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June 19, 2014

Hyla Wagner
Senior Commission Counsel
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Re: Follow up on IP Meeting – SB 27 Regulations

Dear Ms. Wagner:

Thank you for the well – conducted IP meeting on the SB 27 regulation package on June 17, 2014. We look forward to participating in the proceedings that will be expedited by the Commission in light of the pending July 1, 2014, effective date of the legislation, and appreciate the staff's efforts to put in place rules to guide the regulated in the upcoming election.

We have reviewed the comments submitted by Lance Olson, and Olson, Hagel & Fishburn, LLP and find ourselves in agreement with many of the technical suggestions as well as their suggestion that the timetables for compliance by identified multipurpose organizations (MPOs) and potential major donor filers are too short and not reasonable under the circumstances. We agree that extending these deadlines as they suggest would be appropriate.

The key issues we address concern:

(1) Adopting reasonable secondary and tertiary notifications authorized or contemplated by the legislation to stay within the bounds of the *California Pro-Life Council v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) ("*CPLC II*") decision and other cases which apply intermediate scrutiny to such campaign finance regulations;

(2) A suggested amendment to the Reg.18215 amendment to better reflect its application to the situation in which a multipurpose organization must report the use of nondonor funds; and,

(3) Some housekeeping suggestions regarding the references to FPPC Manuals, website links and phone numbers in proposed Reg. 18427.1 that may not be appropriate or the

best form for regulations, as well as a recommendation to use the term "tax exempt" rather than "nonprofit" in the Regs. 18427.1 and 18422.

(1) Notice Provisions.

The new regulations provide three types of notice - two of which concern the amendment of Gov. Code §84105 that adds a $10,000/one week to the pre-existing $5,000/two week notification requirement and are found in Reg. 18427.1. The third requires a multipurpose organization that receives a contribution from another multipurpose organization to provide expedited notice to "multi-layer" organizations that have made payments to that multipurpose organization that constitute reportable contributions of $50,000 or more under Gov. Code § 84222(c), subdivs. (2), (3) and (4). This "nonprofit filer notice" is found in proposed Reg. 18422(d) (2). A recipient of a "nonprofit filer notice" must register within 24 hours if the notice is within the 90 day election cycle period before an election or within 5 days if not.

If the provenance of the latter notice requirement is not Gov. Code § 84105, and does it appear in the general authorization found in new Gov. Code § 84222(e) (6), clearly the statute does not contain any specific requirements like those in section 84105. Thus, it appears the Legislature gave the FPPC discretion to adopt appropriate notice regulations for "multi-layer" reporting. While the FPPC's discretion is not bounded by the legislation, the FPPC should be careful to adopt reasonable regulations in this regard, because it still must operate within the general constitutional constraints imposed by the courts, including the Ninth Circuit Court of Appeals in the *CPLC II* decision and other more recent federal court decisions.

While the Ninth Circuit's opinion does not address notice requirements, these would be analyzed generally as to whether they constituted an undue burden on filers or potential filers. Court decisions subsequent to *CPLC II* have applied an intermediate scrutiny standard, *see Citizens United, 558 U.S. at 366-367,* which though less rigorous than strict scrutiny nonetheless requires close judicial review, *see McCutcheon [v. F.E.C.],* 134 S.Ct. at 1445–46 ("[R]egardless whether we apply strict scrutiny or *Buckley's* 'closely drawn' test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective."). See also *Human Life of Wash. Inc. v. Brumsickle,* 624 F.3d 990, 1005 (9th Cir.2010), cited in *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2014), and *Wisconsin Right to Life v. Barland,* ____

F.3d.____; 2014 WL 1929619, *34 (7th Cir. May 14, 2014). Therefore, a reasonable set of notice deadlines would be favored to ensure the fit between the notice regulations and the purposes served by the notice requirements.

Reg. 18422, subdiv.(d)(3), provides for expedited filing requirements for MPOs that make contributions of $50,000 or more identified by a MPO that is involved in "multi-layer" contribution activity. These organizations must register as committees within 2 days if identified during the 90 day election cycle period or within 10 days at other times. The requirement would compel virtually immediate disclosure by a MPO that gave $50,000 or more to a multipurpose organization that used some or all of the first organization's funds for campaign contributions or expenditures, whether for independent expenditures for candidates or independent expenditures or contributions for ballot measures. The broadest reach of the regulation requiring MPO disclosure requires that MPO to identify and disclose its "donors" at the $1,000 level (Reg.18422(c) and Reg. 18427.1(a)(2) [24-hour reporting requirements for major donor committees], would require a third-level "donor" to make disclosures unless the "donor's" donation met standards for exemption (such as an express prohibition on use of the "donor's" funds for campaign contributions or expenditures). Major donors would have a very limited number of days within which to file reports from the date the contribution is recognized by the MPO (by sending a $5,000 or $10,000 notice by expedited means (email, telephone, etc.).

We agree that the very short proposed filing deadlines be lengthened to allow these putative donors to comply fully with the new disclosure requirements. The Olson Hagel proposal seems reasonable to us.

(2) <u>Regulation 18215</u>

Reg. 18215(b)(1) has been amended to eliminate what has been known as the "first/second bite of the apple" rules which were replaced by the more detailed requirements of SB 27, in particular Gov. Code § 84222, subdiv. (c). However, we believe that at least one addition should be made to the remaining first sentence of that regulation to cover the situation when a multipurpose organization uses its "nondonor funds" for political contributions or expenditures.

We suggest a further, technical addition to Reg. 18215(b) (1) as follows:

"(1) Certain Payments to Nonprofit Organizations and Federal or Out-of-State Political Organizations Active in California Elections. A payment made by a person to a multipurpose organization as defined and described in Section 84222

and Regulation 18422 that is used for a contribution or expenditure <u>or an expenditure by the multipurpose organization from non-donor revenue in its general treasury</u>."

This addition would cover what the statute authorizes and in our view should be covered for consistency in Reg. 18215(b) (1).

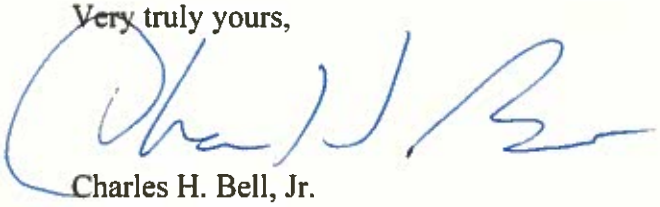
(3) <u>Housekeeping Issues</u>.

Proposed Regs. 18427.1 and 18422 in various places make reference to material and information that is not regulatory but reference material. For example, references to FPPC Manuals, web links and telephone numbers, which would seem to be appropriate for Technical Assistance Division fact sheets, seem less appropriate for regulations. For one thing, including them in regulations may require subsequent regulatory amendments if and when the referenced Manuals, web links or phone numbers are changed, cancelled, or become inoperative in some other way. References to Manuals in particular raise some other potential problems, including underground regulation and vagueness and notice issues (E.g., to what part(s) of a Manual, or the entire manual, does the reference apply? Does the reference to the manual make non-compliance enforceable?)

Finally, in several places, the proposed regulations use the term "nonprofit." The term "non-profit" has a specific meaning under California law, and is used in a number of contexts in the Political Reform Act itself (e.g., Gov. Code § 89519), but may not be applicable uniformly to organizations that are "tax exempt" under the Internal Revenue Code. You may wish to review and reconsider specific uses of the term "nonprofit" in these regulations. In some instances, the use may be appropriate; in others, not. In some instances, the term "tax exempt" may be more appropriate.

We look forward to participating in this regulatory effort.

Very truly yours,



Charles H. Bell, Jr.

CHB/cfd