Help achieve an open and accountable government

March 21, 2018

VIA EMAIL

Chair Remke and Commissioners
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Dear Chair Remke and Commissioners,

AB 249's amended definition of "advertisement" in Section 84501 does not give the Commission the lawful authority to create a loophole that would permit committees to intentionally avoid disclosures on their ads if the ads happen to be fewer than 200 in number. Allowing advertisements distributed in quantities of 200 or fewer to avoid any disclosures at all will allow a serious loophole to committees that are sophisticated enough to use micro-targeting, as well for many local races for which advertisements run in quantities of up to 200 could have significant effects.

That, and the added burden to committees of having differing disclosure requirements for communications depending on the quantities they are produced, is why AB 249 author Assembly Speaker pro Tem Kevin Mullin, the California Clean Money Campaign (sponsor of AB 249), California Common Cause, and Money Out Voters In all opposed staff's Option 1 and Option 2.

First, there is no dispute about whether such a loophole advances or frustrates the intent of AB 249. Undeniably, exempting certain categories of ads in a way that permits any segment of voters to be left in the dark about the funders of ballot measure and independent expenditure ads is not consistent with the intent of AB 249 which is, after all, called the *California DISCLOSE Act*. This exemption is bad policy. No rational in support of this loophole has been offered that is consistent with and in furtherance of the intent of AB 249.

Second, the regulatory record contains zero evidence or rationale establishing why 200 is warranted. Why not 100? 120? This number is wholly arbitrary, without any justification as opposed to other numbers.

Third, such a loophole that self-evidently does not advance the true disclosure intent of the law and that is grounded in a number that is wholly arbitrary will likely prompt needless litigation.

Staff's analysis is mostly about trying to find some legal argument in support of their Option 1 and Option 2, both of which include the loophole. But, that is, respectfully, upside down. It presumes the offered loophole is the right thing to do. The question, respectfully, should not be "can there be some legal reading of AB 249 that justifies our loophole and might survive a legal challenge?" The proper question is simply:

- **Does the regulation permit voters to be left in the dark, or does it promote the aim of an informed electorate?**

WHY ALLOWING 200 VOTERS TO BE LEFT IN THE DARK IS TERRIBLE POLICY— THERE ARE MANY, MANY INSTANCES WHERE ELECTIONS WERE DECIDED BY FEWER THAN 200 VOTES.

The staff memo claims that Options 1 and 2, by using a 200-quantity threshold, "avoid sweeping communications with a low potential to reach the public". That is demonstrably untrue.

Table 1: 23 California city ballot measures in 2016 were won or lost by 200 votes or less.

2016 City Measure	Result
San Clemente Measure OO Transient Occupancy Tax Revenues: Tax Creation/Increase/Continuation	Lost by 8 votes
Sonoma Measure V Ordinance Environment: Regulation/Mitigation	Won by 19 votes
Clearlake Measure X Ordinance Facilities: Museum/Cultural/Comm. Centers	Lost by 36 votes
Point Arena Measure AE Business Tax Revenues: Tax Creation/Increase/Continuation	Won by 45 votes
Taft Measure W Ordinance Governance: Organization	Won by 47 votes
Trinidad Measure G Sales Tax Revenues: Tax Creation/Increase/Continuation	Won by 50 votes
Point Arena Measure AC Transient Occupancy Tax Revenues: Tax Creation/Increase/Continuation	Won by 58 votes
Del Mar Measure R Ordinance Land Use: Voter Approval	Lost by 59 votes
Delano Measure U Sales Tax Revenues: Tax Creation/Increase/Continuation	Won by 61 votes
Rio Dell Measure T Ordinance Land Use: Zoning	Won by 73 votes
Isleton Measure B Sales Tax Safety: Fire	Won by 74 votes
Point Arena Measure AD Advisory Facilities: Parks & Recreation	Won by 85 votes
Gridley Measure M3 Property Tax Safety: Emergency Medical/Paramedic	Won by 88 votes
Lemon Grove Measure V Ordinance Land Use: Zoning	Won by 90 votes
Fillmore Measure G Ordinance Land Use: Growth Cap/Boundary	Won by 96 votes
Isleton Measure C Sales Tax Revenues: Tax Creation/Increase/Continuation	Won by 97 votes
Biggs Measure M2 Property Tax Safety: Emergency Medical/Paramedic	Lost by 107 votes
Atascadero Measure F Ordinance Governance: Organization	Won by 113 votes
Crescent City Measure Q Ordinance General Services: Wastewater/Sewage	Lost by 158 votes
Ukiah Measure Y Sales Tax Transport: Roads	Won by 169 votes
Montebello Measure W Ordinance General Services: Water	Lost by 170 votes
Dunsmuir Measure D Ordinance Governance: Organization	Won by 191 votes
Dunsmuire Measure Y Initiative Land Use: Zoning	Lost by 200 votes

Table 2: 26 City ballot measures in 2016 where 200 votes reports 10% or more of the total votes.

2016 City Measure	Total Votes	200 Voters Represents
Isleton Measure B Sales Tax Safety: Fire	166	100%
Point Arena Measure AE Business Tax Revenues: Tax Creation/Increase/Continuation	181	100%
Point Arena Measure AC Transient Occupancy Tax Revenues: Tax Creation/Increase/Continuation	184	100%
Point Arena Measure AD Advisory Facilities: Parks & Recreation	185	100%
Trinidad Measure G Sales Tax Revenues: Tax Creation/Increase/Continuation	198	100%
Isleton Measure C Sales Tax Revenues: Tax Creation/Increase/Continuation	251	80%
Biggs Measure M2 Property Tax Safety: Emergency Medical/Paramedic	577	35%
Alturas Measure G Business Tax Revenues: Tax Creation/Increase/Continuation	611	33%
Dunsmuir Measure D Ordinance Governance: Organization	677	30%
Dunsmuir Measure W Initiative General Services: Wastewater/Sewage	690	29%
Dunsmuir Measure V Initiative General Services: Solid Waste	692	29%
Dunsmuir Measure Y Initiative Land Use: Zoning	694	29%
Colfax Measure H Sales Tax Revenues: Tax Creation/Increase/Continuation	805	25%
Belvedere Measure C Gann Limit Safety: Multiple Emergency Services	880	23%
Del Rey Oaks Measure B Sales Tax Revenues: Tax Creation/Increase/Continuation	913	22%
Del Rey Oaks Measure A Business Tax Revenues: Tax Creation/Increase/Continuation	919	22%
Rio Dell Measure T Ordinance Land Use: Zoning	1,071	19%
Crescent City Measure Q Ordinance General Services: Wastewater/Sewage	1,124	18%
Avalon Measure X Business Tax Land Use: Zoning	1,148	17%
Corning Measure A Sales Tax Safety: Multiple Emergency Services	1,193	17%
Firebaugh Measure W Utility Tax Revenues: Tax Creation/Increase/Continuation	1,389	14%
Ross Measure K Property Tax Safety	1,394	14%
Nevada City Measure X Business Tax Revenues: Tax Repeal/Reduction/Limit	1,527	13%
Measure Y Initiative Land Use: Zoning	1,728	12%
Nevada City Measure C Sales Tax Safety: Fire	1,934	10%
Gonzales Measure W Business Tax Revenues: Tax Creation/Increase/Continuation	1,986	10%

200 direct mail pieces, robocalls, text messages, flyers, and emails do not have a "low potential to reach the public" in small or close races. They could alter the course of an election. Underscoring the likely illegality and surely arbitrary nature of the 200 loophole are the long list of elections decided by fewer than 200 votes.

As Table 1 shows, in 2016 alone, 23 city ballot measures were decided by 200 votes or fewer, including a San Clemente ballot measure that was decided by only 8 votes. **As shown in Table 2, there were 26 city ballot measures in which 200 voters represent 10% or more of the electorate**. There were, in fact, 135 city ballot measures in which fewer than 10,000 votes were cast in 2016, representing a very large number of city measures for which 200 voters could very easily have made up the winning or losing margin.

Allowing a loophole for up to 200 posters, 200 door hangers, 200 flyers, 200 very large bumper stickers, 200 robocalls, 200 texts, 200 emails, and 200 pieces of direct mail to hide who paid for them would be saying that the Commission doesn't believe that disclosure on advertisements matter for ballot measures in cities like San Clemente, Sonoma, Clearlake, Point Arena, Fillmore, and many others where history shows that ballot measure elections can easily be decided by fewer than 200 votes.

But local ballot measures aren't the only place where 200 votes matter. **The second place finisher in the top-two primary in four 2016 Assembly District races (ADs 46, 49, 62, and 68) was decided by fewer than 200 votes. And in the 2012 general election, Steve Fox won the Assembly seat in the general election for AD 36 by only 145 votes.**

WHY ALLOWING 200 VOTERS TO BE LEFT IN THE DARK EMPOWERS SOPHISTICATED COMMITTEES TO USE MICRO-TARGETING TO COMPLETELY AVOID DISCLOSURE ON KEY TYPES OF ADVERTISEMENTS.

Many sophisticated campaigns engage in substantial micro-targeting, purposefully narrowing the electorate down to small slices and sending them different, carefully tailored messages. Much of this is done as social media advertising, which fortunately Option 1 and 2 do not provide a quantity loophole for, but micro-targeting can and is done through other forms of advertising that Option 1 and 2 do have quantity loopholes for, especially direct mail, robocalls, texting, door hangers, and flyers:

> *"This kind of precision changes the nature of campaigning. Instead of just flooding the zone with TV ads and hoping that the right people see them, **campaigns can send flyers to only a few hundred people**, say, or buy bus ads on one particular city line… **such techniques can make a huge difference on the margin**, and in close elections that's all the difference that matters."*
> — "Calculating Campaigns", by James Surowiecki, The New Yorker, 9/12/2012

Allowing campaigns to avoid disclosures on up to 200 direct mail pieces or flyers that are not in "substantially similar form", as in Option 1 or 2, would allow sophisticated campaigns that engage in micro-targeting with different mail pieces and flyers to completely avoid disclosures on key swaths of the electorate well above 200 voters per election, a particularly major problem for local elections and even legislative races that are so often decided on the margin.

ALLOWING 200 VOTERS TO BE LEFT IN THE DARK IS CONFUSING TO VOTERS AND BAD FOR ENFORCEMENT: HOW WILL A CONCERNED VOTER KNOW IF THEY ARE THE 200TH OF 201ST VOTER RECEIVING AN AD?

How is a voter who receives ballot measure or independent expenditure communications without a disclosure statement to know whether they are the 200th or 201st voter an ad was sent to? If they are concerned about advertisements missing disclosures, as many voters will be after they are educated about AB 249's new rules, they should and would report the missing disclosures as possible violations, because they have no way of knowing the number produced and distributed.

WHY DIFFERENT DISCLOSURE RULES FOR COMMUNICATIONS OF 200 OR FEWER THAN FOR COMMUNICATIONS OF MORE THAN 200 WILL LEAD TO CONFUSION AND LEGAL JEOPARDY FOR COMMITTEES

If Option 1 or Option 2 is chosen, committees may commonly print a small direct mailing or print advertisement in quantities under 200 without the disclosure, but later decide to produce and distribute additional copies.

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Is the committee then to be out of compliance due to having mailed or distributed 200 copies without disclosures that only later become required due to production of additional copies? They'd have to keep additional records to prove that they printed 200 or fewer copies in the first place – records that would not be needed without the 200 loophole. What if they printed an advertisement in-house and distributed it by hand — a very common occurrence for small committees — and so don't have any receipts or other records?

And what requirements could apply for printed materials that committees post online that they may expect to be downloaded and printed by fewer than 200 people, but turn out to have more than 200 copies printed, unbeknownst to the committee? Do they get fined for that?

ALLOWING 200 VOTERS TO BE LEFT IN THE DARK WILL INCREASE REPORTING BURDENS ON COMMITTEES. Having different disclosure requirements for ads printed in quantities of 200 or fewer from those printed in quantities greater than 200 will be an additional burden on committees because they will have to keep additional records to prove how many copies were produced. As Shane McLoud testified on behalf of Money Out Voters In at the December 21st Commission hearing on this issue:

> ***"This will complicate matters for some committees****, like the committee MOVI operated in 2016 in support of Prop 59, a truly grassroots campaign with enough decentralization and volunteer participation such that* ***it would not only have been nearly impossible to find a way to track who was printing what and how many, but try as we might we'd likely have been unsuccessful****."*
> — Shane McLoud, public comment for Money Out Voters In at December 21st Commission Hearing

In contrast to the additional reporting burdens that the 200 loophole will engender, a clear-cut disclosure rule that all advertisements paid for by committees must have disclosures will be much easier for committees to comply with, because they will know that the standard format for flyers, door hangers, etc. will need to use the committee's disclosure, regardless of quantity.

Such additional burdens on committees could be worth it if it served a valuable disclosure purpose for voters. But here, the opposite is true, because it will lead to less disclosure than AB 249 intended, and will in fact leave significant numbers of voters in the dark, especially for close and local races.

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO LET COMMITTEES LEAVE 200 VOTERS IN THE DARK. AB 249 purposefully changed the definition of "advertisement" in Section 84501 to include only general or public communications paid for by committees, and not those paid for by persons who aren't committees, to address concerns that individuals who may be unaware of AB 249's new disclosure rules might be in legal jeopardy by not including its disclosures. AB 249 also amended the definition of "advertisement" to more specifically describe the types of communications that are not considered to be advertisements.

AB 249's section 84501(a)(2)(F) gives discretion to the FPPC to define other types of communications that are not to be considered "advertisements". However, the of AB 249 in that exclusion was to allow the FPPC to exclude other types of advertisements than the types listed in 84501(a)(2)(A)-(E) for which requiring AB 249's disclosures would be impracticable, not to allow the Commission to set quantity thresholds for being considered advertisements. It clearly is practicable and valuable for telephone, fax, email messages, direct mailings, posters, door hangers, flyers, and yard signs to include AB 249's disclosures. Printing fewer than 200 copies would not make it any less practicable to fit the disclosures on the ads or produce them.

The staff memo attempts to buttress its claim of the Commission's authority to use quantity as a threshold for being considered advertisements across a broad swath of communication types by saying:

> *"Former Section 84501 similarly defined an 'advertisement' as 'a general or public advertisement.' Since its adoption in 2002, Regulation 18450.1 gave effect to this requirement by defining certain types of communications with a limited audience as 'advertisements' when produced at a threshold of more than 200."*

We believe that the Commission did not have authority to set quantity thresholds for the definition of "advertisement" in 2002, either. The matter was never taken to the courts, in part because the threshold did serve the purpose of avoiding possible legal jeopardy to unwitting individuals who would have otherwise been swept up in the pre-AB 249 definition of "advertisements", and in part because advertising disclosures before AB 249 were not nearly as clear and effective as they are now with AB 249.

Now, however, with the significantly added clarity of AB 249 disclosures, and the much greater sophistication of well-funded committees at engaging in micro-targeting that could take advantage of the 200 loophole, the thresholds are a much bigger consideration that could decide elections, especially in local races. So whether the Commission has the authority under AB 249 to allow quantity loopholes would be a matter for the courts to decide.

OUR PROPOSED OPTION 4 COMPROMISE

We do not believe Option 1 and Option 2's inclusion of quantity loopholes for multiple different types of communications to be lawful, given the definition and intent of "advertisement" in Section 84501 as intentionally amended by AB 249. Option 3 clearly is lawful and better matches AB 249's intent.

We do, however, recognize the legitimate desire of the Commission and stakeholders to have bright lines, so we've included below a compromise "Option 4" definition that is consistent with that desire and also consistent with the *DISCLOSE Act*.

Option 4 amends Option 2 to remove quantity thresholds for 18450.1(5) for "Print materials designed to be individually distributed including posters, door hangers, and flyers". It also removes the quantity thresholds in 18450.1(7) for "Campaign buttons 10 inches in diameter or larger, and bumper stickers 60 square inches or larger". There's obviously no question that posters, door hangers, flyers, campaign buttons, and bumper stickers are general or public communications.

To allow for a bright-line and avoid concerns of stakeholders about potentially sweeping up individual emails or letters, Option 4 retains a threshold in 18450.1(3) for "A telephone, facsimile, or electronic message media communication addressed to recipients, such as electronic messages and text messages" and in 18450.1(4) for "A direct mailing that is not solicited by the recipient and is intended for delivery in substantially similar form". However, Option 4 lowers that threshold from 200 to 50 to lessen the chances that this threshold would impact close and local races, or be easily abused by sophisticated committees using micro-targeting with different messages to avoid disclosure on thousands or tens of thousands of communications.

We sincerely hope that the Commission will accept our compromise proposal Option 4, as we believe it much more closely matches the intent of AB 249 than Option 1 or 2, will better serve the state's interest in disclosure in close and local races, and avoid likely prompting needless litigation.

Thank you again for the opportunity to comment to ensure that the intent of AB 249 is fulfilled.

Sincerely,

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

Appendix: Proposed Option 4 for Regulation 18450.1

Amend 2 Cal. Code Regs., Section 18450.1 to read:

§ 18450.1. Definitions. Advertisement Disclosure.
(a) Definition of Advertisement. An advertisement as defined in Section 84501 includes but is not limited to the following:

(1) A communication ~~Programming received by a~~ broadcast by television or radio, or disseminated by print media;
~~(2) A communication as described in subdivision (a) of Section 84501 that is placed in broadcast, print or electronic media;~~

(2)~~(A)~~ An electronic media communication ~~advertisement means an advertisement~~ including a logo, icon, writing, image, recording, video, or other data ~~transmitted, distributed,~~ posted, broadcast, or displayed ~~electronically. This includes, but is not limited to advertisements in electronic messages, electronic message attachments, text messages, or advertisements that appear~~ on Internet websites or webpages, social media, blogs, ~~mobile devices,~~ or other generally accessible electronic communication systems.

(3) A telephone, facsimile, or electronic ~~message~~ media communication addressed to recipients, such as electronic messages and text messages, ~~that is~~ not solicited by the recipient and ~~is~~ intended for delivery in substantially similar form to more than ~~200~~ 50[1] recipients. For purposes of this paragraph, this includes ~~when a committee sends a message to 200 or fewer recipients and the message is "forwarded" to other persons by a recipient, the message sent by the committee is not an advertisement by that committee unless the recipient forwarded the~~ any message forwarded at the behest of the committee ~~and~~ where more than ~~200~~ 50 total recipients ~~received~~ receive the message.

(4) A direct mailing ~~that is~~ not solicited by the recipient and ~~is~~ intended for delivery in substantially similar form to more than ~~200~~ 50 recipients.

(5) Print materials[2] designed to be individually distributed including ~~Posters~~ posters, door hangers, and flyers ~~and yard signs produced in quantities of more than 200.~~

(6) ~~A billboard.~~ Print advertisements larger than those designed to be individually distributed, including yard signs, road signs, and billboards.

(7) Campaign buttons 10 inches in diameter or larger, and bumper stickers 60 square inches or larger ~~produced in quantities of more than 200~~.

(b) Burden of Proof. Electronic Media. A committee that claims the inclusion of a required disclosure in an electronic media communication is impracticable or would severely interfere with the committee's ability to convey the intended message under Section 84501(a)(2)(E) has the burden of establishing that this exception

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[1] Lowering the threshold for being considered an "advertisement" for mass emails, telephone calls, faxes, and direct mail pieces from 200 to 50 significantly reduces the number of close and local races that are likely to be impacted and would significantly increase the costs to sophisticated campaigns who attempt to abuse the quantity threshold to avoid disclosure by engaging in micro-targeting.

[2] Staff's Option 1 and Option 2 say "Print advertisements designed to be individually distributed…" However, that is a circular definition of "advertisement", and still leaves open what is meant to be a "general or public communication". Changing that to "Print materials" makes clear that any print materials "designed to be individually distributed, including posters, door hangers, and flyers" are considered to be a general or public communication and therefore an advertisement, removing the circularity.

has been met.

~~(b) In addition to the exempted communications in subdivision (b) of Section 84501, none of the following are an "advertisement":~~
~~(1) A small tangible promotional item (e.g., pen, pin, etc.) upon which the disclosures required by Sections 84503, 84506 and 84507 cannot be conveniently printed or displayed, wearing apparel, and skywriting.~~

~~(2) A communication from an organization to its members, other than a communication from a political party to its members.~~

~~(3) An electronic media advertisement where inclusion of any of the disclosure requirements of Sections 84503, 84504, 84506, or 84506.5 or of Regulation 18450.4(b)(3)(G)(iv) would be impracticable because:~~

~~(A) The nature of the technology used in conveying the communication makes it impossible to incorporate the disclosures, and~~

~~(B) The inclusion of the disclosures would severely interfere with the committee's ability to convey the intended message so that it can be understood by the audience. Any committee that claims a required disclosure in an electronic media advertisement is impracticable has the burden of establishing that a disclaimer could not be included due to the above factors~~.

(c) Aggregation of Contributions. The aggregation rules of Regulation 18215.1 shall apply in determining when a contributor has reached the $50,000 disclosure threshold of Sections 84501, 84504, 84504.2. Note: Authority cited: Section 83112, Government Code. Reference: Sections 84501, 84502, 84503, 84504, 84504.1, 84504.2, 84504.3, 84504.4, 84504.5, 84505, ~~84506, 84507, 84508,~~ 84506.5, 84509, 84510 and 84511, Government Code.