balance of the 99% was without exceptions.** The auditors clearly state that this was a limited scope audit. Further, CTC was unable to furnish records. CTC states on Page 38 of their response, “Please note that the employees continued to receive back-up for credit card charges after the close of the audit investigation period...” On page 29 of the audit report under “violation of the public contracts code”, the auditors state, “Our office did not conduct an audit of the performance of these contracts based on the amount of time it was taking our office to receive the credit card detail.” It is clear that the auditors were unable to audit many of the CTC’s expenses due to time constraints outside their control. It is in fact one of the singular most critical fiscal findings of the audit that large swaths of the records one would expect to find available and auditable at a public agency’s headquarters were either in the possession of a contractor in Seattle or with the credit card company or vendors.

4. *CTC finally argues in pages 6 through 10 it has accomplished a lot for industry.*

The department never doubted it. But accomplishing a lot has never given anyone or any organization a pass. Nor does the department by pointing out all it is pointing out in either the audit or in these findings intend to downplay the considerable achievements of the Tomato Commission or the stakeholders involved, or of Employee A for that matter.

In fact the Tomato Commission, like all the marketing programs the department oversees, is vitally important to agriculture and to the department. Promoting agriculture is one of two essential functions of the department (see Food and Agricultural Code section 3, section 40, and section 401.5). The Legislature has made it plain that promotion and marketing of Agricultural products is critical to the State (see Food and Agricultural Code sections 801 through 822 and section 63901). Whether the form of the marketing program is a Commission, a Council, or a Marketing Order, and the form is subject to its own enabling Act or the Marketing Act of 1937, the mission these bodies further is of fundamental importance to the State of California.

It is for these very reasons that the department has been entrusted with the oversight authority it has invoked with respect to CTC. Much like Marketing Orders, when a Commission implements its powers it is acting for the State and

speaking for the State. There has been much discussion in the courts as to what this means and one of the most important cases in that regard, *Gerawan Farming v. Kawamura* (attached as 21) originated out a marketing order the department oversees. While there are differences, much of what the court had to say about the relationship between that order and the department also applies to CTC.

The department now examines more specific comments by CTC on the audit. Page 16 begins a detailed discussion of programmatic differences between CTC and the Exchange.

5. *CTC argues that the Exchange and the Commission “operated separately and independently for all material purposes.” [Page 10]*

Whatever “material” means (material is usually an accounting term related to whether the financial statements can be counted on by bankers, shareholders, and financial regulators), CTC does not dispute that the books of the Exchange were run through the books of the Commission or that the Commission advanced Exchange expenditures on Commission credit, and in some cases paid them. CTC does not dispute that Commission staff, office equipment, and office were used for Exchange business. Rather, CTC seeks to minimize these facts and argue that:

“The use of common staff and other resources was fully disclosed, arranged at arms length, and the subject of written MOUs. In any event, such use of common resources is not by itself improper and was never used as an instrument of concealment or wrongdoing.” [Page 10]

And again on page 13:

“Few specific items of the Commission purportedly “funding” Exchange activities identified by the auditors are relatively minor ... fully explained.”

Then there is the statement on page 14 of the employee who served a “dual role”:

“All individuals who have served on the Exchange Board of Directors have at one time or another also served on the Board of Directors of the California Tomato Commission.”

The department is unclear what “arranged at arms length” means when shared board directorship is so co-extensive and the Commission CEO has a “dual role” with the Exchange. This noted the department believes that once again CTC’s descriptions are internally inconsistent.

CTC goes on to argue that the two were programmatically different and based upon a model approved by USDA for Florida. See CTC on page 19:

“The concept in Florida was to provide complimentary not competitive programs ... same concept holds true in California.”

And on page 10:

CTC “and the Exchange served entirely different and distinct functions and operated separately and independently for all material purposes.”

On page 22-3 CTC in attempting an additional argument, acknowledges to the contrary of the two paragraphs quoted above that CTC and Exchange business did, in fact, “intersect”:

“ ... few instances where business of the Commission and ... Exchange ... intersect ... Since Employee A’s involvement ... only interaction of the two programs ... related to the illegal packing of tomatoes ... mutual concern of both entities ... surveillance program ... ”

And on page 23 CTC admits, “opportunities for shared expenses ... annual basis, Employee A would attend the Florida Tomato Conference ... “

So the two programs are programmatically different, when they are not intersecting.

The audit called attention to some of those “opportunities for shared expenses,” and CTC seeks to explain these away. The auditors highlighted the Commission’s payment of legal fees. These fees were generated by a lawsuit brought by the Exchange. On Page 17 CTC states:

“ The Commission *intentionally* paid for a portion of the legal fees incurred by the Exchange in *California Fresh Tomato Growers Exchange v. Romas R Us, Inc, Maya Fresh, Inc.*, Fresno County Superior Court No. 05 CE CG 00537, filed November 23, 2005 ... because the Commission received tangible benefits ... produced public and industry benefits directly related to the Commission’s purpose and business which are difficult to quantify ... cessation of certain gunny sacking activity, which was a subject of the suit, benefiting the industry in general and non-exchange members such as Gonzales Packing whose boxes were being used ... suit led to payment of assessments in connection with the state’s standardization and curly-top programs ... ”

This explanation raises more questions than it answers. First, whatever benefits CTC thought the lawsuit provided, it was the Exchange’s litigation. CTC paid the debts of a private organization. Paying the debts of a private organization may

be a gift of public funds under Article XVI, section 6 of the California State Constitution (see attachment 22 and subsequent for greater discussion of gifts of public funds).

Second, a commission may not exceed its statutory authority (see *United Farm Workers of America v. California Table Grape Commission* (1995) 41 Cal.App.4th 303, attachment 23) for a thorough discussion of this point. The alleged fact, if proven, that the litigation might generally benefit the same industry benefited by the Commission, could be construed to confer a public benefit. Such a construction might also take the payment out of the "Gift of Public Funds" category (and of course it may not). However, this logic does not render the action within CTC's authority. CTC has broad authority to "promote and maintain" the tomato industry. But even interpreted liberally authority to promote and maintain the industry does not seem to the department to clearly provide regulatory authority over "gunny sacking activity." CTC itself recognized this and sought statutory change, subsequently vetoed by the Governor, to expand its authority into surveillance and enforcement for purposes of regulating food safety, including "gunny sacking" as a related activity. If CTC had the authority, legislation was not needed. Moreover, at no time did the department concur in the expenditure of Commission funds to pay a private agency's legal fees, or for the Commission to join in litigation of the type brought by the Exchange. In fact, the department through its Marketing Branch was very clear with CTC that the Commission did not have the authority to regulate gunny sacking and food safety. That clear guidance led to CTC seeking legislation and on that legislation the Administration was clear, vetoing it.

Third, this bill evidences a treatment of Exchange business as CTC business, a point about which the auditors were very concerned. It does so because of the fact CTC paid the bill. It does so because CTC appears to be saying it was CTC business, on page 17. It does so because the firm that represented the Exchange in the lawsuit was the same firm that advised and represented the Commission at the time (albeit different counsel in the firm). In this example and CTC's comments on page 17, CTC actually underscores the auditor's concerns that CTC was using the Exchange to carry on activities CTC's enabling Act did not authorize CTC to carry out, supporting a separate corporate "shell" engaging in activities not authorized to CTC. As CTC correctly points out, *the facts adduced by the auditors are not yet sufficient to make the legal case for a corporate shell game.*

However, enough facts have been adduced to suggest to the department that this matter warrants further investigation. Consider all of the foregoing again in conjunction with the below already noted quote from page 14:

"All individuals who have served on the Exchange Board of Directors have at one time or another also served on the Board of Directors of the California Tomato Commission."

The department will refer the relationship between the Exchange and the Commission to the Attorney General's Office for such action as the Attorney General deems appropriate.

CTC also seeks to minimize the concern raised by the audit, Gonzales Packing, and Tim McCarthy that while the Commission is funded by all growers who are mandated to provide what might otherwise be considered sensitive proprietary and "pack out" information, the Exchange seemed to be controlled by and to benefit a smaller subset of growers associated with a very few handlers. On pages 12 through 13 CTC contends that there *are* only 100 hundred assessment-paying growers not 400 as presented in the department's audit and says there was no basis presented in the audit for the audit's claim the Exchange was controlled by 4-5 handlers.

But CTC did not dispute that there were 30 handlers in the industry. Nor did CTC provide evidence of how many handlers *were* involved in the Exchange. CTC instead stated on page 14:

"nearly all producers, except those aligned with Gonzales Packing, Sunrise Tomato (now defunct), Red Rooster, and Deardorff Jackson, have either been aligned with the start-up ... and/or served on the Board of Directors (of the Exchange)."

Another carefully crafted and qualified statement. Is the department to assume that "aligned" means, paying members? How does "nearly all producers" rebut the contention that 4-5 handlers controlled the Exchange? How does the information that all who served on the board of directors of the Exchange also at one time served on the CTC board rebut the contention that a few controlled the Exchange? Even had the statement been reversed, that all who served on the CTC board at one time served on the board of the Exchange, it still would not have rebutted Gonzales Packing's contention that a small group of handlers controlled the Exchange to the detriment of Gonzales Packing (and here the department needs to be very clear that it has not adduced direct evidence of detriment to Gonzales Packing, either).

There are more questions raised in this regard by CTC's response. While CTC references the Capper-Volstead exemption (based upon being a grower cooperative) and discusses the Exchange as grower managed, on page 14, CTC's former CEO describes the Exchange as "all producers, except those *aligned* with Gonzales Packing, Sunrise Tomato, Red Rooser, and Deardorff Jackson." The CEO seems to be categorizing the growers in terms of their handlers, although that may be coincidence.

So the relationship of handlers to the Exchange is not clear, and the CTC response really does not dispose of the issue of how many paid and informed

compared to how many benefited from the expenditures and information. Moreover, the point is not the detail of how many. The point is the Exchange was a smaller subset of the industry than those who paid in assessments that ended up supporting the Exchange to some degree, and whose information was at least available to the Exchange (although the department does not have direct evidence that this information was conveyed), the program of which by the CTC's own statements included price setting, volume "protections," volume control. CTC by statute collects pack-out information and may share that information in aggregate with others (Food and Agricultural Code section 78681).

CTC says such information as it collects was not relevant to the Exchange's activities. Gonzales Packing and others beg to differ. Whether or not such information was shared and how useful it would have been if shared can be and is disputed, and the audit has no direct evidence in that regard. However, the information was available, the staff, the office, and the records of Commission and Exchange shared, by CTC's own admission every person who served on the board of the directors of the Exchange served on the board of directors of the Commission at one time, and the Exchange demonstrably was composed of a subset of the assessment payers.

How were the non-Exchange members to hold the Commission publicly accountable to inform them of the detailed transactions and flow of information? CTC contends that they could not gain access to the Exchange's information. As Gonzales and Tim McCarthy point out, this was so even though the Exchange was linked to the CTC website and Commission assessments were spent to construct that site. This is a formula for misunderstanding at best. More importantly, it seems inconsistent with CTC's responsibilities for public accountability and transparency. And it raises questions that warrant further investigation, including the possible conduct of business CTC was not statutorily authorized to conduct through vehicle of the Exchange. As noted previously, the department will refer this issue also to the Attorney General's Office for such disposition as the Attorney General deems warranted by the facts adduced on investigation.

6. CTC appears comfortable with the various ways the various family travel and other personal expenses of employees of CTC were paid by private parties or the Commission and CTC and refuses to pursue reimbursement of CTC payments.

The apparent comfort with multiple business dealings documented in the audit extended beyond the issue of the Exchange. For instance, consider this entry on page 29-30 of the response to the audit's highlighting of Employee A's trip to Italy in connection with a Research Foundation in which CTC says Employee A had no role:

“Employee A took a trip to Sicily, Italy, *in connection with the Foundation*, to attend ... the 2005 *Syngenta Tomato Conference* ... Commission was reimbursed for full fare coach (by Syngenta)... paid the difference between full fare coach and business class (with CTC assessment dollars). All hotel and meal ... paid for by Syngenta or Employee A with one exception. Due to an air traffic controllers strike, Employee A had to remain in Italy an additional night, and those expenses were paid by the Commission ... Commission funded the initial exploration of a Foundation, legal fees for draft bylaws, and a “*diminimis*” portion of Employee A’s participation in the 2005 Syngenta Tomato Conference. The Commission has determined that it would be “diseconomic” and impractical to attempt to retrieve these small amounts, which amounts were justified ... as consistent with its mandate to promote the California fresh tomato industry and a reasonable effort to further improve the industry.”

Despite the CTC comfort with this situation, Syngenta’s “gift” to Employee A of major expenses associated with a trip to Italy (airfare, lodging, meals) raises an issue under the Political Reform Act of a gift far in excess of the statutory limit for gifts from one organization. Neither the account of CTC nor the Employee describes the bases for an exemption. If the transaction was not a gift, but consideration for services rendered at the conference, then the transaction raises an issue of unreported income under the Political Reform Act, and the Commission share raises issues of a possible violation of provisions of 1090 of the Government Code because Syngenta was allegedly the research contractor (the department should quickly note that evidentiary elements have not yet been adduced to support all the elements of such violations of 1090 of the Government Code) because of the interrelationships of the organizations.

The transaction or gift additionally raises issues of a gift of public funds as to Commission’s share if a connection with a legitimate Commission role cannot be established. While CTC states summarily that the Commission expenditures were consistent with its mandate to promote the industry, it does not say how and a general reasonable effort to improve the industry is not found in the enabling Act. Moreover, the department did not concur in either the expense or the activity. The department must be quick to acknowledge that it is possible these expenditures by the Commission might not be gifts. Op.Atty.Gen. 05-309 (December 6, 2005) concluded that a local district hospital could pay for the expenses of a district emergency room physician incurred in traveling to Sri Lanka to provide emergency medical care to tsunami victims if the district reasonably determines that the performance of such services will directly assist the district in accomplishing its authorized public responsibilities. However, in order to evaluate this expenditure the department requires considerably more detail concerning the conference and how it helped further activities authorized CTC by its enabling Act.

Another issue with similar multiple implications *viz a viz* the Political Reform Act in regards to Employee A's consultant is revealed by another entry on Employee A's 2001 Form 700 (attached as 24). Employee A lists consulting work with the company of "XXXXXX", on the CTC board the same year. Income is estimated between \$1,000 and \$10,000. The audit reveals this same board member provided air travel to Employee A for purported Commission business, with other expenses paid by the Commission. The audit has not adduced more information at this writing, but such a relationship bears investigation. The department will refer this issue to the Attorney General's Office for investigation and disposition as the Attorney General deems appropriate.

The issue of gifts of public funds is raised also by CTC expenditures, as documented in the audit, to pay for family members of staff to attend conferences. CTC says of these expenses at page 35:

"It has long been CTC practice and policy that family travel expenses were covered as part of the ... Conference ... fully disclosed to and approved by CTC board."

CTC adds at pages 37-39:

"Commission concluded that the cost of legal action to collect (personal expenses) from these employees would exceed the reimbursement amount ... Commission does not believe its best interests are served by proceeding against these employees."

However, the character of this expenditure is clear. The Attorney General has concluded that a hospital district may not pay traveling and incidental expenses incurred by spouse of a district director who is attending a conference on the official business of the district (75 Op.Atty.Gen. 20, attached as 25). The analysis of the hospital's actions is clearly applicable to the Commission's. Moreover, not only is the payment of the expenses in the first place a clear gift of public funds, but forgiving the debt, as the Commission proposes to do, may be an additional gift (See *Westly v. U.S. Bancorp* (App. 3 Dist. 2003) 114 Cal.App.4th 577, review denied). Also note that the compromise of a wholly invalid claim may also be a gift (see *Jordan v. CDMV* (App. 3 Dist. 2002) 100 Cal.App.4th 431, review denied).

The Gift of Public Funds issue is also raised by the CTC Annual Conferences as described in the audit, despite CTCs claim on page 30-1:

"Commission's annual conferences ... served an important public service ... produced substantial public benefits ... majority of expenses related to the conferences were underwritten by third parties ... increase industry awareness and usage of Commission programs ... emerging trends ... "

The department notes, it may be that others or a court might agree with the CTC's determination that underwriting the costs of a conference that benefited two private organizations served a public purpose such that it would not be considered a gift of public funds, whether as a payment or as an extension of credit. However, the department notes that once again the confluence of Commission and Exchange business is documented by these conferences.

The auditors also took issue with payments in excess of \$46,000 to Raffo Racing for its entry of a racing vehicle in an annual Baja race, in part questioning the public value of the cost, in part questioning the transaction because a member of the board of CTC was a "co-driver." On February 15 the board member's counsel delivered a response separate from CTC's response to the department. The counsel's response, referenced in the CTC response, was to the effect that the CTC payments did not cover the board member's expenses and that the board member did not have a financial interest in Raffo Racing. The department sought clarification of this response on February 20 (see attachment 26). Essentially the department asked if Raffo had co-sponsors in the event other than CTC, who they were and whether the board member had a financial interest in them (including income). The department asked these questions because in an earlier discussion with CTC representatives the representatives indicated that the board member's employer covered his expenses. If true, the board member's employer is an assessment payer of the Commission, by virtue of which relationship the board member is on the board, and the employer was also a reputed member of the Exchange. On March 2, counsel for the board member provided documentation that clears up the possible conflict issue to the department's satisfaction. The department will not refer this issue to the Attorney General's Office.

The Political Reform Act and gift issues warrant further investigation. The department will refer all matters pertaining to travel, credit card usage, etc. to the Attorney General for such disposition as the Attorney General deems warranted.

7. *CTC argues the Public Contract Code does not apply to the Commission.*

On pages 45-6, CTC argues that the public contract code does not apply to the Commission based upon *San Diego Service Authority for Freeway Emergencies [SAFE] v. Superior Court of San Diego County* (1988) 198 Cal.App.3d 1466 (see attachment 27), *Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th 527 and specific code sections of the CTC enabling Act.

CTC argues, based upon two cases that affect *wholly local entities created by wholly local entities under very specific enabling Acts*, that there is no basis for requiring CTC to follow the contract code. However, a review of Government Code section 4401 and Public Contract Code sections 100, 1100, 102, 1100.7, and especially 10335.7, all attached as 28 through 33, make clear that state agency as used in the code "means every state office, department, division,

bureau, board, or commission,” not just State Agencies within the meaning of Government Code section 11000. A fair reading of *SAFE, supra* (attached as 27) makes it clear it is distinguishable, focused upon a local entity created by special statute. The Court repeatedly uses the term “local” and refers back to the special enabling Act that authorized other local entities to create the local entity examined in *SAFE*.

CTC has an argument it is not a state agency within the meaning of Government Code Section 11000 (see prior). CTC also makes a stab at arguing that its regulation of a commodity group that is less than the entire state population. While not using the term “local,” CTC seems to be trying to align with the local distinction the court saw in *SAFE*. However, CTC’s enabling Act, section 78609, provides that the CTC board members’ interests as growers is “tantamount to, and constitutes the public generally within the meaning of Section 87103 of the Government Code.” CTC acknowledges it is a state entity not a local entity when it admits it is subject to Bagley-Keene rather than the Brown Act. CTC’s foundational code section 78640 opens with the statement that CTC is a part of the state government and goes on to subdivide the Commissions into districts. Those Districts are defined in section 78623 as six based on geographic boundary lines and covering the entire state.

On the other hand, the department acknowledges that section 78652 describes CTC as “a corporate body” with the power to sue or be sued, and to possess all the powers of a corporation. Consequently, while the department believes the Public Contracts Code and its requirement of competitive bidding applies to CTC (and the department’s current policy manual reflects that view), the department is prepared to seek a formal Attorney General’s Opinion to clear up the matter once and for all if CTC remains unsettled on this point.

Thus concludes the department’s analysis of certain issues found in the CTC response to the department’s draft audit. The audit and CTC’s response are attached and exhibits are found in the office of the department’s internal auditors.

Findings:

The department audit report reveals patterns of practice inappropriate to a public agency. The department incorporates all those findings by reference and the prior discussion of the audit. The department will here concentrate on one sub-category, transparency and public accountability. Regardless of the character of any specific audit findings as a violation of any specific law, transparency and public accountability go to the core of what makes a public agency public.

As a public agency, the Commission is subject to the many rules that govern the conduct of a public agency and that are intended to safeguard against abuse of power and unfair treatment. The Commission is publicly accountable for how it

uses assessments and how it conducts its business. Within the parameters of section 78657 and the doctrine of qualified immunity, the board members may be personally accountable for their stewardship.

Public accountability and stewardship begins with reasonable access to information. It is not OK for the Commission's records to be maintained at a location not readily accessible (like Seattle). It is not OK for the records not to exist except in the books of vendors (like American Express). It is not OK for an assessment payer to ever be told he does not have a right to see any document or record that relates to the conduct of Commission business (unless that document shows the proprietary information of another rate-payer, a pre-patent formula being developed by the Commission for the benefit of all, the personal information of a non-management employee, or is a communication subject to an express statutory privilege). Moreover, board of directors not only have a right to access this information, they must be regularly informed of all Commission activities if they are to carry out the public trust. Executive Committees may be delegated authority to act, but board members must be informed of the actions. Finally, general members of the public and the press are entitled to access in accordance with the Public Records Act and the Bagley-Keene Open Meeting Act.

This level of public scrutiny to which a public agency is subject is very different from the scrutiny to which private business is subject. The department entered into this audit to verify and, if necessary, guide, not to punish, in part because the department understands that there are those who genuinely did not understand the Commission is a government agency subject to all the many rules and responsibilities to which it is subject, and in part because the department is sensitive to the question of how much guidance it has provided in the past. The department remains prepared to help the Commission achieve its potential as a transparent, publicly accountable government agency. Unfortunately, the department has discovered information that may evidence violation of laws. The department will refer to the appropriate authority, the Attorney General, and release that issue to the Attorney General's discretion, as it must. This is not a finding of guilt or an assertion of guilt. It is the department's fiduciary responsibility.

Decision and Order:

The department hereby announces its decision and directives under Food and Agricultural Code sections 78641 and 78644.

Based upon the audit findings and the prior September 19, 2006 cease and desist order, the department referred this matter to the Attorney General's Office for further investigation.

Based on the audit report, CDFA issues the following orders directed to the Tomato Commission:

1. The cost containment and asset preservation measures contained in the prior September 19, 2006 cease and desist order are superseded. The new measures contained in the supplemental cease and desist order will remain in effect until released by written order of CDFA. The Commission shall not (a) make any commitment, (b) authorize any expenditure, or (c) sell or encumber any asset, without the express, prior written authorization of the Chief of the Audit Branch of CDFA. This order includes credit card transactions. No Commission member or employee may travel on Commission business or receive reimbursement for travel without the Audit Chief's prior written counter-authorization.
2. The Commission shall immediately distribute the audit report and supplemental cease and desist order to all Commission members and Commission employees. Following this distribution, the Commission shall give at least 10 days notice of a special board meeting to discuss the audit's findings, and noticed specifically to each assessment payer.
3. While the special board meeting may include an Executive Session to discuss litigation and personnel implications, if any, from the audit findings, the general discussion of the audit report shall be in public session.
4. The Commission shall make the audit report available to all assessment payers on request.
5. The Commission shall immediately implement the internal control recommendations made in the audit report.
6. Immediately upon receipt of the supplemental cease and desist order, the Commission shall eliminate passwords on the Tomato Commission website.
7. Immediately upon receipt of the supplemental cease and desist order, the Commission shall transfer to Commission headquarters in California all Commission documents and records (original and copies).
8. Within 30 days of receipt of the supplemental cease and desist order, the Commission shall verify to CDFA's auditors:
 - (a) that all of the Commission's documents and records have been assembled and maintained in an auditable condition at the Commission's headquarters in California, and

(b) that the internal controls recommended by the audit report have been put in place.