

California Political Attorneys Association

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FAIR POLITICAL
PRACTICES COMMISSION

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March 10, 2017

BY HAND DELIVERY

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

RE: Proposed FPPC Regulation 18216.5

Dear Madam Chair and Commissioners:

On behalf of the California Political Attorneys Association (CPAA), please accept these comments regarding proposed FPPC regulation 18216.5. We, of course, appreciate staff's intent and efforts to codify existing advice letters regarding the issue of candidate controlled committees. However, we are compelled to object to the regulation as currently proposed. First, the present draft of the regulation appears to exceed previous written FPPC advice relating to candidate controlled committees. Second, we believe many of the advice letters relied upon in crafting the proposed regulation exceed the purpose and intent of the statutory definition. Third, we believe the effects of the new language run counter to public policy. And, last, we are concerned the regulation as written could be subject to a constitutional challenge on the grounds it violates the free speech clause of the United States Constitution.

The FPPC has published a number of advice letters that interpret the meaning of Government Code Section 82016, which defines the term "controlled committee."¹ (As you know, the FPPC's advice letters are regularly relied upon by the public for the FPPC's interpretation of the Act and, where applicable, its regulations.) For purposes of Government Code Section 82016, "control" of a committee is found when there is a "**connection with the making of expenditures.**" Further, control by a candidate or state measure proponent is found where there is a "**significant influence**" on the actions or decisions of the committee.

¹ § 82016. (a) "Controlled committee" means a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee.

(b) Notwithstanding subdivision (a), a political party committee, as defined in Section 85205, is not a controlled committee.

The FPPC appears to have expanded this statutory language in existing advice letters. The *Pirayou* advice letter (FPPC No. I-10-159) is perhaps the most comprehensive, covering numerous factual situations from previous advice letters and a detailed discussion of the facts present in the letter both individually and in combination. The *Pirayou* letter considered nine proposed permissible activities² and seven proposed impermissible activities³. As can be seen in the footnotes below, considered permissible activities include serving as an honorary chairperson, direct fundraising, fundraising strategic planning, offering general advice about candidates and elections, and other activities. Prohibited activities include participating in any significant discussion of expenditures or strategy, serving as a voting board member, soliciting funds for use in future elections where the candidate who serves as honorary chair will run for election, making independent expenditures for the candidate who serves as honorary chair, and other activities.

² From *Pirayou* letter: Proposed Permissible Activities

1. The PAC would request that one or possibly two city council members consider serving as “honorary” chairpersons of the PAC’s Board of Directors.
2. The PAC would include the “honorary” chairpersons names on its letterhead.
3. The “honorary” chairpersons would provide the committee access to their contributor list, solicit funds in writing and over the telephone, be featured on invitations to fundraising events, speak at such events.
4. The involvement of the honorary chairperson would be confined to influencing other persons to support the committee versus a role in directing the committee’s activities, or influencing the committee’s decisionmaking body.
5. However, the PAC would like to invite its honorary chairpersons to make brief appearances at PAC meetings as an “interested” observer and to offer general advice about various elections and candidates including generic observations about a candidate’s view on issues (*e.g.*, whether a candidate is considered “conservative” or “pro-environment”).
6. Likewise, the PAC would like to receive from the chairpersons informational – *e.g.*, candidate position papers – for potential use in sending out a mass mailing.
7. The chairpersons and the PAC would like to jointly develop “talking points” relating to each respective endorsement of a candidate, ensuring that neither the chairperson or the PAC are directing the expenditures of the other.
8. The chairpersons would “sign a letter” from a PAC that is mailed to voters urging them to vote for a particular candidate.
9. The PAC’s invitations to potential participants to raise money for the PAC’s effort (*e.g.*, to get the group’s message out to the electorate in the upcoming election) might include input from the honorary chairpersons relating to the candidates and themes, such as, “please help the PAC retain the conservative majority on the city council.”

³ From *Pirayou* letter: Proposed Prohibited Activities

1. Participate in any significant discussion and participation by the contributing candidate in the PAC’s expenditures or act jointly or in concert with the PAC in making campaign expenditures so that there is no coordinating of the expenditures, but may seek members of a candidate’s controlled committee to actively participate in the affairs of the PAC as “private” citizens versus as “agents” of the candidate when participating as voting members of committee’s board of directors.
2. Participate in the PAC’s committee leadership by being a voting member of the committee’s leadership body or in any other way being authorized to vote on other of the PAC’s matters as an active or inactive member of its governing board.
3. Participate in developing or implementing campaign strategy with or for the committee.
4. Hold media events together with the PAC.
5. Use materials prepared by the PAC for distribution in the chairpersons’ own mailers or handouts.
6. Solicit funds for use in supporting the honorary chairpersons in a future election where the chairpersons are candidates.
7. Make independent expenditures on behalf of a candidate who has assisted the committee in its fundraising.

In responding to the request for advice in the *Pirayou* letter, the Commission advised:

“[A]n elected official may have some limited involvement in a general purpose independent expenditure committee without the committee being considered the elected official’s controlled committee. However, if an elected official exerts ‘significant influence’ over the committee’s activities, the elected official is considered to control the committee. Importantly, the statutory standard of control is based on a candidate’s total involvement with a committee, and thus, **an elected official’s engaging in most or all of the activities on your proposed list with the committee would, taken together, constitute control.**”

It seems clear that the FPPC focused its advice on the *cumulative effect* of multiple actions, not on a single one. The FPPC further advised in the *Pirayou* letter:

“[Y]our list of nine proposed activities that would not constitute a local elected officeholder controlling an independent expenditure committee is drawn from eight separate advice letters, and eight separate factual situations. We note that if a local elected official was involved in the independent expenditure committee by engaging in one or two of these activities, it is qualitatively different from cumulating all nine of these activities together. **Though none of these activities standing alone may have been sufficient to constitute control of the committee by an officeholder, taken together, several of these activities could constitute control by the officeholder.** And if an elected official engages in all the activities with the committee that you have described in the proposed activities list, we would conclude that this high degree of involvement in the committee is exerting significant influence over the committee and would result in control.”

The *Pirayou* letter went even further by singling out certain permissible activities from the list.

“As to your list of activities that the local elected officials would be permitted to engage in without being considered to ‘control’ the independent expenditure committee, we agree that listed items 1-4 (the PAC requesting one or two city council members to serve as ‘honorary’ chairpersons, the PAC’s including the ‘honorary’ chairpersons” names on its letterhead, limited involvement in fundraising, and influencing other persons to

support the committee) generally would not result in the elected official controlling the committee.”

As a result, the Commission’s advice in *Pirayou* is that providing a committee access to their contributor list, soliciting funds in writing and over the telephone, being featured on invitations to fundraising events, and speaking at such events, if these are the only activities, generally do not constitute control.

Focusing more closely on the issue of fundraising and controlled committees (which *Pirayou* stated allowed for “limited involvement”), the FPPC expanded its interpretation of section 82016 in the *Shaffer* Advice Letter (FPPC No. 12-122). *Shaffer* appears to misquote *Pirayou* when it states:

“[W]e have also advised that an elected official who has extensive involvement in a committee’s fundraising activities – by actively participating in its solicitation, fundraising events and fundraising strategy – is also exerting ‘significant influence’ over the committee and controlling the committee within the meaning of Section 82016.

As noted, *Pirayou* actually stated that the specific activities listed in Item 3 of the proposed activities, that “the “honorary” chairpersons would provide the committee access to their contributor list, solicit funds in writing and over the telephone, be featured on invitations to fundraising events, (and) speak at such events,” “generally would not result in the elected official controlling the committee.”

In the proposed regulation 18216.5, the FPPC staff has structured the regulation to provide three separate rules for determining significant influence. First, in subdivision (b) a list of activities is proposed such that any one of them results in a finding of significant influence resulting in committee control. Next, in subdivision (c) a list of activities, if done solely, are provided which do not result in significant influence. Finally a third rule is provided in subdivision (d) which appears to undermine the safe harbor list provided in subdivision (c). Subdivision (d) provides that raising an “extensive amount” or engaging in more than one activity identified in subdivision (c) *may* result in significant influence, although apparently not in a “dispositive” way.

Stated another way, the proposed regulation provides a list of conclusive presumptive activities that result in controlled committee status and a list of activities which do not result in a controlled committee if done alone. That standard is clear enough and appears consistent with past advice letters. But the regulation then goes on to indicate there is still a set of circumstances that *might* result in a finding of significant influence depending upon a vague term (*i.e.*, “extensive”) and a suggestion that doing multiple activities otherwise deemed not to be significant influence could now be deemed significant influence. For example, a candidate *might* be deemed to control a committee if she were to raise a single contribution and provide her

fundraising list to the committee, or not, since the regulation provides that subdivision (d) is not dispositive.

We believe the proposed regulation is an expansion of *Pirayou*, by providing in proposed subdivision (d) that a candidate raising extensive amounts of money may make it a committee controlled. This also appears to contradict the Commission's *Shaffer* Advice Letter. *Shaffer* required extensive involvement in solicitation, fundraising events AND fundraising strategy. However, under proposed regulation 18216.5, the FPPC is proposing that *fundraising alone*, even if done completely separate from the committee, would result in a controlled committee. As noted earlier, we believe the statute is explicitly focused on expenditures, not fundraising. Our reading of the proposed regulation is that it would extend the current interpretation of control to a point where it is potentially in conflict with the statute itself.

There are sound public policy reasons for not expanding the scope of prior FPPC advice letters and at the same time providing a bright line test for candidates and committees. Many local and state elected officials rely on a variety of means to bring positive change to their communities. This can frequently take the form of supporting ballot measures that pay for schools, parks and infrastructure. Elected officials frequently support these efforts by using their fundraising networks and abilities. Proposed regulation 18216.5, as presently written, would appear to limit the ability of public officials to directly participate in such efforts. It likely also will trap the unwary, as public officials who frequently mention the ability to contribute to such a ballot measure risk having their activity deemed "extensive involvement" and having control of the ballot measure committee being thrust upon them even if they had no other connection to it.

Finally, proposed regulation 18216.5, if adopted, could be subject to legal challenge on the ground that it would violate the First Amendment's prohibition against laws abridging the freedom of speech. As noted in the *Pirayou* letter, one of the main purposes of the restrictions on controlled committees is to limit candidates from making independent expenditures. The limit on independent expenditures by candidates is found in Government Code Section 85501. Section 85501 prohibits committees that are controlled by candidates from making independent expenditures. However, Section 85501 was found by the Sacramento Superior Court to be unconstitutional in 2014 in *Reed v FPPC* (Case No.34-2013-80001709).

As you are undoubtedly aware, in *Reed*, San Jose Mayor Chuck Reed established a candidate controlled committee. He then used this committee to make independent expenditures to support another candidate for office. The FPPC pursued an enforcement action against Reed for violating Section 85501. Reed challenged the enforcement decision against him on two grounds, one of which was that Section 85501 violated the First Amendment. The Superior Court agreed with Reed and ruled in his favor. It cited the *Citizens United* decision of the United States Supreme Court as the basis for its decision.

As a result of the foregoing, we respectfully request that the Commission and staff reconsider proposed regulation 18216.5. The regulation, as proposed, appears to exceed previous FPPC advice and could substantially restrict local and state candidates' participation

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(even minor participation) with respect to ballot measure efforts important to them and their communities. Moreover, we believe the new restrictions resulting from proposed regulation 18216.5 could be seen as contravening the rulings in *Citizens United* and *Reed*, and therefore could be subject to attack on constitutional grounds.

Thank you for your consideration of this issue.

Very truly yours,

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