FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: C. Scott Tocher, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Prenotice Discussion of Amendments to Regulation 18450.4 – Conforming Advertisement Disclosure Regulations with Commission Policy

Date: June 29, 2005

Executive Summary

Shortly before the recent November statewide election, the State's Republican and Democratic parties, along with the Orange County Republican Party, sued the FPPC in federal district court, alleging that the advertising disclosure provisions of the Political Reform Act ("Act") that require on-publication identification of the two largest contributors of $50,000 or more were unconstitutional. (*California Democratic Party, California Republican Party, et al., v. Fair Political Practices Commission, et al.*, No. Civ-S-04-2144, E.D. Cal.) The primary ground of the complaint is based on a 2004 Ninth Circuit opinion (*American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 ("*Heller*")) that struck down a Nevada statute that also required on-publication identification of donors.

In light of controlling appellate authority and the holding of the district court in the current litigation, the Commission adopted a resolution earlier in the year clarifying the Commission's enforcement policy with respect to Government Code sections 84503 and 84506 as they apply to general purpose committees. Staff proposes the Commission consider amending existing regulations to reflect the policy decision embodied in the resolution.

I. BACKGROUND

Government Code sections 84501 - 84511[1], added to the Act by Proposition 208, pertain to the disclosure of major funding sources for campaign advertising. Proposition 34 and Senate Bill 34 further amended these statutes.

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[1] All statutory references are to the Government Code, unless indicated otherwise.

A. <u>Summary of the Primary Advertising Statutes</u>.

Generally speaking, the statutes comprise two distinct sets of advertising disclosure rules. One set covers disclosure in political advertisements related to *ballot measures.* (§§ 84501-84504.) The second set addresses political advertising that is an *independent expenditure* paid for by a committee, whether the advertisement relates to a candidate or a ballot measure. (§ 84506.) These sections present a complex statutory scheme, resulting in a "layering" of requirements. Since the Commission already has considered on several occasions the entire statutory scheme related to advertising disclosures, staff presents a summary only of the primary disclosure statutes that are implicated in the decisions called for in this item.

DISCLOSURES REQUIRED

The essential elements of the advertising disclosure statutes are threefold. Sections 84503, 84504, and 84506 require certain disclosures in advertisements. **Sections 84503 and 84504** require a **disclosure statement in ballot measure advertising**. The third, section **84506**, includes **both ballot measure advertising and candidate advertising** in its disclosure requirements. Different information is required in the disclosure statements, depending on which section applies.

1. Section **84503** requires a <u>disclosure statement identifying any person whose cumulative contributions are $50,000 or more</u>. Subdivision (b) of that statute instructs that if there are more than two such donors, the committee is required to disclose only the highest and second highest donors. Again, this statute only applies to ballot measure advertising. (See Exhibit A.)

2. Section **84504** outlines <u>how a committee must identify itself in its name when advertising in support or opposition of a ballot measure</u>. This section adds to the requirements found in section 84503 by specifying that a committee identify itself with a name or phrase that "clearly identifies the economic or other special interest of its major donors of fifty thousand dollars ($50,000) or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed pursuant to Section 84101."

Thus far, in ballot measure advertising, these statutes require disclosure of the two highest contributors of $50,000 or more, and committee identification including the economic or special interest of its major donors of $50,000 or more. Section 84504 goes on to require that if the major donors of $50,000 or more share a common employer, the identity of the employer shall also be disclosed in the advertising. The statute further requires that any committee that supports or opposes a ballot measure shall print or broadcast its name as provided in this section as part of any advertisement or *other paid public statement*.

Section 84504 reaches beyond the advertising arena in requiring that a committee name contain certain information *in any reference to the committee required by law*. The section specifies that this includes the committee's statement of organization, filed pursuant to section 84101.

3. Section **84506** is the first section that seeks to govern both ballot measure advertising and candidate advertising. The common thread here is that this applies to broadcast or mass mailing advertisements, advocating the election or defeat of any candidate or ballot measure, funded by *independent expenditures*. This section adds yet another requirement to some advertising disclosures. If the expenditure for a broadcast or mass mailing advertisement is an independent expenditure, the committee shall disclosure on the advertisement the name of the committee making the expenditure and the identities of the two persons making the largest contributions of $50,000 or more to the committee.[2] (See Exhibit A.)

B. Litigation of Disclosure Requirements.

On October 12, 2004, the California Republican Party, the California Democratic Party, and the Orange County Republican Party filed a Complaint in the Federal District Court seeking injunctive and declaratory relief from two "on-publication" provisions of the Act, sections 84503 and 84506, which require a committee paying for ballot measure advertisements to identify their two highest contributors of $50,000 or more. Prior to filing the complaint, the plaintiffs did not request the Commission to consider application of the statutes to them in light of the *Heller* decision. On October 20, 2004, plaintiffs amended their Complaint, and noticed a motion for preliminary injunction to be heard on October 26, 2004. The FPPC filed its Opposition to this motion on October 22, and Plaintiffs' Reply was filed and served on Monday, October 25. The matter was heard before the Honorable Frank C. Damrell, Jr. on October 26, 2004. The Attorney General's office represented the Commission.

On October 27, 2004, Judge Damrell granted Plaintiffs' motion and enjoined the Commission from enforcing these provisions against political party committees registered with the Secretary of State as general purpose committees. One of the key arguments made by the plaintiffs was that requiring disclosure of certain contributors on the communication as "paid for by" or similar language was, in fact, misleading. The plaintiffs offered evidence that certain groups required to be identified in the parties' advertisements regarding measures on the November ballot in fact opposed the measures supported by the advertisements. At the hearing, the judge found significant that campaign reports required elsewhere in the Act show all the contributors, which allow members of the public to more fully determine donors' connections to a committee's efforts. On the other hand, the judge felt that the advertisement disclosure statutes

[2] Section 84508 can also be classified as a disclosure statute, although it really serves to limit the scope of the disclosure required under sections 84503 and 84506 to a committee name and its highest major contributor, if the advertisement is of a smaller scale, as specified in the section.

challenged can be misleading when major donors do not support or oppose a political party ballot measure effort.

A key factor in determining whether to grant the preliminary injunction request is the likelihood of plaintiffs' success at trial. The court, in its decision, found that plaintiffs demonstrated "serious questions going to the merits of their claim" based on the *Heller* decision.

C. The *Heller* Decision.

In *Heller*, the Ninth Circuit applied strict scrutiny to strike down a Nevada statute requiring on-publication disclosure of parties responsible for any materials relating to an election of a candidate or ballot measure. In support of the disclosure requirements, the defendant in *Heller* proffered several governmental interests, including the need to provide information to voters regarding the identity of campaign donors. The Ninth Circuit rejected as "not sufficiently compelling" the government's interest of informing voters, finding that "the simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." (*Heller, supra*, 378 F.3d at p. 993.) In striking down Nevada's statute, the 9th Circuit's defining statements were: (1) "The constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements has been noted and relied upon both by the Supreme Court and by this Circuit;" and (2) "The availability of the less speech-restrictive reporting and disclosure requirement confirms that a statute like the one here at issue cannot survive the applicable narrow tailoring standard." (*Id.*, at pp. 991, 995.)

In the instant matter, although the Commission attempted to distinguish the Nevada statute, the district court found the statutes did not satisfy constitutional safeguards as to general purpose committees in light of the existence of less intrusive campaign reporting statutes. Because California's scheme requires proscription "of the speech itself" unless it complies with certain criteria, the court found that the statutes suffered the same constitutional infirmity as in *Heller*.

Of particular significance in the context of general purpose committees is the point that the required disclosures may in some cases actually be misleading. General purpose committees, by their nature, may exist over many election cycles and receive contributions from donors of such a size that the donor may be disclosed on an advertisement regarding an issue years later with which the donor has no affiliation or indeed may oppose. Such disclosure is arguably misleading and impossible to compel under *Heller*.

D. 2005 Commission Resolution.

In light of controlling appellate authority and the holding of the district court in the party litigation discussed above in section "C", the Commission adopted a resolution

in April of this year clarifying the Commission's enforcement policy with respect to Government Code sections 84503 and 84506 as they apply to general purpose committees. (Exhibit B.) The resolution states that sections 84503 and 84506 are unlawful as applied to these committees.

II. AMENDED REGULATION 18450.4

While Commission policy regarding enforcement of sections 84503 and 84506 is clear from the resolution recently adopted addressing this issue, the taking of regulatory action to codify that policy makes the policy more visible to the regulated community and public at large. This will reduce possible confusion over the law and ensure that the Commission's regulations reflect current policy.

To that end, staff has identified regulation 18450.4 as the proper vehicle for amendment to reflect the Commission's current policy. Regulation 18450.4 addresses the contents of disclosure statements. As such, this regulation is the logical location for a simple amendment stating the scope of the disclosure requirements.

Attached as Exhibit C, staff has drafted a new subdivision (a) to the regulation to indicate that the disclosure requirements of sections 84503 and 84506, subdivision (a)(2), do not apply to general purpose committees. The remaining subdivisions are renumbered accordingly. Finally, a technical fix is made in renumbered subdivision (d) to clean up potentially confusing language and to ensure that the subdivision addresses "contributors" of identical amounts, as opposed to "contributions." Staff believes these amendments codify the Commission's policies consistent with the resolution adopted earlier this year and provide the necessary clarity to the advertising disclosure regulations.

III. RECOMMENDATION

Staff recommends the Commission notice regulation 18450.4 for amendment at its September meeting consistent with the draft attached hereto.

Exhibits:

A. Sections 84503 and 84506.
B. Commission Resolution
C. Draft Amended Regulation 18450.4