

Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Casher, Eskovitz, Wasserman, and Wynne

From: Zackery P. Morazzini, General Counsel
Heather M. Rowan, Commission Counsel

Subject: Proposed Regulation 18421.5: Expenditure Reports, Committee Reporting of Payments for Online Communications

Date: August 12, 2013

Proposed Commission Action and Staff Recommendation

Proposed Regulation 18421.5, which the Commission discussed during the June Commission meeting, addresses the Commission's focus on updating the Act to match the changing practical workings of campaigns. After the discussion at the June Commission meeting, staff has addressed many comments received from both the Commission and members of the public.

Background and Current Law

The Supreme Court, as recently as 2010 when it decided *Citizens United v. FEC*, 558 U.S. 310 (2010), has unequivocally declared its support for disclaimers and disclosure in paid communications. In fact, the Court has consistently found, as far back as *Buckley v. Valeo*, that disclaimers and disclosure are sufficiently important state interests to outweigh the potential burden on speech. (*Id.* at 368.) Specifically, the Court found that disclosure “. . . enables the electorate to make informed decisions and give proper weight to different speakers and messages.” (*Id.* at 371.)

The Act, as well, has an informed electorate as its primary goal. (See Section 81002.) Expressly in the “Purposes of Title,” the Act reads: “Receipts and expenditures in election campaigns should be fully and trustfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.” (*Id.*) The proposed regulation serves exactly that purpose. By giving the electorate the information it needs to weigh the information it receives, whether from a digital or other source, the regulation provides a tool for the electorate to confidently participate in California's democracy.

At the Commission's June 2013 meeting, staff presented background information regarding the need for disclosure for paid online communications.¹ Staff presents an opportunity here for the Commission to update the Act in an age where quite often the majority of sources for information individuals review are online.

The proposed regulation requires a committee to provide information when it pays a person, either directly or through a third party, to create content for a digital platform unless the content provides a clear and conspicuous statement that a committee paid the author for the content. The committees will provide the specific reporting on the Form 460, a form already required for reporting of expenditures, using both the "WEB" code as provided on the form and a description of where on the Internet (or other platform) the content appears. The regulation covers such content as a post for a blog, a video produced and posted online, and content created for social media. The regulation requires a campaign to disclose where the initial posting is made (on a supportive blog, for example), but does not require the campaign to know where the content is shared or passed on to after that initial post.

The regulation also provides that a committee is not paying for content by simply purchasing advertising space on a website, provided that the committee pays the going rate for the advertising space. There is an additional exception for content that is produced for a committee's own website, given that the public does not have to question who paid for the message appearing on a committee's own website.

After the June meeting, staff reworked the language of the proposed regulation in response to the discussion. Staff then sent the draft language to many people who have participated in this regulatory process. While the comments were few in number, they were helpful in providing staff with greater insight into campaigns that will be disclosing this information. At the June meeting, we discussed whether the "in-house" exception was a useful carve-out of the general rule. The comments received sparked further discussion and staff concluded that including the exception for a campaign's in-house staff is an effective way to provide the public with disclosure without creating excessive burdens on campaigns.

In response to comments from Commissioners and the FPPC's Enforcement Division, the language presented here lists specific categories that campaigns must report, thus making reporting for paid online communications as straightforward as possible. Additionally, staff offers a definition for "content," further responding to comments about the proposed regulation.

Proposed Action

Staff recommends that the Commission Adopt proposed Regulation 18421.5.

¹ The memorandum provided at the June 2013 meeting can be found here <http://www.fppc.ca.gov/agendas/06-13/19Reg18421.5%20Memo.pdf> and the regulation language can be found here <http://www.fppc.ca.gov/agendas/06-13/19Paid%20Online%20Communications%2018421.5.pdf>.