



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

To: Chair Miadich, Commissioners Cardenas, Hatch, Hayward, and Wilson

From: Dave Bainbridge, General Counsel, Legal Division
Toren Lewis, Commission Counsel, Legal Division

Subject: Disclosure by Limited Liability Companies

Date: February 20, 2020

Issue

The Commission has expressed concern with the lack of meaningful disclosure of political activity by limited liability companies (LLCs). This lack of information is largely due to corporate laws that require very little information from LLCs about their formation, funding, management, and operation.¹ Currently, an LLC can make contributions or independent expenditures solely in the name of the LLC without disclosing any information, or even a way to determine, the source of the funds expended by the LLC and individuals responsible for operating the LLC. This memo will provide background information about these issues and possible regulatory action the Commission can take under the Political Reform Act² to address the lack of information about LLCs influencing the political process in California.

Background

The Enforcement Division has identified a pattern in which LLCs, often formed shortly before an election, make large contributions and expenditures in California elections without the sources of the money ever being disclosed to the public in any meaningful way. In one prominent example, an LLC that formed the month before the November 2018 election contributed nearly \$200,000 to a local committee, which in turn produced mailers supporting and opposing candidates for city council. Since the California Corporations Code does not require any disclosure of an LLC's managers until 90 days after its formation,³ voters in that city had

¹ On an LLC's Articles of Organization (Form LLC1), filed Secretary of State's Office, an LLC must designate an agent and a manager, and list the name and address of both. An LLC must also indicate whether it is member-managed (i.e. managed by its investors) or manager-managed (i.e. professionally managed by an outsider). Many LLCs remain anonymous by appointing a professional agent and manager, such as an attorney or accountant, thereby never having to reveal their members or the sources of capital contributions (i.e. funding).

² The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

³ See, 17702.09(a) of the California Corporations Code (requiring an LLC to form a Statement of Information, Form LLC12, within 90 days of after filing its articles of incorporation).

zero information as to where this money originated, or who authorized or directed these contributions, until after January 1st of the following year—well after the election was decided.

One impediment to truthful disclosure of LLC political activities is that recipient committees who receive contributions from an LLC generally list only the name of the LLC (e.g. “5th Street Development, LLC”), as opposed to the individual or individuals who funded or directed the LLC’s contributions or expenditures. The Act requires the disclosure of a person who makes a campaign contribution but “person” is defined broadly to include “an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, or any other organization or group of persons acting in concert.” (Section 82047.)

Further complicating matters is the fact that the California Corporations Code permits an LLC to list *another corporate entity* as its registered agent and/or manager and therefore no individual is identified. Even when an individual is listed as an LLC’s registered agent and/or manager, that person is usually not the true source of the LLC’s campaign contributions or expenditures.

Under existing law, an LLC that makes independent expenditures totaling \$1,000 or more in a calendar year qualifies as an Independent Expenditure (“IE”) Committee, while an LLC that makes contributions totaling \$10,000 or more in a calendar year qualifies as a Major Donor Committee. (Section 82013(b) and (c).) Yet even among LLCs that are properly registered as Major Donors or IE Committees, full disclosure is not guaranteed. IE Committees and Major Donors must complete Form 461 (Major Donor and Independent Expenditure Committee Campaign Statement), which provides a summary of all contributions and expenditures made, as well as information regarding the filer, such as the filer’s name and mailing address, responsible officer, and business interests. However, neither the Act nor the Commission Regulations define “responsible officer,” allowing an LLC filer to simply list its registered agent, attorney, or accountant on Form 461, as opposed to the individual(s) responsible for directing and controlling the LLC’s contributions and expenditures.

The lack of information about the individuals responsible for the political activity attributed to LLCs makes investigation of suspicious activity extremely challenging and burdensome. The Enforcement Division has found that in addition to the lack of public documents about LLCs, LLC agents and managers often do not have, or are unwilling to share, basic information and records of the LLC that would facilitate an investigation.

For the public, there is no disclosure of the source of LLC funds. Contributions and expenditures merely disclose the name of the LLC without any additional information. There is no way for the public to determine the source of LLC political activity.

Discussion

LLC Decision-makers

The Commission can address the lack of information about LLC decision-makers through regulations requiring identification of an individual responsible for the political activity of an LLC on campaign statements and reports. Staff has drafted two new regulations, identified as Regulations 18402.2 and 18421.10, for the Commission's consideration to partially address the lack of disclosure and information about political activity by LLCs.

LLCs as Committees

Campaign statements that are filed by LLCs that are major donors or independent expenditure committees are signed by a responsible officer. (Section 81004; *see also*, FPPC Form 461.) Proposed Regulation 18402.2 defines "responsible officer" for LLCs that qualify as IE Committees or Major Donors as "the individual primarily responsible for approving the political activity of the limited liability company." This change would provide the public with information regarding who is directing an LLC's expenditures and contributions, rather than just a registered agent or professional manager with no actual authority or control of the LLC. Subdivision (b) provides that if one or more individuals share this primary responsibility, at least one such individual must be listed the LLC's responsible officer.

Subdivision (c) clarifies that a responsible officer may be held liable not only for violations of the Act he or she caused, but also those violations which he or she "purposefully or negligently" caused another to commit, as well as for violations he or she aided or abetted, as provided under Section 83116.5.⁴

Subdivision (d) makes clear that an LLC qualifies as a recipient committee if it receives payments totaling \$2,000 or more in a calendar year for the purpose of making contributions or expenditures in California, as specified under Section 82013(a) of the Act.

Finally, subdivision (e) specifies that any LLC that makes a contribution on behalf of another, or while acting as the intermediary or agent of another, must disclose to the recipient of the contribution both the identity of the LLC and the original contributor, as required by Section 84302.

Subdivisions (c)(d) and (e) are intended to restate the application of existing law to LLCs.

Contributions received from LLCs

Proposed Regulation 18421.10, meanwhile, details the information a committee that receives a contribution from an LLC must include as part of a contributor's "name" on its

⁴ Section 83116.5 provides that any person who purposefully or negligently causes any other person to violate any provision of the Act is liable if the person causing the violation has filing obligations under the Act, or is compensated for services related to activities regulated under the Act.

campaign statements and reports.⁵ In addition to reporting the name of the LLC, the committee receiving the contribution would need to provide the name of the individual responsible for the LLC's political activity. That individual will vary slightly depending on the committee status of the LLC. Subdivision (a) requires committees who receive a contribution \$100 or more from an LLC that has qualified as an IE Committee or Major Donor to include the name of the company's responsible officer, as defined in Proposed Regulation 18402.2. Subdivision (b) addresses contributions of \$100 or more from LLCs that have not qualified as committees under Section 82013, requiring the "name" of such contributors to include the individual primarily responsible for approving the contribution. In addition, subdivision (b) provides that if more than one individual shares in the primary responsibility for approving a contribution, a committee must report at least such individual. Lastly, subdivision (c) makes clear that, for contributions of \$100 or more received from an LLC that has qualified as a recipient committee, the "name" must include the LLC's principal officer as defined in Section 82047.6.

These regulatory changes would allow the public to be informed of the individuals behind an LLC's contribution to a committee, rather than simply the name of a corporate entity and its registered agent and/or professional manager. In addition, the proposed regulations would clarify that an individual who approves an LLC's expenditures and contributions is responsible for the LLC's violations of the Act—whether by violating the Act directly, or causing another to do so. The changes would also clarify that an LLC acting as an intermediary for the contribution of another must properly disclose the true source of the contribution under the Act.

Source of LLC Funds

The regulatory changes proposed above would not require an LLC to disclose the original source of the funds it uses to make contributions. Currently, state law does not require an LLC to disclose its members or sources of capital. Only in the instance where an LLC reports as a recipient committee does the identity of the persons who provide the funds for an LLC's political activity become public. Requiring disclosure of that information in other contexts would require statutory change.

Attachments:

Proposed Regulation 18402.2

Proposed Regulation 18421.10

⁵ At the February 5, 2020 Law and Policy Committee meeting, Ashlee Titus, a partner at Bell, McAndrews & Hiltahck, LLP, suggested that committees who receive a contribution from an LLC without the required "name" information should be required to return the contribution within 60 days. It is staff's interpretation that Regulation 18570 already require a committee that receives a contribution for which the committee lacks the "name" information required under Section 85700 of the Act to return said contribution within 60 days of receipt.