



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel
Karen Harrison, Senior Commission Counsel
Katelyn Greene, Commission Counsel

Subject: Request for Prenotice of Proposed Disclose Act Regulation Amendments and Regulations for Adoption

Date: September 9, 2019

Requested Action and Summary of Proposal

Staff requests approval to notice the regulations discussed below for amendment or adoption on or after September 19, 2019, the scheduled date of the Commission’s September meeting. The proposed changes seek to clarify the campaign advertisement disclosure requirements.

Staff proposes to amend Regulation 18435 to clarify the campaign advertisement disclosure requirements for mass mailings that are advertisements, and mass mailings by a major donor committee that are of a personal and not political nature. Regulation 18450.1 requires a conforming amendment to update a statutory reference. Additionally, staff proposes three regulations for adoption that will: define “authorized and paid for by” pursuant to Section 84501, clarify the top donor disclosure for a major donor committee that qualify with affiliated entity contributions, and address the disclosure length for a video or television advertisement lasting less than five seconds.

This proposal is intended to facilitate discussion and to allow the Commission to provide guidance and instruction to staff prior to presenting the regulations for approval at a later Commission meeting. This regulatory project is not limited to the proposed regulations at this time. In addition to the proposed regulations, staff is soliciting the Commission’s and the public’s input regarding any other issues or potential regulations to consider related to the Disclose Act.

Background

The Disclose Act (Assembly Bill 249 of 2017, c. 546), repealed and recast numerous advertisement and mass mailing provisions within the Political Reform Act.¹ Through the advice process, Commission staff has identified Disclose Act issues that may be addressed on the regulatory level.

¹ The regulations of the FPPC are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to this source. The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code.

Proposed Regulations for Amendment

Regulation 18435: Definition of Mass Mailing. The proposed amendments seek to clarify two items:

Mass Mailing Advertisements. Section 82041.5 defines mass mailings as sending over two hundred substantially similar pieces of mail. Section 84305 provides the required disclosures for a mass mailing. However, for a committee, other than a candidate controlled committee established for an elective office for the controlling candidate or a political party committee, the mass mailing disclosure requirements in 84305 are required only if the mailing “is not required to include a disclosure pursuant to Section 84502.” (Section 84305(a)(2).) Similar language applies to such committee’s mass electronic mailing, which require a disclosure under 84305 only if the mass electronic mailing “is not required to include a disclosure pursuant to Section 84502 or 84504.3.” (Section 84305 (b)(2).) This exclusion language has caused some confusion as to whether the mass mailing disclosures apply to these committees when the mass mailing is an advertisement under Section 84501.²

Staff proposes to amend Regulation 18435 to clarify that for a non-political party and non-candidate for elective office committee, when a mass mailing meets the definition of an advertisement under Section 84501, the communication is subject to the advertising disclosure requirements set forth in Section 84501, *et. seq.* and the mass mailing disclosures found in Section 84305 do not apply.

Mass Mailings of a Personal Nature: Major Donor Committees. There has been some confusion as to whether mailed personal communications, such as a wedding invitation, sent by an individual who qualifies as a major donor committee must include the mass mailing disclosures.

Staff proposes to amend Regulation 18435 to clarify that personal messages, such as invitations, greeting cards and announcements sent to friends and family, sent by a person who is a major donor committee under Section 80213(c), do not fall within the definition of a “mass mailing” where the communication is personal and not political in nature. Thus, such personal messages do not require the mass mailing disclosures under Section 84305.

Regulation 18450.1: Definitions. Advertisement Disclosure.

Section 84501 defines an advertisement as a public communication, authorized and paid for by a committee, for the purpose of supporting or opposing any candidate or a ballot measure.

Staff proposes a non-substantive update in the regulation’s citation reference in subdivision (b) from “Section 84501(a)(2)(E), to “Section 84501(a)(2)(G)” to reflect the amendments to Section 84501(a) by Assembly Bill 2155 of 2018, c. 777.

² See definition provided under the discussion of Regulation 18450.1.

Proposed Regulations for Adoption

Regulation 18450.2: Definitions. Authorized and Paid For.

For the purpose of Section 84501 defining “advertisement,” the term “authorized and paid for by a committee,” necessarily includes any advertisement where the advertisement is attributable to the committee in a number of separate circumstances. Clarification is needed so that the disclosure required under Section 84502, “Ad paid for by” followed by the “name of the committee” discloses the appropriate committee.

Staff proposes language to clarify that a communication is “authorized and paid for” by a committee pursuant to Section 84501 if (a) the communication is paid for by a committee; (2) the committee paid for a portion of the communication and no other committee paid a larger portion of the costs for the communication; (3) the person who paid for the communication does not qualify as a committee under Section 82013 and that person coordinated the expenditure for the communication with the committee pursuant to Regulation 18225.7(c); or (4) a committee disseminated the communication but incurred no ascertainable costs due to the technology used (e.g. social media) to disseminate the communication. For purposes of the Section 84502 disclosures, the proposed regulation specifies that the committee name disclosed on an advertisement pursuant to Section 84502 shall be the name of the committee that “authorized and paid for” the advertisement.

Additionally, the proposed regulation further clarifies that paying for a communication includes making, promising to make, or incurring an obligation to make a payment for any costs associated with the design, production, or dissemination of the communication and that payments made by an agent of a committee for a communication are attributed to that committee.

Regulation 18450.3: Top Contributors Disclosure for Affiliated Entities.

Section 84503 of the Act requires the disclosure of top contributors for certain advertisements. Generally, the disclosure of top contributors requires a committee to identify “the persons from whom the committee paying for the advertisement has received its three highest cumulative contributions of fifty thousand dollars (\$50,000) or more.” (Section 84501(c)(1).) Currently, there is no established rule for reporting a top contributor when the contributor qualifies due to contributions it received from affiliated entities.

Consistent with formal advice provided by staff, the proposed regulation provides that if a top contributor is a committee pursuant to 82013(b) or (c) and it qualifies as a top contributor as the result of aggregated contributions from other entities pursuant to Regulation 18215.1, the committee disclosing the top contributor must identify the contributor using the “name of filer” required by Regulation 18428 on the contributor’s most recent campaign statement.

Regulation 18450.4: Video and Television Ads Less than Five Seconds Disclosure.

Under Section 84504.1(b), certain video and television advertisements under 30 seconds require a written disclosure to be displayed for five seconds. Similarly, under Section 84504.5(b), certain video and televisions advertisements under 30 seconds require a written disclosure to be displayed for five seconds unless the disclosure is spoken during the advertisement (in which case the written disclosure can be displayed for less than five seconds). However, neither Sections 84504.1(b) or 84504.5(b) provide a rule for video or television advertisements of less than five seconds. In response to requests for advice on this matter, Commission staff has provided informal assistance that the disclosure must play for the length of the advertisement and may be less than five seconds. This advice ensures that the sections are not overbroadly interpreted as a strict prohibition against any video and television advertisements of less than five seconds.

Implementing the informal advice previously provided by staff, the proposed regulation provides that for a video or television advertisement less than five seconds long required to include a written disclosure pursuant to Section 84504.1(b) or Section 84504.5(b), the disclosure must be displayed for the length of the broadcast. The proposed regulation allows for a 4 second video to have a 4 second disclosure. Consistent with the statute, if a disclosure required by Section 84504.5(b) is spoken during the advertisement, the written disclosure need not be displayed for the length of the advertisement.

Summary

The proposed amendments to existing regulations and the proposed adoption of new regulations will clarify Disclose Act issues that have arisen in the advice context. With input from the Commission and the public, these regulatory changes will assist in compliance with the Act.

Attachments: Proposed Regulations 18435 and 18405.1 for Amendment
Proposed Regulations 18450.2, 18450.3, and 18450.4 for Adoption