

April 19, 2020

Fair Political Practices Commission  
Attn: Toren Lewis, Commission Counsel  
[tlewis@fppc.ca.gov](mailto:tlewis@fppc.ca.gov)

VIA EMAIL

**Re: Comments Regarding Proposed FPPC Regulations 18402.2 and  
18421.10**

Dear Commissioners:

As counsel to clients who are politically active longstanding businesses established as limited liability companies (“LLCs”) and to recipient committees who have routinely accepted contributions from LLCs, we respectfully submit these comments regarding the proposed regulations identified in the FPPC’s notice of the April 20, 2020 Interested Persons Meeting. For the reasons explained below, we respectfully request that the Commission postpone consideration of the proposed regulations until after the abatement of the impacts of the COVID-19 crisis and, in the interim, publish additional information to justify the proposed regulations.<sup>1</sup>

**A. Timing and Procedural Concerns**

These proposals have an incredibly broad reach. From the small family businesses and service providers in our local communities, to some of the largest and most well-known companies in the world, including Google and Amazon.com Services, LLCs are one of the most common entity forms in America. An individual or group’s choice to organize an entity through the form of an LLC is in no way an indication of a nefarious purpose or is a fly-by-night operation.

Meaningful public participation in this dialogue, including by the very businesses being targeted by these proposed regulations, is impossible while Californians are striving to overcome the severe health, social, and economic impacts of this once-in-a-century pandemic. In the last 4 weeks, the lives of Californians—including those who own and work for LLCs—have been dramatically impacted by the COVID-19 crisis. As of today, California has suffered nearly over

---

<sup>1</sup> The Notice mentions further legislative proposals that have yet to be drafted that would more extensively regulate LLC contributions, including rules that would force an LLC to register and file reports as a political committee based solely on the timing of capital contributions, lowering the major donor threshold for LLCs, and compelling the disclosure of all direct and indirect owners with membership interests of LLCs that makes contributions or expenditures. These additional proposals suffer from many of the same defects addressed with respect to the proposed regulations.

31,000 confirmed cases and over 1,100 deaths, people have been sheltering in place and social distancing for a month, children have been kept from attending school, many —if not most— businesses have been prohibited from operating, whole industries are being devastated, an unprecedented 2.7 million Californians have filed for unemployment insurance, and the California economy has, according to the Governor, slid into recession. It is still unknown when the shelter-in-place will be lifted and when businesses can re-open and, then, in what capacity. Being mindful of the current state of the state, the Legislature has postponed its return until May, *at the earliest*, and then only to consider the most essential legislation, such as the budget. The FPPC should likewise refrain from this significant expansion of its regulatory requirements, without sufficient justification or time to identify its unintended consequences.

Although the extreme and unprecedented ways that the pandemic is affecting political fundraising and campaigns are also only beginning to be understood, its impacts have already been dramatic. Even under the best of circumstances, which these are not, enacting novel rules burdening donors and recipient committees within months of a major election is a recipe for a fiasco. Proceeding with new, complex regulations at this time is simply not appropriate. We respectfully request that you postpone any and all consideration of the proposed regulations at least until such time as the full public can meaningfully participate.

Admittedly, even under the most challenging circumstances, changes could be warranted by sufficiently compelling circumstances. But here, the published materials supporting the proposed regulations are strikingly bereft of justifications and instead rely on conclusory assertions. This lack of an administrative record leaves the public with no meaningful way to contribute to the Commission's deliberations.

First, among the other myriad other entities defined as “persons” under the PRA (“an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, . . . association, committee, or any other organization or group of persons acting in concert”) these regulations single out all entities operating as LLCs for special burdens. Yet there is a stunning lack of information about the frequency and uniqueness of the claimed abuse of the LLC form. The supporting memorandum asserts, without context, quantification, or substantiation, that it “identified a pattern in which LLCs, often formed shortly before an election, make large contributions and expenditures in California elections without the sources of the money ever being disclosed to the public in any meaningful way.” But only *one* vague example of an LLC making a suspect contribution before the 2018 election is cited. The unsupported legal premise upon which the proposed regulations rest is that contributions from LLCs—unlike contributions from any other “person”—are uniquely not in fact contributions from the LLC. No information or legal argument, however, is provided to justify or allow the public to otherwise evaluate that claim.

Second, proposed Regulation 18402.2 would require LLCs to identify a “responsible officer” who is *the individual* primarily responsible for approving the LLC’s political activity, including authorizing expenditures and contributions on behalf of the LLC, or developing or approving its campaign strategy. Even accepting, *arguendo*, concerns about contributions from some LLCs having another true source (and investigations of those transactions being difficult), there is no information justifying having one individual named in every row of every report disclosing a contribution from every LLC alongside the name of that LLC. Moreover, the memo does not establish a basis for making that individual personally, legally, and financially liable for the LLC’s violations—including for “aiding and abetting” an LLC’s violations—in a way that is different from the Commission’s enforcement of violations by any other type of entity.

Third, the gravamen of the stated concerns over LLCs is a fear that contributions made by them *might* be undisclosed earmarked contributions from other sources and that it would be challenging to investigate such allegations. Again, assuming *arguendo* that there was evidence of a uniquely significant number of undisclosed earmarked contributions through LLCs, the Commission has abundant existing authority to investigate and punish that activity. Specifically, current law flatly prohibits undisclosed earmarked contributions and the Commission zealously punishes the making of contributions in the name of another, regardless of the organizational form of the conduit/intermediary. Further, any entity (including LLCs) must register if they qualify as “major donor committees” and file reports—including reports within 24 hours of making a significant contribution shortly before an election. In addition, affiliation rules require contributions from entities under the direction and control of an individual, entity, or group to be aggregated and reported together.

Fourth, the supporting memorandum contends, without explanation, that “the lack of information about the individuals responsible for the political activity attributed to LLCs makes investigation of suspicious activity extremely challenging and burdensome.” However, the FPPC can and does routinely launch investigations, including issuing subpoenas, before providing its targets with prior notice and an opportunity to respond to the allegations. This is the same subpoena power every civil and criminal agency uses to complete the most complex investigations. Contributions are all made through easily traceable transactions like physical checks, credit cards, and wire transfers. The contention that it is challenging for the Commission to investigate a simple financial transaction is therefore perplexing. If the real issue is one of agency resources, this novel and drastic change in the reporting regime—but only as to one entity type—is misdirected and fails to confront the actual problem.

## **B. Substantive Concerns with the Proposed LLC Regulations**

For the reasons stated above, this rulemaking should be postponed until after the immediate COVID-19 crisis has subsided, businesses reopen, and the

Commission has supplemented the record to justify the proposed LLC regulations. Despite the constraints imposed by the timing of this proceeding and the public record, we provide the following preliminary substantive comments:

**1. Unclear Statutory Authority.** The Political Reform Act does not differ in its application of its requirements based on the form of an entity as the Commission proposes here. The Commission should explain which provision of the Act authorizes it to create heavier regulations for any one class of person defined in the Act, including LLCs, which are otherwise treated the same under the statute. The Staff Memorandum indicates the Commission is also considering proposing changes to the Act to support more regulation of LLCs, seemingly including some of the same issues addressed in these regulations, so it is unclear whether or not the Commission believes it currently has the power to enact these regulations and which power, precisely, it is relying upon.

**2. Redundancy & Complexity.** The Act's statutory regime includes the major donor, recipient committee, and earmarking rules. These rules were created specifically to provide heavier regulation and disclosure of the activities of entities that make significant contributions and expenditures and to prohibit any person from concealing a contribution by having it disclosed in the name of another person. The Act does not empower the Commission to selectively supplement this regime. Doing so would also add an unnecessarily complex layer to what are already overly complicated rules burdening core political activity.

**3. Novel, Burdensome & Confusing Recipient Obligations.** Proposed regulation 18421.10 would require a committee that *receives* a contribution from an LLC to report the responsible officer's name *as part of the name of the contributing LLC*. The proposed regulations thus would threaten to punish recipient committees for not disclosing the name of the responsible officer of an LLC donor—but the proposed regulations do not require an LLC to provide a recipient committee with the name of its responsible officer. This would create havoc and confusion. Committees often rely on volunteer or low-cost treasurers who would have to spend time (and money) chasing that information while the clock was ticking on reporting deadlines—including 24 hour reporting deadlines. These rules would hinder the ability of committees to fundraise and will pose compliance challenges in the heat of an election because LLC donors will have no idea about these new requirements.

**4. Secretary of State's Jurisdiction over Business Filings.** To the extent the Commission is unsatisfied with the practices of the Secretary of State regarding LLC registration forms, or the multiple requirements of the law that the Secretary of State currently administers, the solution must be to work with the Secretary of State as to matters within its jurisdiction, or appeal to the Legislature.

**5. Litigation Risk.** The proposed rules threaten to chill the constitutionally protected political activity of only those entities organized as LLCs

by compelling one individual to submit to being publicly identified as *the* individual “responsible” for the organization’s political choices *and* assuming virtually vicarious liability for violations of the LLC—while also imposing additional reporting obligations on committees who accept contributions from LLCs. The proposed regulations may face a credible constitutional challenge without a public record establishing the unique risks posed by LLCs.

\* \* \*

For the reasons stated here, we respectfully request that the Commission postpone the consideration of the proposed regulations and supplement the agency record to better justify their provisions.

Sincerely,



Elli Abdoli, Partner



Michael A. Columbo, Of Counsel