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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel
Karen Harrison, Senior Commission Counsel
Katelyn Greene, Commission Counsel

Subject: Request for Disclose Act Regulation Amendments to Regulations 18435 and 18450.1 and Adoption of Regulations 18450.2, 18450.3 and 18450.4.

Date: November 8, 2019

Requested Action and Summary of Proposal

Staff presents for the Commission’s approval proposed regulatory changes to clarify the campaign advertisement disclosure requirements. The regulatory changes address issues of interpretation of the Disclose Act (Assembly Bill 249 of 2017, c. 546) identified by Commission staff since the passage of that legislation in 2017. Specifically, staff proposes to amend Regulation 18435 to clarify the disclosure requirements for mass mailings that are advertisements, mass mailings of a personal nature sent by a major donor or independent expenditure committee, and mass mailings that are a nonmonetary contribution to a committee. The proposed amendments to Regulation 18450.1 are non-substantive. Additionally, staff proposes three regulations for adoption to clarify the disclosure requirements for campaign advertisements. Proposed Regulation 18450.2 further defines “authorized and paid for” by a committee for situations such as multiple committees paying for an advertisement, advertisements that are a nonmonetary contribution to a committee, and electronic advertisements disseminated by a committee with nominal costs. Proposed Regulation 18450.3 clarifies the top contributor disclosure for major donor committees that qualify as top contributors by virtue of affiliated entities. Proposed Regulation 18450.4 addresses the required length of a disclosure for a video or television advertisement lasting less than four or five seconds.

Background

The Disclose Act repealed and recast numerous advertisement and mass mailing provisions within the Political Reform Act.¹ Through the advice process, Commission staff has identified Disclose Act issues that may be addressed on the regulatory level.

Staff presented proposed language to the Commission at the September hearing for prenotice discussion. Subsequently, staff held an Interested Persons meeting on September 24,

¹ The regulations of the FPPC are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to this source. The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code.

2019 inviting public input on the regulatory language as well as requesting public input as to other regulations to consider relating to the Disclose Act. Staff received two written comments and one in-person comment on the proposed language. A representative from the law firm Olson and Hagel recommended that the language in proposed Regulation 18450.2 regarding more than one committee paying for an advertisement be consistent with a similar provision in Section 84305, regarding mass mailings. Proposed Regulation 18450.2(a)(2) reflects this recommendation. The same representative stated concerns that disclosing committees as having “authorized and paid for” an advertisement that is a nonmonetary contribution by a person would not match the committee’s campaign statements and thus cause the public confusion. However, campaign statements require the reporting of nonmonetary contributions, so staff believe concerns about possible confusion do not outweigh the benefit of committee disclosures on coordinated advertisements. Lastly, this representative recommended staff reconsider the language regarding an advertisement disseminated by a committee by electronic media where there are nominal or no ascertainable costs for bookkeeping reasons. The proposed language in Regulation 18450.2(a)(4) reflects these concerns, with the understanding that the Act presumes “costs” where a committee is posting, texting, or emailing electronic media advertisements, except where the statutes specifically address the issue.

Enforcement staff raised the issue of clarifying the situation of coordinated mass mailings that are nonmonetary contributions to a committee and might otherwise avoid disclosure. Proposed Regulation 18435 (b)(2) responds to this request.

In addition, staff has updated Regulation 18450.4 since it was last presented to the Commission on September 24, 2019. The language in Regulation 18450.4 initially only addressed the disclosure requirements for video and television advertisements less than five seconds under Section 84504.1 and simply restated the disclosure rule for video and television advertisements under Section 84504.5. The regulation did not encompass the disclosure requirements for videos less than four seconds in Sections 84504.4 and 84504.5. Accordingly, staff has updated the regulation as a catch-all for all three video and television disclosure requirements set forth in the Act.

No new proposals for additional regulatory changes were received.

Proposed Regulations for Amendment

Regulation 18435: Definitions. Mass Mailing. The proposed amendments seek to clarify the following items:

Mass Mailing Advertisements.

Section 82041.5 defines mass mailings as sending over two hundred substantially similar pieces of mail. Section 84305 provides the required sender identification disclosures for a mass mailing. However, where the mass mailing is an advertisement sent by a particular type of committee the mass mailing disclosures are not required if advertisement disclosures are

required. (Section 84305(a)(2) and (b)(2).)² The Section 84305 exclusion language has caused some confusion as to the mass mailing disclosure requirements when the mass mailing is an advertisement under Section 84501³ for these particular committees.

Staff proposes to amend Regulation 18435 to clarify that for a non-political party and non-candidate for elective office committee, when a mass mailing meets the definition of an advertisement under Section 84501, the communication is subject to the advertising disclosure requirements set forth in Section 84501, *et. seq.* and the mass mailing disclosures found in Section 84305 do not apply. (See proposed subdivision (d).)

Mass Mailings of a Personal Nature: Major Donor and Independent Expenditure Committees.

There has been some confusion as to whether mailed personal communications, such as a wedding invitation, sent by an individual who qualifies as a major donor committee or an independent expenditure committee must include the mass mailing disclosures.

Staff proposes to amend Regulation 18435 to clarify that personal messages, such as invitations, greeting cards and announcements to friends and family, sent by a person who is a major donor committee or independent expenditure committee under Section 80213(c), do not fall within the definition of a “mass mailing” where the communication is personal and not political in nature. Thus, such personal messages do not require the mass mailing disclosures under Section 84305. (See proposed subdivision (e).)

Mass Mailings that are Nonmonetary Contributions to a Committee, coordinated with and paid for by a person.

Under Section 84305, the committee “sending” a mass mailing must be disclosed on each piece of mail. The sender is defined as “the candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing which are reportable pursuant to Sections 84200 to 84217, inclusive.” (Section 84305(e)(2).) To avoid a lack of disclosure where a committee or candidate coordinates a mailing with a person (not a committee) who pays for the mailing, staff proposes language in subdivision (b)(2) to clarify the definition of “sender” to include a candidate or committee who coordinates an expenditure pursuant to Regulation 18225.7(c) with a person who pays for the

² Section 84305 provides that for a committee, other than a candidate controlled committee established for an elective office for the controlling candidate or a political party committee, the mass mailing disclosure requirements in 84305 are required only if the mailing “is not required to include a disclosure pursuant to Section 84502.” (Section 84305(a)(2).) Similar language applies to such committee’s mass electronic mailing, which require a disclosure under 84305 only if the mass electronic mailing “is not required to include a disclosure pursuant to Section 84502 or 84504.3.” (Section 84305 (b)(2).)

³ Subject to the exceptions in Section 84501, paragraph (a)(2), Section 84501 defines as advertisement as:

“Advertisement” means any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures.

communication when that person does not qualify as a candidate or a committee. (This includes a non-substantive correction to a citation in (b)(1).)

Regulation 18450.1: Definitions. Advertisement Disclosure.

Staff proposes non-substantive updates to Regulation 18450.1 to reflect the amendments to Section 84501(a) by Assembly Bill 2155 of 2018, c. 777. Also, staff proposes limiting the regulation's reference to sections relating to "top contributors" to Section 84501, which provides the definition of "top contributor" in subdivision (c).

Proposed Regulations for Adoption

Regulation 18450.2: Definitions. Authorized and Paid For.

Generally, an advertisement is defined under the Act as a public communication supporting or opposing a candidate or ballot measure if it is "authorized and paid for by" a committee.⁴ Under Section 84502, certain committee advertisements must state "Ad paid for by" or "Paid for by" followed by the "name of the committee." Through the advice process, staff has addressed the definition of "authorized and paid for" by a committee for disclosure purposes where multiple committees have paid for an advertisement, the advertisement is a reportable nonmonetary contribution to a candidate or committee under the Act, and where the committee posts, reposts, texts, or emails the advertisement electronically with nominal costs.

Staff proposes language in subdivision (a) of the proposed regulation to clarify that a communication is "authorized and paid for" by a committee pursuant to Section 84501 if (1) the communication is paid for by a committee; (2) the committee paid for the largest portion of the communication (3) the committee coordinates the expenditure for the communication pursuant to Regulation 18225.7(c) with a person who pays for the communication and the person does not qualify as a committee under Section 82013; or (4) the communication is an electronic media communication with nominal costs disseminated by the committee, unless the communication is a social media advertisement not requiring disclosures under Section 84504.3.⁵

The proposed regulation specifies that the committee name disclosed on an advertisement pursuant to Section 84502 shall be the name of the committee that "authorized and paid for" the advertisement as provided for in subdivision (a) of the proposed regulation.

Additionally, the proposed regulation further clarifies in subdivision (c) that paying for a communication includes making, promising to make, or incurring an obligation to make a payment for any costs associated with the design, production, or dissemination of the

⁴ See footnote 3.

⁵ Section 84504.3(g), "electronic media ads disclosures" states: "The disclaimer required by this section does not apply to advertisements made via social media for which the only expense or cost of the communication is compensated staff time unless the social media account where the content is posted was created only for the purpose of advertisements governed by this title." (This language was non-substantively amended and redesignated as subdivision (i) by AB 864, c. 558 of 2018, effective January 2020.)

communication and that payments made by an agent of a committee for a communication are attributed to that committee. Subdivision (d) of the proposed regulation clarifies that payments made by an agent of a committee for a communication are attributed to the committee.

Regulation 18450.3: Top Contributors for Affiliated Entities.

Section 84503 of the Act requires the disclosure of top contributors for some advertisements. Generally, the disclosure of top contributors requires a committee to identify “the persons from whom the committee paying for the advertisement has received its three highest cumulative contributions of fifty thousand dollars (\$50,000) or more.” (Section 84501(c)(1).) Clarification is needed for reporting a top contributor, when contributions are received from affiliated entities.

The proposed regulation provides that if a top contributor is a committee pursuant to Section 82013 and it qualifies as a top contributor as a result of aggregated contributions from other entities pursuant to Regulation 18215.1, the committee disclosing the top contributor must identify the contributor using the “name of filer” required by Regulation 18428 listed on the contributor’s most recent campaign statement.

Regulation 18450.4: Video and Television Advertisement Disclosure.

Sections 84504.1, 84504.4, and 84504.5 each require video and television advertisement written disclosures to be displayed for a minimum of four or five seconds. Under Section 84504.1(b), certain video and television advertisements under 30 seconds require a written disclosure to be displayed for five seconds.⁶ Under Section 84504.4(b) certain video or television advertisements regardless of length require a written disclosure of four seconds.⁷ Similarly, under Section 84504.5(b), certain video and televisions advertisements under 30 seconds require a written disclosure to be displayed for five seconds unless the disclosure is spoken during the advertisement (in which case the written disclosure can be displayed for less than five seconds).⁸ However, Sections 84504.1, 84504.4, or 84504.5 do not provide a length of

⁶ Applicable to a committee other than a political party or candidate controlled committee established for the candidate’s elective office, Section 84504.1 requires “(b) The disclosure required by subdivision (a) shall be written and displayed for at least five seconds of a broadcast of 30 seconds or less or for at least 10 seconds of a broadcast that lasts longer than 30 seconds.”

⁷ Applicable to political parties and candidate controlled committee for the candidate’s elective office advertisements that do not support a ballot measure and are not paid by an independent expenditure, Section 84504.4 requires, “(b) In a television advertisement, the words shall appear in writing for at least four seconds with letters in a type size that is greater than or equal to 4 percent of the height of the screen.”

⁸ Applicable to independent expenditures by a political party committee or candidate controlled committee for the candidate’s elective office, Section 84504.5 requires “(b) A video advertisement, including television and videos disseminated over the internet, shall include the required disclosures in writing at the beginning or end of the advertisement in a text that is of sufficient size to be readily legible to an average viewer and in a color that has a reasonable degree of contrast with the background of the advertisement for at least four seconds. The required disclosure must also be spoken during the advertisement if the written disclosure appears for less than five seconds of a broadcast of 30 seconds or less or for less than 10 seconds of a broadcast that lasts longer than 30 seconds.”

disclosure rule where the video or television advertisement is less than four or five seconds. In response to requests for advice on this matter, Commission staff has provided informal assistance that the disclosure must play for the length of the advertisement and may be less than the required four or five seconds. This advice ensures disclosure and avoids an overly broad interpretation of the sections that would in effect prohibit video and television advertisements of less than four or five seconds.

Implementing the informal advice previously provided by staff, the proposed regulation provides that a disclosure must display for the length of the advertisement where the video or television advertisement is shorter than the required disclosure time applicable to the advertisement as set forth in Sections 84504.1, 84504.4, and 84504.5.

Summary

The proposed amendments to existing regulations and the proposed adoption of new regulations will clarify Disclose Act interpretation issues that have arisen in the advice context and assist in compliance with the Act.

Attachments: Proposed Regulations 18435 and 18450.1 for Amendment
Proposed Regulations 18450.2, 18450.3, 18450.4 for Adoption