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Fair Political Practices Commission
Attn: Jack Woodside, Senior Commission Counsel
Cc: Hyla Wagner, General Counsel
428 J Street, Suite 620
Sacramento, CA 95814

Re: Proposal to Amend Regulation 18225.7 (Made at the behest of), and to Repeal Regulation 18550.1 (Independent and Coordinated Expenditures).

On behalf of the law firm Sandler Reiff Lamb Rosenstein & Birkenstock, P.C. ("Sandler Reiff"), we submit these comments to the California Fair Political Practices Commission ("FPPC") regarding the FPPC's proposal to amend Regulation 18225.7 and to repeal Regulation 18550.1 ("Proposed Rule").[1] Sandler Reiff is a Washington, DC law firm that specializes in advising clients about political law and campaign finance regulation at the federal, state and local levels, including compliance with independent expenditure and coordination laws across the country.

Our clients include candidates for public office, committees, corporations, labor unions, and other organizations that make independent expenditures, along with the vendors and consultants that assist their efforts.

The Proposed Rule makes numerous changes to California's coordination standard for independent expenditures, but is missing key guidance that is provided in many other jurisdictions – the ability for a consulting firm to implement what is commonly referred to as a "firewall policy." Firewall policies serve to prevent the flow of strategic non-public information between individuals working for a candidate client, and individuals working for an independent expenditure client, so no coordination will occur because of a common consultant.

Sandler Reiff would strongly recommend that the FPPC add a provision to the Proposed Rule that allows for separation between a common consultant's staff in this way. Although the presence of a common consultant is presumed to result in coordination, a written and appropriately implemented firewall policy should be able to rebut that presumption. In our experience, the use of written firewall policies specifically authorized in multiple jurisdictions is an effective and practical way to safeguard against coordination, while tailoring the impact of regulation to avoid overreach and focus on the areas of greatest concern.

[1] Sandler Reiff, or the attorneys listed below, have not been compensated by any client to comment on the Proposed Rule, and we are filing these comments in our personal capacities.

Consultants that provide professional services related to campaign or fundraising strategy are sophisticated entities, and many implement advanced firewall policies in other jurisdictions. The consulting industry is small, and firms should not be punished for taking on one client over another. The FPPC should take particular care not to flatly prohibit the use of common consultants for a candidate and independent expenditure effort, so long as the proper procedures and controls are in place.

1. Sections of Proposed Rule addressed in comments.

Sandler Reiff focuses its comments on Proposed Rule Sections 18225.7(d)(3) (expenditures where coordination is presumed) and 18225.7(e) (expenditures that are not coordinated). The "Common Consultants" section holds that expenditures are presumed to be coordinated if:

> The person making the expenditure for a communication relating to a clearly identified candidate or ballot measure retains the services of a person such as a political, media or legal consultant, or polling firm, who provides either the candidate or the committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy for the current campaign.

The overall concept of the Proposed Rule, with the exception of including "legal consultants," is fairly common. Multiple states and jurisdictions restrict common consultants from providing services to both a candidate and an independent expenditure effort in certain circumstances.[2] The rationale is simple – once a vendor provides services to a candidate, and learns or shares strategic, non-public information about that candidate's plans, projects, or needs, it raises a legitimate concern about whether that vendor can provide the same services to an outside independent expenditure effort in that same election without undermining the independence of that outside effort.

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[2] See, e.g. 11 C.F.R. § 109.21(d)(4); Ariz. Rev. Stat. Ann. § 16-911(A)(3); 8 Colo. Code of Regs. § 1505-6:21.1.2(b); Conn. Gen. Stat. Ann. § 9-601c(b)(9); 15 Del. Code § 8002(13); Florida Stat § 106.011(12)(b); Idaho Secretary of State, "Independent Expenditures, available at http://www.sos.idaho.gov/elect/indexpen.htm (last accessed September 18, 2015); Iowa Code § 68A.404(7); Kentucky Registry of Election Finance, Advisory Opinion 2014-006 (January 13, 2015); Maryland State Board of Elections, "Coordination and Cooperation", (January 29, 2014), available at http://www.elections.state.md.us/campaign_finance/documents/Guidance_Coordination%20and%20Cooperation.pdf (last accessed September 18, 2015); Minnesota Campaign Finance & Public Disclosure Board, Advisory Opinion 410 (September 7, 2010), Advisory Opinion 338 (April 23, 2002); Rhode Island Admin. Code 23-1-25:3; 1 Texas Admin. Code § 22.6(b); Washington Admin. Code § 390-05-210.

Despite this presumption of coordination, many states and jurisdictions allow vendors to use written firewall policies for common vendors, as a way to rebut any presumption of coordination.[3]

2. The Proposed Rule should not include attorneys in the class of persons where coordination is presumed.

Sandler Reiff strongly opposes the portion of the Proposed Rule stating that the presence of a common "legal consultant" results in coordination. Sandler Reiff notes that attorney/client privilege generally extends to any confidential information learned as a result of the representation of a client, ***including*** information regarding political expenditures. There are a limited number of law firms that specialize in campaign finance regulation, and including attorneys in the class of persons that create a presumption of coordination would ignore an attorney's duty of confidentiality to their clients.[4]

Including attorneys in the presumed-coordinated class would also create problems for clients. Given the limited number of subject matter experts in the field, clients should not be forced to retain inexperienced counsel simply because specialized counsel is "conflicted-out" under the Proposed Rule. If a law firm is used to channel strategic non-public information from a candidate client to an independent expenditure client, then there would be coordination whether attorneys are included as "common consultants" or not.

The FPPC should write a rule with this in mind, and should not hold that the mere retention of a common attorney between a candidate and an independent expenditure effort would lead to a presumption of coordination. "Legal consultants" should not be included in the Proposed Rule.

3. The Proposed Rule lacks an express exemption for a written firewall policy to rebut the presumption of coordination for common consultants.

As noted above, many states and jurisdictions allow for written firewall policies for common consultants, to rebut any presumption of coordination. Assisting persons that engage in political activity is a business in and of itself – many political or media firms that would be covered by the common consultant rule have large staffs, and multiple divisions in different

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[3] See, e.g. 11 C.F.R. § 109.21(h); Ariz. Rev. Stat. Ann. § 16-911(B)(1) (allowing firewalls for trade associations); 8 Colo. Code of Regs. § 1505-6:21.1.4; Conn. Gen. Stat. Ann. § 9-601c(d); Kentucky Registry of Election Finance, Advisory Opinion 2014-006 at 3 (January 13, 2015); Massachusetts Office of Campaign & Political Finance, Advisory Opinion 14-02 (February 12, 2014); Minnesota Campaign Finance & Public Disclosure Board, Advisory Opinion 400 (July 22, 2008); Texas Ethics Commission, Ethics Advisory Opinion 503 (February 8, 2012).

[4] Of note, Colorado specifically ***exempts*** attorneys who are providing services in the scope of their profession from the coordination regulation. 8 Colo. Code Regs. § 1505-6:21.1.3.

states. These companies should not be prohibited from working for certain clients, if they can properly ensure that strategic information will be kept secure and that no coordination will occur.

Firewall policies allow consulting firms to create physical and technological barriers, preventing the flow of strategic, non-public information from staff who are working on candidate campaigns, to staff who are working for independent expenditure clients.

a. The Federal Election Commission's Written Firewall Model

The Federal Election Commission's coordination rule, including its safe-harbor for written firewall policies, is the most cited in this area of law. Under the Federal Election Commission's rule:

> "Safe harbor for establishment and use of a firewall. The conduct standards [to find coordination]. . .are not met if the commercial vendor, former employee, or political committee has established and implemented a firewall that meets the requirements [below]. . .This safe harbor provision does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.
>
> (1) The firewall must be designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee; and
>
> (2) The firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy."[5]

The Federal Election Commission's rule recognizes that the vast majority of common consultants that provide campaign or fundraising strategy are made up of more than one person. As long as the common consultant can ensure that the firewall is properly implemented and enforced, then the mere presence of a common consultant would not in and of itself indicate coordination.

b. General terms of a firewall policy.

Firewall policies serve one purpose for a vendor or consulting firm – to protect strategic, non-public information about a candidate's plans, projects, or needs from persons that are

[5] 11 C.F.R. § 109.21(h).

working on an independent expenditure. To accomplish this goal, firewall policies lay out the following restrictions:

- **Separation of Staff:**
    - Candidates and party committees are serviced exclusively by one set of staff ("Candidate Side")[6]; and
    - Outside groups making independent expenditures are serviced exclusively by a different set of staff ("Independent Side").
    - Persons that are not subject to strategic, non-public information regarding a candidate's plans, projects, or needs, or do not provide campaign or fundraising services (such as a billing or office manager) are not subject to the firewall.

- **Restrictions on Interactions:**
    - Staff on the Candidate Side are prohibited from servicing clients on the Independent Side, and vice versa.
    - Staff on the Independent Side are prohibited from accessing Candidate Side files, work, or data (including electronic data), and vice versa.
    - Staff on the Candidate Side are prohibited from communicating with the Independent Side about the relevant campaign, and vice versa.
    - Staff on the Independent Side are prohibited from working in contiguous office space or in close proximity to the Candidate Side, and vice versa.

Consultants that assist clients in federal elections have relied on this firewall model for over a decade, and has become commonplace in the political and media consulting industry. There is no reason why the same protections for common consultants provided under federal law should not be extended to consultants working in California state or local elections.

c. The FPPC has previously considered the viability of a written firewall policy.

The FPPC has previously addressed firewall policies in a 2002 advice letter:

> We have long advised that when a candidate and a committee making expenditures on behalf of the candidate employ the same political consultant, there is a "strong inference" of coordination. This "inference" is not a conclusive

[6] As a note, the Federal Election Commission's coordination rule covers both candidates and party committees. See 11 C.F.R. § 109.21(d).

> presumption, but merely a greater or lesser "reason to believe" that coordination actually took place.
>
> The procedures used [a firewall]. . .to safeguard against such coordination might well weaken the inference, but no set of rules can foreclose the possibility that expenditures may be coordinated with a candidate's campaign in a manner that would cause the expenditures to be characterized as contributions made "at the behest" of the candidate.[7]

Advice Letter I-01-292 indicates that, at one point, the FPPC was willing to consider written firewall policies for common consultants. We are not aware of any cases or actions in California where firewall policies have been abused, or a common consultant has been used to facilitate unlawful coordination despite the implementation of the kind of firewall policy recognized by the Federal Election Commission and other state or local regulators.

Furthermore, since the 2002 Advice Letter, California law and the FPPC's regulations have changed, and have cast doubt on the rationale behind that opinion. Clarity on the FPPC's position on firewall policies under its new coordination regulations would allow political and media consultants that provide campaign or fundraising strategy to adjust their structure accordingly.

4. The FPPC should add language to the Proposed Rule to allow for common consultants to implement written firewall policies.

Given the discussion above, Sandler Reiff proposes the following addition to the Proposed Rule, as a new Section 18225.7(e)(9) (under "Expenditures Not Considered Coordinated/Made at the Behest") to read:[8]

> <u>Written Firewall Policy: A person, such as a political or media, or legal consultant, or polling firm, who provides either the candidate or the committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy implements a firewall policy that meets the criteria in (A)-(C) to prohibit the flow of strategic non-public information between persons servicing a candidate, and persons servicing a person making an independent expenditure in the same campaign:</u>
>
> A. <u>For a particular campaign, the firewall policy designates specific staff that will solely service the candidate, and specific staff that will solely service persons making independent expenditures;</u>
>
> B. <u>The firewall policy provides for physical and technological separations to ensure that strategic non-public information (including strategy information, polling,</u>

[7] California Fair Political Practices Commission, Advice Letter I-01-292 (January 22, 2002).

[8] If "legal consultant" is removed from the Proposed Rule, it would be removed from the proposed language as well.

research, pre-broadcast, or like campaign information) does not flow between persons servicing a candidate, and persons servicing a person making an independent expenditure in the same campaign; and

C. The firewall policy must be written, and distributed to all relevant, employees, consultants, and clients affected by the policy.

5. Conclusion

The FPPC should modify the Proposed Rule to include an exemption from the presumption of coordination for common consultants that adopt written firewall policies. Allowing for firewall policies would allow consulting firms with multiple principals to work on behalf of more than one client in the same election, as if they were operating two separate firms. This practice is very common, and has been adopted by campaign finance regulators in multiple other jurisdictions. Recognition of firewall policies has not led to further coordination issues in other jurisdictions, but has allowed vendors to create structures to service multiple clients.

Without clear guidance on whether a firewall policy may rebut the presumption of coordination in the case of a common consultant, consultants that engage clients in California are left in a grey-area as to how they may operate. Clear guidance regarding firewall policies would allow consultants to grow their businesses, and to ensure that they are in compliance with California campaign finance law.

For the reasons above, we submit these comments on the Proposed Rule. We hope that our comments will lead to a constructive discussion about the breadth of independent expenditure and coordination regulation in California. We look forward to reading a modified version of the rule that takes into account our comments.

Sincerely,

Neil Reiff

James Lamb

Joseph Birkenstock

David Mitrani