

KAUFMAN LEGAL GROUP

A PROFESSIONAL CORPORATION

September 14, 2018

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VIA U.S. MAIL & E-MAIL

Alice Germond
Chair
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Re: Comment Letter for Agenda Item 44

Dear Chair Germond:

We are writing on behalf of twenty-six interested parties for whom we submitted our original Opinion request to urge the Commission to adopt the Opinion set forth in Attachment “B” to the staff report for agenda item 44.

As we detailed in our original letter, the issue presented by this Opinion request is of vital importance to the campaign community in California, and we appreciate the Commission’s efforts to resolve this issue in a timely manner. After reviewing the staff memorandum and the alternatives presented, we believe that only alternative “B” will truly enable professional polling companies to continue providing professional polling services to political campaigns in California as they have done for over 80 years. Adoption of alternative “A” will effectively stifle this important component of modern political campaigning in California.

In our initial request letter, we articulated the facts, history and legal analysis that supports this position. We would like to take the opportunity here to make a few additional comments in response to the staff report prepared for the Commission on this item.

First, neither the Legislature nor the Fair Political Practices Commission (Commission) contemplated polling when they adopted the relevant statute and regulations addressing “mass mailings,” because polls have never been considered in that context before. Therefore, the statute is ambiguous as applied to polling communications.

A “mass mailing” is defined under the Political Reform Act (the “Act”) as “over two hundred substantially similar pieces of mail...” (Government Code §82041.5.) FPPC Regulation 18435 was amended in 2012 to include e-mail communications in the definition of “mass mailings.” However, Government Code Section 84305 (Requirements for Mass Mailings) was amended by

the Disclose Act in 2017 to include a definition of “mass electronic mailing,” and the Commission subsequently amended Regulation 18435 again in December 2017 to delete the reference to e-mail communications, since it was now provided for in the statute. At no point in the legislative history of any of these statutory or regulatory changes was polling discussed.

Second, a key point for consideration is that a poll is conducted to obtain information, not to communicate with the public. Polls are designed to target a scientific sampling of the electorate. They are not designed to communicate with voters who have been targeted by the campaign as likely supporters. In fact, polling communications are exactly the opposite of campaign communications: Polling firms try to communicate with as few voters as possible to obtain a scientific sampling of the electorate, whereas campaigns try to communicate with as many voters as possible to influence the outcome of the election.

Third, pollsters are not paid to send a mailing on behalf of the campaign; rather, they are being paid to gather information by conducting a poll. Once the poll is completed, the results are analyzed and provided to the campaign. That is the “product” for which the campaign is paying -- not for the mailing as an end in itself. And, this again points out why polls are only sent to a limited universe of people.

Fourth, the analysis accompanying alternative “A” in the staff report states: “Neutral telephonic polls are not required to contain a disclosure statement because the Act requires a disclosure statement in a telephone call only if the call is made for the purpose of supporting a candidate, ballot measure, or both. (See Sections 84310, 84501 and 84504.) If the Legislature intended the law to apply equally between telephonic polling, as it has for several years, and polling by electronic mail, then it would have enacted statutory law to reflect that intent.”

We disagree with this conclusion. If the Legislature had been aware of this new form of polling by electronic mail at the time it adopted this statute (or that polling was even an issue), it likely would have made the exact same provision for polls by email because, as the staff report readily concedes, a neutral poll is not made for the purpose of supporting a candidate or ballot measure. There is simply no reason to believe the Legislature affirmatively intended to treat telephonic polls differently from electronic polls that contain the exact same content and reach the same universe of potential participants.

Finally, we oppose the “optional language” at the end of the staff analysis supporting alternative “A” proposing the inclusion of a written disclaimer at the end of e-mail polls. The integrity of the poll, as well as the willingness of people to continue participating in such polls, would be severely impacted by the inclusion of this language – even at the end of the poll. If participants feel that they were “duped” into participating in a campaign advocacy exercise, they may respond negatively to the candidate or measure paying for the poll, and be less likely to participate in future polls – thereby limiting the universe of potential participants. Thus, we believe that alternative “B” remains the only viable option.

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Conclusion

The requestors, who collectively represent the interests of most major polling firms and political consultants in California, respectfully request that the Commission adopt Opinion "B" set forth in the staff report, in order to preserve the integrity of professional polls conducted on behalf of candidates and ballot measure campaigns in California. This important public function will be severely impacted absent the Commission's issuance of the Opinion articulated in Attachment "B."

We thank you again for your consideration of this request.

Sincerely,



Stephen J. Kaufman

SJK:VCC

cc: Commissioner Brian Hatch
Commissioner Allison Hayward
Commissioner Frank Cardenas