California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Hyla P. Wagner, Senior Counsel
Luisa Menchaca, General Counsel

Date: June 28, 2002

Subject: **Reporting Payments for Communications that Clearly Identify a State Candidate under Section 85310 – Prenotice Discussion of Amendment to Regulation 18539.2**

A. Summary. Regulation 18539.2 sets forth the disclosure required on reports filed pursuant to section 85310 concerning disclosure of communications that clearly identify a state candidate. The Commission is asked to consider a request from the Secretary of State for a minor amendment to regulation 18539.2 to require disclosure of the type of communication made, such as television or radio broadcasts, print advertisements, or literature and mailings.

B. Background. All payments by a committee that "expressly advocate" the election or defeat of a candidate or measure are required to be reported under the Act, generally as direct campaign expenditures or as independent expenditures. Regulation 18225(b)(2) defines the term "express advocacy" as follows:

> "A communication 'expressly advocates' the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as 'vote for,' 'elect,' 'support,' 'cast your ballot,' 'vote against,' 'defeat,' 'reject,' 'sign petitions for' or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election."

In addition, section 85310 of the Act which was added by Proposition 34 requires the reporting of payments of $50,000 or more for communications that clearly identify a state candidate and are made within 45 days of an election, even though the communication does not "expressly advocate" the election or defeat of the candidate. Section 85310 provides in part:

> "(a) Any person who makes a payment or a promise of payment totaling fifty thousand dollars ($50,000) or more for a communication that

> clearly identifies[1] a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election, shall file online or electronically with the Secretary of State a report disclosing the name of the person, address, occupation, and employer, and amount of the payment. The report shall be filed within 48 hours of making the payment or the promise to make the payment."

This section is designed to capture reporting of payments made for election-related "issue ads" by political parties, PACs, and others. The Supreme Court in its 1976 *Buckley v. Valeo* decision distinguished between speech that "expressly advocated" a candidate's election which could be regulated by the Federal Election Campaign Act, and general debate and discussion about political issues, termed "issue advocacy," which the Court held was outside the scope of regulation by federal election law.[2] In the 1990's, parties and interest groups on the federal level began taking advantage of the distinction *Buckley* drew between "express advocacy" and "issue advocacy," crafting advertisements that were designed to influence election outcomes, but which did not use terms of express advocacy and thereby avoided the contribution limits and disclosure requirements of federal election law.

Election-related issue advertisements characteristically take a position on an issue, such as education, health care, seniors, or taxes. They praise or criticize a particular officeholder for his or her position on the issue, or past votes on legislation. The ads then ask the viewer to call the legislator and thank the legislator for his or her work on the issue, or tell the legislator his or her views are all wrong. A classic example of an issue advertisement is the campaign run by the AFL-CIO during the 1996 election, in which a Philadelphia couple told viewers:

> "Next year we will have two children in college and it will be very hard to put them through - even with two incomes . . . . Congressman _____ voted with Newt Gingrich to cut college loans while giving tax breaks to the wealthy. To take away

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[1] Regulation 18225(b)(1) defines "clearly identified" as follows with respect to candidates:
"(A) A candidate is clearly identified if the communication states his name, makes unambiguous reference to his office or status as a candidate, or unambiguously describes him in any manner.
(B) A group of candidates is clearly identified if the communication makes unambiguous reference to some well-defined characteristic of the group, even if the communication does not name each candidate. A communication that clearly identifies a group of candidates and expressly advocates their election or defeat is reportable as an expenditure, but the expenditure need not be allocated among all the members of the class or group on the campaign statement reporting the expenditure."

[2] *Buckley v. Valeo*, 424 U.S. 1, 39-44, 78-80 (1976) (construing the requirements and restrictions in the Federal Election Campaign Act to apply to express advocacy and exempting those expenditures made for issue discussion or advocacy from the restrictions of federal election law).

> opportunities for children to go to college is a crime. . . Tell him his priorities are all wrong."[3]

Issue advertisements are not as prominent in California politics as they have become at the federal level,[4] but they are increasingly being used. Interest groups have put up billboard advertisements in Sacramento thanking legislators for their support of a particular piece of legislation. Section 85310 is designed to obtain disclosure of such election-related issue advertisements and to prevent them from being used to circumvent the Act's limits and disclosure requirements as has happened on the federal level.

C. Disclosure Reports Under Section 85310. To implement section 85310, the Commission adopted regulation 18539.2, which sets forth the required contents of the reports. Regulation 18539.2, attached as Appendix 1, was adopted on an emergency basis in June of 2001 and adopted permanently in October of 2001. The FPPC and the Secretary of State's office worked together to develop the electronic form for reporting under section 85310, called the E-530 – Communications Identifying Candidates. The electronic form is available for filers at no charge on the Secretary of State's website. The FPPC issued instructions for completing the E-530 report in January 2002. Attached as Appendix 2 are the revised E-530 Instructions 2002 which reflect the proposed regulatory changes. Both the instructions and the regulation may be approved by the Commission in September when the amendments to the regulation will be presented to the Commission for adoption.

It should be noted that in developing the E-530 report, the Secretary of State's office included a field for the filer to describe what type of expenditure identifying the candidate was purchased, for example, a television ad, radio ad, print ads, or literature and mailings. Because the expenditure purpose was not specifically required by section 85310 or regulation 18539.2, the instructions to the form currently indicate that these are "optional fields." As is evident reading the instructions, keeping the expenditure purpose as an "optional field" is ambiguous and may be confusing for filers, who will question whether or not they need to provide the information. Other campaign forms required to be filed under the Act generally do not contain "optional fields."

It will be clearer for the Commission to determine by regulation whether the information should be required or not. The Secretary of State's office has requested that the Commission consider amending regulation 18539.2 to require a description of the

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[3] Hayward, Allison R., "When Does an Advertisement about Issues become an 'Issues Ad'?" 49 Cath. U. L. Rev. 63 (1999). See Briffault, Richard, "Issue Advocacy: Redrawing the Elections/Politics Line," 77 Tex. L. Rev. 1751 (1999).

[4] In fact, logging into the Cal-Access campaign disclosure system, we are told that "[t]here are no issue advocacy filers currently in the system." As the Commission noted in May, the question arises as to why no section 85310 reports were filed during the March primary election. There may not have been a lot of issue advocacy campaigning that took place in the primary. Election-related issue ads may be more of a general election phenomenon than a primary election one. Alternatively, filers may not be aware of or complying with the new disclosure requirement, or the $50,000 threshold may be high.

purpose of the expenditure for which the payment of $50,000 or more was made. The question presented for the Commission then, is whether requiring the expenditure purpose to be reported is within the ambit of section 85310 and, if so, whether it is desirable?

At the outset, we observe that not all the precise fields and codes requested on FPPC campaign forms are specified in detail by a statute or regulation. For example, though section 84211 – Contents of Campaign Statement, is quite specific about what must be disclosed for contributions, loans, expenditures, etc., it does not delineate the Form 460 precisely, or state exactly what must be disclosed on each schedule. Generally under the Act, a statutory provision states what information must be disclosed, the required disclosure is fleshed out in some cases by regulation, and then implemented in further detail on the campaign disclosure form itself. This is one reason why forms implementing the Act are required to be approved by the Commission and to go through the public notice and comment procedure set forth in regulation 18313 – Forms and Manuals.[5]

Regulation 18539.2 adopted by the Commission, currently requires filers to report information that is specifically required by the statute and some additional information as well. Of the information to be disclosed on the E-530 reports, the statute itself requires the information set forth in subdivisions (a)(1) - (3) of regulation 18539.2:

(1) the name and address of the person making the payment totaling $50,000;
(2) his or her occupation or employer (if an individual); and
(3) the amount of the payment.

Though not specifically required by section 85310, regulation 18539.2 also requires the reports to contain the information set forth in subdivisions (a)(4)-(7) of the regulation:

(4) the Secretary of State committee identification number if the person making a payment of $50,000 or more is a committee;
(5) the date of the payment;
(6) the name and office sought or held by the candidate identified in the communication; and
(7) identification of amended information.

The proposed amendment would insert a new subdivision requiring filers to state the type of communication that they purchased, whether a television or radio advertisement, a print advertisement, or literature and mailings, clearly identifying the candidate.[6]

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[5] As noted by staff at the Commission's October 2001 meeting, an issue the Commission may wish to consider at a later date is the procedure for electronic forms to be approved by the Commission and subject to the public notice and comment period set forth in regulation 18313. In this case, however, making the contents of the electronic report specific in the regulation will suffice.

[6] For ease of reporting, we propose using the applicable categories which already exist as expenditure purpose codes on Schedule E - Payments Made (attached as Appendix 3).

Section 85310 states that a person making a payment of $50,000 or more in connection with a clearly identified candidate for state elective office that is disseminated, broadcast, or otherwise published within 45 days of an election, must report their name, address, occupation and employer, and the amount of the payment. Though the statute does not explicitly state that the person running the issue ad must report the name of the affected candidate, this information is certainly critical for disclosure purposes and was added by regulation. Knowing what type of communication was used for the issue ad is not as crucial as knowing the affected candidate, but it is still valuable information for public disclosure. Section 85310 itself discusses the type of communication involved in the issue ad, requiring reporting of such communications that are "disseminated, broadcast, or otherwise published." It seems well within the scope of the statute to require that filers disclose the type of communication used for the election-related issue ad.

In addition to being within the scope of section 85310, the reporting required to describe the type of communication is analogous to reporting the purpose of expenditures on Schedule E of Form 460 (attached as Appendix 3). Committees routinely report the purpose of their expenditures using the purpose codes provided on Schedule E. Granted, with respect to the purpose of expenditures, section 84211(k)(4) specifically requires filers to provide a "brief description of the consideration for which each expenditure was made." However, filers are very used to doing similar reporting of the types of communications for which expenditures are made on Schedule E.

From a practical standpoint, requesting filers to state the type of communication used for the message identifying a state candidate does not impose a burden on them. Unlike subvendor information or occupation and employer information for contributors, which requires effort for filers to gather, the type of communication placed is information readily available to filers.

Recommendation. Considering that disclosure of the type of communication made clearly identifying a state candidate is within the scope of section 85310, provides useful information to the public and is not burdensome to filers, staff recommends that the Commission approve the amendments to regulation 18539.2 for adoption in September 2002. Staff also recommends approval of the revisions to the E-530 Instructions 2002 to reflect the regulatory changes.

Attachments

Appendix 1 – Proposed regulation 18539.2
Appendix 2 – E-530 Instructions 2002, Communications Identifying Candidates
Appendix 3 – Schedule E, Form 460