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September 19, 2017

The Hon. Jodi Remke, Chair
Hon. Members
California Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811
CommAsst@fppc.ca.gov

Re: Agenda Item 42, Legislative Report, Request The FPPC Endorse AB 249 (Mullin)

Dear Chair Remke and Commissioners:

California's most respected lawyer and expert on the Political Reform Act, Robert Stern, the broadly-admired reformer who wrote the Act that created the Commission and who served as your first General Counsel, has meticulously reviewed AB 249 (Mullin), and has this to say:

> ***"I strongly endorse AB 249. It represents a major advancement in disclosure on ads for both ballot measures and independent expenditures for and against candidates[.]."***

AB 249, if signed by the Governor, will indisputably place California far in the lead of any state in addressing so-called "Dark Money" on political ads. Mr. Stern is joined by unanimous support from all the expert thought-leaders and organizations on campaign finance reform in the State who have weighed in, ranging from Common Cause, to CALPIRG, to the League of Women Voters of California.

By this letter, the California Clean Money Campaign, as sponsor of AB 249, asks that the Commission endorse this landmark measure, too.

First, we address your staff's analysis of the bill which is, respectfully, deeply flawed, which is why it stands alone aside from the Howard Jarvis Taxpayers Association among stakeholders in recommending an oppose position.

Second, we discuss the major advancements embraced by the bill that are the reasons why so many endorse the bill and that make it worthy of your support.

Each Of Staff's Critiques Of The Bill Are Contradicted By The Language Of The Bill Itself, Which Is Why Literally All Other Experts Who Have Weighed In Support AB 249.

Q: Does AB 249 potentially narrow circumstances of illegal earmarking?

A: No, it broadens them far above what is in current law by expanding Section 85704 to also include earmarking meant for specifically-identified ballot measures and committees, and not just for particular candidates.

Staff's suggested position is premised upon its argument that AB 249 narrows earmarking because the bill lists the most obvious earmarking example: where there is an "express consent" to transfer funds between committees. If that were the only earmarking example option listed in the bill, staff's analysis would be correct. But, in what is, respectfully, a significant omission in its analysis to the Commission, staff never highlights the paragraph that comes directly after the paragraph capturing "express consent". Proposed 85704(b) reads, with emphasis supplied:

(b) For purposes of subdivision (a), a contribution is earmarked if the contribution is made under any of the following circumstances:

*(1) The committee or candidate receiving the contribution solicited the contribution for the purpose of making a contribution to another specifically identified committee, ballot measure, or candidate, requested the contributor to **expressly consent** to such use, and the contributor consents to such use.*

*(2) The contribution was made **subject to a condition or agreement** with the contributor that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate.*

Staff implies the bill captures only express agreements. That is simply and, respectfully, obviously not so, for three reasons:

1. As (b)(1) is about express agreements, the only reason for (b)(2) to exist is that it captures agreements that are not express. The existence of the word "express" in (b)(1) makes it impossible for a court to infer that (b)(2)'s reference to "conditions or agreements" is limited to "express agreements" as the word "express" isn't there and such a reading would make (b)(2) superfluously redundant to (b)(2).

2. (b)(2) is, in fact, operatively a codification of current law the Commission already interprets as embracing implied agreements. Here is current section 85704, emphasis added: "A person may not make any contribution to a committee **on the condition or with the agreement** that it will be contributed to any particular candidate unless the contribution is fully disclosed pursuant to Section 84302." If the Commission interprets these bolded words now as embracing implied agreements (and it does), then implied agreements remain in this bill in (b)(2). The addition of "express agreements" in (b)(1) does nothing to impair the Commission's ability to pursue enforcement against implied agreements via (b)(2), and staff's objection to the insertion of "express" is not meritorious.

3. The only significant difference between (b)(2)'s language and existing Section 85704 is that (b)(2) says to "a specifically identified candidate" instead of to "any particular candidate". But when we asked staff to provide examples where the difference between "any particular candidate" and "a specifically identified candidate" might be a problem, they couldn't provide a single even hypothetical example.

As staff's argument is contradicted by the bill itself, and omits bill language from its analysis that would contradict its conclusion, staff analysis on this point cannot, respectfully, serve as the basis of Commission opposition.

Q. Is AB 249's prohibition of the Commission from using "timing" as the sole basis for finding violations related to earmarking a reason to oppose it?

A. No. The language of the bill proposed 85704(f) says in full: "A violation of this section shall not be based **solely** on the timing of contributions made or received.[1]"

Confronted for the first time with far greater earmarking liability due to AB 249's expansion of section 85704's earmarking rules to also cover earmarking to specifically identified ballot measures and committees, some stakeholders wanted assurance that the timing of contributions would never all alone expose them to an enforcement action.

No court would ever rule that someone had engaged in illegal earmarking based solely on timing of contributions made or received and no sensible agency would ever bring such a case. Including this assurance in

[1] Emphasis added.

the bill was an inoffensive addition codifying what is certainly Commission practice. If the only evidence in the case was the timing of a contribution, no enforcement agency would be able to meet its burden of proof.

Thus, staff has a high bar in explaining why it would ever bring a case based "solely" on what might be only a coincidence in timing between receipt of a contribution and making of another contribution and, to the extent it would consider bringing such a case, it underscores the wisdom of this prohibition.

Q: Does AB 249 create a problematic exemption for membership organizations?

A: No. Respectfully, this argument badly misreads the bill. This argument misreads a provision that closes a loophole as actually creating one. Here is the provision:

> *(c) Notwithstanding subdivisions (a) and (b), dues, assessments, fees, and similar payments made to a membership organization or its sponsored committee in an amount less than five hundred dollars ($500) per calendar year from a single source for the purpose of making contributions or expenditures shall not be considered earmarked.*

This subdivision exists to ensure that a membership organization that imposes assessments on members under this amount will itself be earmarked as the source of those assessed contributions when the membership organization makes an earmarked contribution to another committee. Under this subdivision, a membership organization such as a union cannot evade reporting itself as earmarking a contribution by claiming that its assessed members were the source of the contributions instead of itself. The membership organization would still have to disclose those member assessments in its own report as under current law, but when making contributions to another committee the organization would report itself as the earmarking source of that contribution, not its individual members, if the members' assessments were under $500 per calendar year.

This provision closes a loophole that could have allowed membership organizations to evade being disclosed on ads and even potentially evade contribution limits by claiming that their contributions weren't coming from them, but were instead earmarked from dues or assessments from all of its individual members. This is good policy.

Moreover, nothing here has anything to do with broader campaign finance giving limits. That is simply not what the provision says. As the Assembly Elections Committee analysis points out, "<u>this provision does not apply generally to the solicitation of contributions</u>", and that nothing in it "expressly or impliedly repeals, amends, or alters the calculation of how much money individuals and organizations may lawfully contribute to political campaigns."

Q: Should the Commission oppose AB 249 because the bill would prevent the Commission from seeking triple penalties on unintentional violations of disclosure formatting requirements?

A: No, the Commission should not elevate its theoretical discretion to bring a case it would never bring over enacting good public policy in binding statute.

Under current law, the Commission may seek up to three times the cost of an ad for any violation of "the article" addressing ad disclosures. The underlying requirements for ad disclosures in current law are ambiguous when compared with those in AB 249, so, in enforcement, there is in current law a proportional need for Commission judgment in matching penalty to violation; because the former is more subjective, the latter needs to be more flexible. But, when, as is the case with AB 249, the law is drafted in such a way as to be newly detailed and prescriptive, it is appropriate likewise specifically to tailor penalties based upon specified violations, thus offering fair caution and notice to regulated entities about the possible consequences of their behavior.

Below is the portion of AB 249, as the bill proposes to amend current law. Observe that proposed section 84503 is the section that is the heart of AB 249 and newly requires "*names of the top [three] contributors to the*

committee paying for the advertisement" to be on ads. Further observe that the treble costs remedy in subdivision (a) is maintained for section 84503, as under current law, and made applicable to violations of that new requirement, with no mention of intentionality. (Section 84506.5 deals with IE disclosures.)

Next, observe in proposed (a)(2) that the three times cost penalty is also maintained for intentional violations of proposed sections 84504 to 84504.3 and 84504.5 (establishing for the first time in California and more clearly than anywhere in the nation clear statutory requirements for the on-ad disclosure formatting, covering radio, television, Internet, and direct mail). As the Commission would never in overwhelming likelihood seek or successfully obtain treble costs in a case where the Commission knows that, say, a font size mistake was unintentional, then (a)(2) does nothing more than codify Commission common sense enforcement.

Only if the Commission values its theoretical latitude to bring cases that it would never bring above the enactment of better and more specific laws shaping our political discourse is this a problem. To repeat: codifying that which the Commission would never in practice do does not, in any meaningful sense, impair the Commission's discretion in any fashion, and certainly not enough to prompt the Commission to oppose landmark legislation.

> **84510.** (a) *(1)* In addition to the remedies provided for in Chapter 11 (commencing with Section 91000) of this title, any person who violates Section 84503 or 84506.5 is liable in a civil or administrative action brought by the *Commission* or any person for a fine **up to three times the cost of the advertisement, including placement costs.**
>
> *(2) Notwithstanding paragraph (1), any person who intentionally violates any provision of Sections 84504 to 84504.3, inclusive, or Section 84504.5, for the purpose of avoiding disclosure is liable in a civil or administrative action brought by the Commission or any person for a fine up to* ***three times the cost of the advertisement, including placement costs.***

As you can see, AB 249 maintains in (a)(1) the treble cost penalty for violations without an intent requirement where the violations are those where voter deception is at stake. For violations of AB 249's more prescriptive formatting requirements, treble costs are available in (a)(2) if the mistake wasn't inadvertent. This is sound policy.

Q: What about the risk of litigation?

A: Surely, this cannot be a reason to oppose ambitious and good statutory reform. Under this theory, the Political Reform Act itself is objectionable as its existence has led to lawsuits that would never have been brought had it not been enacted. As for the prospects of litigation prevailing, 8 out of the 9 Supreme Court justices in *Citizens United* supported on-ad disclosure requirements, specifically citing the problem of independent groups running election advertisements "while hiding behind dubious and misleading names".

Q: Does AB 249 have "added complexity" that's a problem during an election year?

A: No. It makes things less complex by making the rules more detailed but clearer. In fact, the California Broadcasters Association, representing the over 1,000 radio and television stations in California has endorsed AB 249, saying *"The California Broadcasters Association supports AB 249 because it improves transparency for political advertising in a reasonable fashion."* They would not endorse the bill if they thought it would be overly complex for radio and television advertisers.

AB 249's Flagship Improvements Over Current Law

Unmentioned in the staff analysis are AB 249's many pro-reform "firsts".

- AB 249 significantly improves disclosures on ballot measure and independent expenditure ads, requiring their three largest funders to be shown clearly and prominently on television and print ads regardless of whether they're paid for by primarily-formed or general purpose committees. It applies with appropriate and landmark nuances to all major forms of political advertising (radio ads, robocalls, television, electronic, print). Each of these is spelled out in a detailed but consistent and easy to comply with manner that will allow voters to easily find and see the top funders, unlike current law.

- AB 249 also expands existing earmarking rules for contributions to candidates to include contributions meant for specifically identified committees or ballot measures. Even more importantly, it ensures that when a committee primarily formed to support or oppose a state candidate or ballot measure contributes to another committee primarily formed to support or oppose a state candidate or ballot measure and the funds used were earmarked for that candidate or ballot measure, that they must report the earmarked contributions and that the donor of those earmarked contributions must be shown on the ads if they're one of the top three contributors. This marks AB 249 as the first in the nation to stop true funders from hiding on political ads behind front groups.

- AB 249 also codifies in California state law, for the first time, requirements that television and radio ads paid for by a candidate controlled committee established for an elective office of the controlling candidate must disclose that it paid for them, rather than relying on FCC regulations, using the same disclosure requirements as those FCC regulations.

Each of these represents a vast advance over current law, which is why over 350 organizations and leaders support AB 249, why over 100,000 Californians have signed petitions urging its passage, and why the Commission, respectfully, should, too.

Conclusion

Staff's analysis is, respectfully, insufficiently well-grounded to justify an oppose position. More deeply, it offers no or insufficiently solid reasons to depart from Robert Stern and the enthusiastically favorable analysis of every other expert and good government organization.

Broadly speaking, we now stand at a crossroads where first-in-the-nation landmark reform has passed with astonishing bipartisan support. It has taken seven years to move such legislation through the special interest thicket to the Governor's desk. This is lightning in a bottle; a once in a generation opportunity to enact what will be by a wide margin the best campaign disclosure law in the nation.

No legislation is so perfect that refinement is unwarranted but, by that same reasoning, that legislation may benefit from or require future refinement is not a reason, alone, to oppose it. If that were the benchmark, then no bill of any significance would warrant support. Had the Commission existed in some form prior to passage of the Political Reform Act, it is unimaginable that the Commission would have opposed its watershed passage, notwithstanding the many clarifying amendments and regulations that have been needed since then.

We respectfully ask that the Commission endorse AB 249.

Sincerely,

Trent Lange, PhD.
President and Executive Director
California Clean Money Campaign

California Clean Money Campaign
3916 Sepulveda Blvd., Suite 208 ♦ Culver City, CA 90230
Phone (800) 566-3780 ♦ www.CAdisclose.org ♦ info@CAclean.org