

Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery, and Rotunda

From: Gary Winuk, Chief of Enforcement
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Subject: Discussion of Independent Expenditures Legislative Reform Proposals

Date: March 28, 2012

Discussion Item: This memorandum presents some ideas for legislation concerning independent expenditures for the Commission's consideration.

Background: Independent expenditures, someone other than a candidate or measure proponent spending to voice their view in support of or opposition to the candidate or measure, has long been a feature of the political landscape, as recognized in the Supreme Court's 1976 *Buckley v. Valeo* decision. The Political Reform Act (the Act)¹ defines an independent expenditure in Section 82031 as follows:

“‘Independent expenditure’ means an expenditure made by any person, including a payment of public moneys by a state or local government agency, in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.”

Independent expenditures have been on the rise in California politics for the past decade. Proposition 34's limits on campaign contributions for state officials took effect in the year 2000 and independent expenditures typically increase when contribution limits encourage campaign spending by persons other than candidates. The FPPC and the National Institute on Money in State Politics have issued reports analyzing the growth of independent expenditures in California elections.² In 2010 the FPPC released an analysis finding that \$127 million had been spent by

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

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² Fair Political Practices Commission, “Independent Expenditures: The Giant Gorilla in Campaign Finance” 2008; Linda Casey, National Institute on Money in State Politics, “Independent Spending in California 2005-2010, September 20, 2011.

special interests on independent expenditures since 2000. In California, the money spent in independent expenditure campaigns comes from labor unions, business groups, Indian tribes with casinos, political parties and wealthy individuals.

Independent spending has risen dramatically in local elections in California too. The Los Angeles City Ethics Commission found that “independent spending to advocate the election or defeat of City candidates is no longer unprecedented, but is a regular occurrence that has affected a wide range of City offices.” Their 2006 report found “increasing numbers of candidates elected in Los Angeles since 2001 have been supported by independent spending, and few since that time have been successful without it.”³

At the federal level, the Supreme Court’s 2010 decision in *Citizens United v. FEC* changed the fundraising calculus by permitting corporations and unions to spend unlimited amounts of money from their general treasuries on independent expenditures for or against candidates. This decision, together with the *Speech Now* case has led to the rise of Super PACs or independent expenditure-only committees that may raise unlimited sums of money from corporations, unions, associations and individuals, and then spend unlimited amounts for or against federal candidates. Federal law and many states’ laws had previously restricted corporate or union spending on elections, limiting it to contributions raised from management personnel or employees into political action committees. While corporate and union independent expenditures on candidates or measures have never been restricted in California, these entities’ gearing up to make independent expenditures on the federal level may mean they also increase their independent spending in California state and local elections.

Disclosure is the best tool available to make the voting public aware of independent expenditures. It is important that the voters know who, if not the candidate, is paying for the messages they are seeing so they can evaluate the content. With independent expenditures, it can be especially difficult for voters to track the true source of spending on a candidate or measure because independent expenditure committees frequently make contributions to other independent expenditure committees, obscuring the identities of the original donors.

The Act currently provides for timely and meaningful disclosure of independent expenditures in California. All independent expenditures of \$1,000 or more made on state candidates or measures within 90 days of the election must be disclosed online (for electronic filers) within 24 hours. Advertisements paid for by independent expenditures must state on the ad itself the name of the committee or entity making the expenditure and certain committees must also include the name of the top two donors of \$50,000 or more. And an independent expenditure ad on a candidate in California must also state that it was “not authorized by a candidate or candidate’s committee.”

Many states have examined their laws in light of *Citizens United*, and passed legislation to remove state prohibitions on corporate independent expenditures or to improve their disclosure of independent expenditures.⁴ Our examination of California’s rules has revealed a

³ Los Angeles City Ethics Commission, “Investing in the Public Trust: Campaign Finance Reform in the City of Los Angeles 15 Years after Proposition H,” February 2006.

number of concrete changes that could be made to improve disclosure and further the goal of greater transparency and accountability in the area of independent expenditures.

1. 24-Hour Reporting of Independent Expenditures

Proposal: Amend the Act to require 24-hour reporting for all independent expenditures, both state and local, made in the 90 days prior to an election. (Section 82036.5.) The Act now requires independent expenditures of \$1,000 or more made to support *state* candidates or measures *during the 90 days prior to an election to be reported* within 24 hours. (Section 85500.) In contrast, the Act only requires 24-hour reporting of independent expenditures on *local* candidates or measures *during the last 16 days before an election*. (Section 82036.5.) This proposal would expand the 90-day reporting period to local independent expenditures.

Rationale: At the state and local level virtually all independent expenditures are made within the three months prior to an election. This change would mean that 24-hour reporting applies to almost all independent expenditures. Creating one 24-hour independent expenditure reporting period instead of two different ones would simplify the Act, campaign report filing schedules, and FPPC manuals and advice.

The change would mean that more 24-hour independent expenditure reports are filed in local jurisdictions. Requiring 24-hour disclosure of all independent expenditures during the 90 days prior to an election provides the public with increased disclosure about contributors to independent expenditure committees and allows the public to make more informed decisions about issues and candidates.

Some cities and counties have enacted their own extended period for independent expenditure reporting. For example, Los Angeles requires 24-hour reporting of any independent expenditure made during the 12 months prior to an election. If the Act's independent expenditure reporting period for locals were changed to 90 days, similar to the state requirement, it would capture virtually all independent expenditures and mean that local jurisdictions would not have to adopt various different independent expenditure reporting periods.

It is also desirable to consider a corresponding change to Section 82036's definition of "late contribution," so that there is a single 90-day period for 24-hour reporting of independent expenditures and contributions close to an election, rather than a 90-day time period applicable to state candidates and measures, and a 16-day period applicable to local candidates and measures.

2. Advertisement Disclosure for Independent Expenditures

Proposal: Amend Section 84506 of the Act to require that *any* advertisement paid for by an independent expenditure be required to include the name of the committee that paid for the ad and the names of the top two \$50,000 contributors. *Currently this independent expenditure*

⁴ State laws affected by Citizens United and state legislative responses are summarized by the National Conference on State Legislatures at <http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx>.

disclosure rule applies only to broadcast or mass mailing ads, but not to newspaper and other print ads, and billboard ads.

Section 84506 provides:

“(a) A broadcast or mass mailing advertisement⁵ supporting or opposing a candidate or ballot measure, that is paid for by an independent expenditure, shall include a disclosure statement that identifies both of the following:

- (1) The name of the committee making the independent expenditure.
- (2) The names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of fifty thousand dollars (\$50,000) or more during the 12-month period prior to the expenditure. . . .”
(Emphasis added.)

There is no logical reason why newspaper, print and billboard ads should not contain the independent expenditure ad disclosure. And the discrepancy for print ads makes the independent expenditure disclaimer rule more complicated to interpret and comply with.

The Commission’s 2010 Report on Internet Political Activity and the Political Reform Act recommended this change. Specifically, the report recommended legislation to:

“Expand advertising disclosure statutes to include all advertisements, whether in print, broadcast, or other electronic form. (See Section 84501-84510.) These sections, if read broadly, include online advertisements that are paid for by independent expenditure or support or oppose a ballot measure, but the statutory language could be expanded to delete limiting disjunctive phrases such as ‘if printed or broadcast.’ . . .”⁶

For example, the FPPC recently received an advice request asking if an Internet website was subject to disclosure requirements of the Act contained in Section 84506 if the website was an independent expenditure paid for by a primarily formed or general purpose committee supporting or opposing a candidate for public office. In the *Rios* Advice Letter, No. A-11-181, FPPC staff concluded that “[a] plain reading of Section 84506, coupled with the Commission’s amendments to Regulations 18450.1, 18450.4 and 18450.5 relating to electronic advertising disclosures, requires application of the disclaimer requirements to Internet websites that constitute independent expenditures paid for by a primarily formed or general purpose committee supporting or opposing a candidate for office.” The advice letter interpreted broadcast advertisement in this situation to include an Internet website. However, Section 84605 would be clearer and easier to comply with if it applied to “any advertisement” paid for by an independent expenditure.

⁵ An “advertisement” is defined in Section 84501 and Regulation 18450.1. Section 84501 provides that: “‘Advertisement’ means any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures. . . .”

⁶ FPPC Subcommittee Report on Internet Political Activity and the Political Reform Act, August 11, 2010, page 15.

This change would make the language in Section 84506 parallel to Section 84503 (ballot measure advertising disclosure) which states that “any advertisement” for or against any ballot measure shall include a disclosure statement identifying the top two donors.⁷

By requiring this disclosure on all advertisements paid for by independent expenditures, the public will be better informed about who is responsible for an ad and the source of the contributions being made to fund the independent expenditure. Voters can then make more informed decisions about issues and candidates.

3. Independent Expenditure Source Verification

Proposal: Amend the Act to require independent expenditure committees and major donors committees under Section 82013(b) or (c) to verify that they have used their own funds to qualify as a major donor or independent expenditure committee. A sentence could be added to the verification section of the Major Donor and Independent Expenditure Committee Campaign Statement (Form 461) in order for the signer to verify that, “*I have not received any money or reimbursement from anyone else to make these contributions or expenditures.*”

Rationale: There is great concern that those making independent expenditures are not the true source of the expenditures and are concealing contributions from other parties. This is reflected in the increased number of money laundering investigations and administrative prosecutions being undertaken by the FPPC currently. This proposal would increase accountability by requiring signed verification of the true source of the contribution or expenditure.

4. Principal Officer Liability

Proposal: Amend the Act to provide that principal officers for certain types of campaign committees, including independent expenditure committees, should be held personally liable for violations of the Act committed by their committees. The PRA does not currently provide for principal officer liability for violations of the Act. This would be an addition to the Act.

Rationale: There are a significant number of enforcement situations where the committees are no longer active and/or terminated where violations are discovered and there is no one left to be held accountable. This is because generally the committee has ceased activity and no longer is in operation. Because there is no principal officer liable for its actions, there is a lack of accountability as only an empty shell of a committee is left to be held accountable for any violations of the Act. Additionally, with the rise of influence of independent expenditure committees, it is vital that an individual be designated to be responsible for its actions. This will serve as a deterrent to violations such as failing to disclose contributions and expenditures, and failing to properly identify donors on campaign advertisements.

5. Cumulate Independent Expenditures on Reports

Proposal: Require the cumulative total a committee or entity has spent in independent expenditures on a candidate or measure to be displayed on the Independent Expenditure Report

⁷ On-advertisement disclosure of the top two contributors of \$50,000 or more under Sections 84503 and 84506 applies to primarily formed committees, not to general purpose committees. (Regulation 18450.4(a).)

(Form 496), in addition to the amount of the most recent independent expenditure. Amend Section 84204(b) which specifies the contents of the late independent expenditure report to state that for each candidate and measure supported or opposed, the cumulative amount⁸ of late independent expenditures shall be reported. (This change could possibly be made by either regulation or legislation.)

Rationale: This small change would add greatly to the value of the information conveyed by the Form 496 Independent Expenditure Report. These reports are filed online with the Secretary of State by state electronic filers during the 90 days prior to an election. They are filed online or faxed to local clerks during the 16 days before an election, unless local law requires a longer period. The reports are filed on a transaction-by-transaction basis, and report isolated independent expenditures as they are made. Third parties who are interested in tracking independent expenditures must add the amounts spent on successive reports together to get the total independent expenditures by a committee or entity on a particular candidate or measure. The cumulative total of independent expenditures on a candidate or measure is tracked by the individual or entity making the expenditure, either by their campaign software or for later reporting. The cumulative total is information that the committee or entity has at its fingertips. So to require the addition of this information on the 496 Independent Expenditure Report would not be a burden on filers, but would be a great benefit to the public viewing these reports.

Conclusion: Staff is requesting Commission direction as to whether to pursue a legislative proposal concerning independent expenditures. If the Commission determines that it wishes to pursue a legislative proposal, then staff will seek an author who is interested in the legislation and a bill would be drafted by Legislative Counsel's Office.

⁸ "Cumulative amount" is defined in Section 82018, and generally means the amount of contributions received or expenditures made in the calendar year.