Staff of the Fair Political Practices Commission will be holding an interested persons’ meeting to elicit public input on possible Commission action focused on the Commission’s interpretation of “express advocacy.”

In late 2002 the California First District Court of Appeal issued a decision entitled The Governor Gray Davis Committee v. American Taxpayer Alliance, 102 Cal.App.4th 449 (2002), indicating that Section 82031 and Regulation 18225(b)(2) were constitutional only if they were narrowly construed to define “independent expenditure” as advertisements including “express advocacy,” a term said by the court to require the presence of “magic words” such as “vote for,” “support,” or “vote against.”

Although the Commission was not a party to this litigation, the Commission understood the opinion to require that it give no effect to the last 26 words of Regulation 18225(b)(2), which defines “express advocacy,” or to the last 32 words of Section 82031, which defined the term “independent expenditure” in similar language.¹

Staff anticipates proposing to the Commission that it reconsider its interpretation of Regulation 18225(b)(2), and of the statute as well, in light of recent Supreme Court opinions culminating in Citizens United v. FEC, 2010 WL 183856. These opinions explain that the Constitution does not require the existence of “magic words” in an advertisement before campaign reporting and disclosure requirements may be imposed, if the advertisement amounts to “the functional equivalent of express advocacy” and as a result is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. The high court’s teaching on this point warrants reconsideration by the Commission of what may now be an unnecessarily restrictive interpretation of what can be regulated as “express advocacy.”

The Commission would especially welcome public comment on the following topics:

¹The Political Reform Act is contained in Government Code Sections 81000 through 91014. Commission regulations will be found in Sections 18110 through 18997 of Title 2 of the California Code of Regulations.
Would the purposes of the Act be furthered by a definition of “express advocacy” that included not only communications using particular words to openly solicit votes for or against a particular candidate or measure, but also communications that lack those particular words, but are susceptible of no reasonable interpretation other than as soliciting votes for or against a specific candidate or measure?

If the answer to the foregoing question is “yes,” are there legal, practical, or any other barriers that would prevent the Commission from interpreting “express advocacy” in this manner?

In addition to attendance at this meeting, interested persons may contact the Commission by letter at the address listed above. If you have any questions on the meeting, please call Lawrence T. Woodlock at (916) 322-5660.

Members of the public may listen to or participate in the Interested Persons’ meeting by teleconference by calling 877-771-7176; access code is 348709. For questions about participating by phone, you may contact Virginia Latteri-Lopez at (916) 322-5660.