

June 3, 2020

Fair Political Practices Commission  
Attn: Toren Lewis, Commission Counsel  
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VIA EMAIL

**Re: June 4, 2020 Law and Policy Committee Meeting—Comments  
Regarding Proposed FPPC Regulations 18402.2 and 18421.10**

Dear Commissioners:

This afternoon at approximately 2:30 p.m., the Commission published revised drafts of its proposed LLC regulations that will be discussed at tomorrow's Law and Policy Committee meeting. It is not clear at this time if there will be a staff memorandum accompanying and explaining the revised draft regulations. None has been published as of this writing (5:45 p.m.). This letter addresses the newly revised regulations published today and focuses on concerns raised in our April 19, 2020 Comment Letter.

### **BACKGROUND**

In our April 19, 2020 Comment Letter, we asked for a more complete explanation of the Commission's view as to which provisions of the Political Reform Act were being implemented by the draft regulations. To date, there has been no response to our concerns. Moreover, our letter has not been published, nor have we seen any other comments published in response to the proposed regulations.

In our April 19, 2020 Comment Letter and at the April 20, 2020 meeting, we also highlighted our concern with promulgating regulations affecting one of the most common forms of businesses in the state during an unprecedented global pandemic, with strict shelter-in-place orders that have severely impacted the operations of business entities, and the concomitant devastation of the California economy. At the April 20, 2020 meeting, the commissioners acknowledged this concern and, in response, noted that the proposed LLC regulations had not been scheduled for consideration and adoption by the full commission.

## STATUTORY CONCERNS REGARDING DRAFT LLC REGULATIONS

In addition to the practical compliance difficulties the proposed regulations would create, we have two primary concerns about the Commission's power to promulgate them. First, based on the discussions to date, the adequacy of the Commission's justifications for singling out LLCs for stricter regulation than other entities remains unclear. For example, one principle justification is that the "[t]he California Corporations Code does not require any disclosure of an LLC's managers until 90 days after its formation." Feb. 5, 2020 Staff Memo at 2 (citing Cal. Corp. Code § 17702.09(a)). However, this is true of all corporations. *See* Cal. Corp. Code § 1502(a) ("Every corporation shall file, within 90 days after the filing of its original articles . . .").

Second, as demonstrated below, the proposed regulations are not consistent with or reasonably necessary to implement the PRA, and indeed one proposed provision creates an entirely new class of prohibited contributions without any statutory support. Therefore, the proposed regulations are not within the scope of the Commission's rulemaking power.

"The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission." Cal. Gov. Code 83112. However, "Section 83112 expressly incorporates the dictates of the Administrative Procedure Act (§ 11340 et seq.), which provides that to be effective, regulations "shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law" (§ 11342.1) and that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute" (§ 11342.2)." *Citizens to Save California v. California Fair Political Practices Com.*, 145 Cal. App. 4th 736, 746 (2006) (invalidating FPPC regulation). Courts "do not defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature." *Id.* at 747.

Draft regulation 18402.2(a) would require LLC independent expenditure (IE) and major donor (MD) committees to identify a responsible officer on its statements and reports. While the Political Reform Act allows LLC committees to choose whether to have their reports signed by a responsible officer, or an attorney or accountant, the legislature did not require that every LLC identify a responsible officer. *See* Cal. Gov. Code § 81004(b).

Draft regulation 18421.10(a)-(c) would require committees receiving contributions from an LLC—whether an IE or MD committee, a non-committee LLC, or a recipient committee—to report the name of the contributor as the name of the LLC *and* the name of its responsible officer. Section 84211 of the PRA specifies the contents of a committee’s campaign statement. This information includes the full name of contributors. Section 84211(f). There is no requirement for any committee to include, in addition to the “full name” of a contributor and as the disclosed name of the contributor, the name of any other individual associated with the contributor.

Draft regulation 18421.10(d) creates a new and unprecedented class of prohibited contributions by directing that any “contribution lacking the ‘name’ information required by [regulation 18421.10(a)-(c)] shall be returned” to the contributor. As stated above, there is no requirement in the PRA for a committee to include, in the name of a contributor, the name of that contributor’s responsible officer. There is also no provision of the PRA that prohibits a committee from accepting a contribution unless it discloses the name of its contributor’s responsible officer in the name of that entity in the committee’s disclosure reports. Bluntly stated, the Commission has no authority to create new classes of prohibited contributions.

Accordingly, the draft regulations are not consistent with, or reasonably necessary to implement, provisions of the Political Reform Act.

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Regardless of its good intentions, the Commission lacks authority to issue regulations that correct or fill-in what it has concluded are inadequate aspects of the Corporation Code or which, in its view, would generally advance the purpose of the PRA without implementing the existing provisions of the PRA. Those are jobs for the Legislature or the people through the initiative process. We therefore urge more time for the regulated community to respond to the latest drafts of these proposed regulations, published this afternoon in advance of tomorrow’s meeting, and for the Commission to discuss the statutory underpinnings of the regulations.

Sincerely,



Elli Abdoli, Partner



Michael A. Columbo, Of Counsel