

## Fair Political Practices Commission

### MEMORANDUM

**To:** Chair Remke, Commissioners Casher, Eskovitz, Wasserman and Wynne

**From:** Zackery Morazzini, General Counsel  
Hyla P. Wagner, Senior Commission Counsel

**Date:** July 7, 2014

**Subject: SB 27 Multipurpose Organization Disclosure – Implementing Regulations**

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[SB 27](#) was passed by the Legislature and signed by the Governor on May 14, 2014. The bill contains an urgency clause and became effective July 1, 2014. The legislation describes when a nonprofit organization that is making political expenditures in California (hereafter “multipurpose organization”) qualifies as a committee under the Act and must file campaign reports disclosing donors.

The legislation also provides the public with some easy-to-use top contributor disclosure lists. State ballot measure committees and state candidate independent expenditure committees that have raised \$1,000,000 or more will now provide updated top 10 contributor lists to the FPPC for posting online. In addition, the bill requires the FPPC to post lists of the top 10 contributors supporting or opposing each state ballot measure and candidate.

SB 27, like the rules before it, requires limited disclosure from nonprofit organizations that make expenditures on candidate and measure elections in California. Unlike a regular political committee under the Act, a multipurpose organization is not required to disclose all donations it receives and expenditures it makes. Rather, a multipurpose organization that qualifies as a committee only reports its political expenditures and the sources of those funds. For example, if the California Heart Association or local parent teachers association spends more than \$100,000 from its general funds for a ballot measure ad, it will report the expenditure and show the source of those funds, identifying its most recent donors of \$1,000 or more.

FPPC rules requiring tailored disclosure of a nonprofit organization’s political expenditures were upheld by the Ninth Circuit in the *California Prolife v. Randolph* case litigated by the FPPC. (501 F.3d 1172 (9<sup>th</sup> Cir. 2007).) This was a hard-fought FPPC court victory upholding our prior nonprofit donor disclosure rules in the face of a challenge brought by California Pro-Life Council.

The Americans for Responsible Leadership case highlighted the need for disclosure of the sources of funds used by nonprofit organizations for political expenditures. In that case, \$11 million contributed to two ballot measures in the 2012 elections was transferred through several nonprofit organizations obscuring the actual donors of the funds. In a unanimous decision on the Sunday before the elections, the California Supreme Court ordered the Arizona group to provide its records of donors. (*FPPC v. Americans for Responsible Leadership*, Order No. S206407.)

The FPPC has been working to achieve better disclosure of political activity by nonprofit organizations for some time. The rules for disclosure of a nonprofit organization's political activity were for many years contained in Regulation 18215(b)(1), the so-called "first bite of the apple" rule. Flaws in the disclosure scheme under that regulation allowed an organization to make a large first expenditure of any amount, the so-called first bite of the apple, and no disclosure applied for that first expenditure. In addition, the rule and FPPC advice permitted donors to be identified by "any reasonable method" and by "pro rata" reporting once disclosure was required, so an organization could spread out its political expenditure over many members, and no contributors were disclosed as none reached the \$100 disclosure threshold. In 2011-12, the FPPC adopted Regulation 18412 which specified that a nonprofit organization making political expenditures had to identify donors using the "last in, first out" (LIFO) accounting method.

SB 27 eliminates the first-bite-of-the-apple rule and, when triggered, requires donors to be identified using LIFO accounting. The Act still requires that if a multipurpose organization is *specifically soliciting funds* for expenditures on candidates or ballot measures, the organization must file as a committee when it spends \$1,000 and must itemize contributors at the \$100 level, just like all other recipient committees under the Act. And when a multipurpose organization is making expenditures on candidates or ballot measures from its general fund, SB 27 provides that it qualifies as a recipient committee if it makes expenditures of more than \$50,000 in a calendar year or more than \$100,000 in four consecutive years. If donor funds were used for the expenditure, the multipurpose organization must identify and disclose donors who gave \$1,000 or more, using LIFO.

SB 27 strikes a balance in nonprofit disclosure reporting. By eliminating the first bite, SB 27 obtains immediate reporting of large sums spent by a multipurpose organization on an election, even if it is their first expenditure. Equally important, the legislation ensures that reporting burdens are not excessive on multipurpose organizations that may have many small donors and may not be making very large political expenditures. SB 27 provides reasonable reporting requirements for multipurpose organizations by requiring an organization to report when it reaches \$50,000 in expenditures per year, permitting it to disclose donors at \$1,000, and permitting automatic termination of committee status.

To implement SB 27, three existing regulations need to be amended or repealed (18215, 18412, 18427.1), and two others are proposed (18422, 18422.5). FPPC staff determined that these regulatory changes are needed to give effect to SB 27 for the November election. The FPPC will answer other questions of interpretation of SB 27 that arise by phone or written advice through the November election. This advice may be codified in regulations at a later date, if warranted. In addition, changes to Regulations 18419 on sponsored committees and 18402 on committee names will be needed to conform to SB 27, and will be brought to the FPPC in a future rulemaking.

The FPPC sent the first drafts of the SB 27 regulations to its interested persons list and published them with the Office of Administrative Law in early June. The agency held a well-attended interested persons comment meeting on the SB 27 regulations on June 17, 2014.

In addition, we received written comments on the draft regulations from Nayantara Mehta, Senior Counsel at Alliance for Justice, Lance Olson of Olson Hagel & Fishburn, Charles H. Bell of Bell, McAndrews & Hiltachk, Joseph Guardarrama on behalf of the California Political Attorneys Association's Regulatory Committee, and David Montgomery of NetFile. The proposed regulations were revised to address numerous issues raised by the comments. Written comments on the first draft of the regulations are posted on the FPPC's website with this agenda item, in addition to any comments we receive on the regulations proposed in this package.

The regulatory changes for consideration are as follows:

**1. Amend Regulation 18215 - Contribution.**

Prior to the enactment of SB 27, Regulation 18215(b)(1) provided the disclosure rules that applied to multipurpose organizations active in California politics. This provision required disclosure of donors by a multipurpose organization for a political expenditure if the organization had made a previous contribution or expenditure of \$1,000 or more (the "first-bite-of-the-apple" rule). The rule created a presumption that donors knew their contributions to the organization might be used for political purposes given the organization's history of political expenditures. Regulation 18215(b)(1) is being amended to delete the first-bite-of-the-apple rule and to direct readers to the new multipurpose organization disclosure rules in Section 84222 and Regulation 18422.

**2. Repeal Regulation 18412 - Identifying Funding Sources for Contributions and Independent Expenditures Made by Certain Tax Exempt Organizations.**

Regulation 18412 was adopted by the FPPC in 2012 to provide clear rules for nonprofit organizations disclosing the sources of funds used for political expenditures. The regulation specified that nonprofit organizations were required to identify those donors who knew their funds would be used for political purposes, and to identify other donors using the LIFO accounting method, rather than "any reasonable method."

With SB 27, the rules for nonprofit donor disclosure, including identification of donors and the use of LIFO accounting, are now specified in the Act. Because most of the provisions of Regulation 18412 have been supplanted, the regulation will be considered for repeal. Provisions of Regulation 18412 concerning recordkeeping and reporting that have not been codified or superseded by SB 27, are included in new Regulation 18422.

**3. Adopt 18422 - Multipurpose Organization Political Activity Transparency.**

This regulation implements SB 27's provisions concerning disclosure of political activity by nonprofit and multipurpose organizations. The regulation has several important provisions:

**a. Multipurpose Organization Committee Name.** The regulation specifies what information such committees will include on their Form 410 statement of organization or in their name. The regulation provides that a multipurpose organization required to register as a committee under the Act will add a description in the end of its name, to distinguish it from a

regular political committee. For example, a tax-exempt nonprofit group filing as a committee would add “501(c)(4)” at the end of its name, and an out-of-state political action committee would add “TX PAC ID #.” In response to comments received, the regulation was revised to specify that the description will only appear in the multipurpose organization’s committee name on its statement of organization and campaign reports. The description will not be required in the committee’s name on advertisements, communications, sender identification or disclaimers, so it will not take up additional space on campaign materials.

With this designation, the public, the Secretary of State (“SOS”) and the FPPC will know which and how many multipurpose organizations are reporting political expenditures from their organization’s general funds. This is a key element in achieving transparency of multipurpose organizations’ political spending. Without this requirement, there is currently no way of knowing or tracking how many multipurpose organizations are reporting political spending, how much they are spending, and whether these numbers are increasing from year to year. It is also important for the public, the SOS and the FPPC to be able to distinguish multipurpose organization filers from other political committees on their campaign statements, because in some circumstances they will be disclosing donors at a \$1,000 threshold, rather than the Act’s regular contributor disclosure threshold of \$100.

**b. Calendar Year Filers.** To ease reporting burdens on multipurpose organizations that qualify as a committee by spending the requisite amount from general funds, (more than \$50,000/year or more than \$100,000/four years), SB 27 added that these organizations do not have continuous filing obligations like a regular political committee. Instead, these organizations’ filing obligations terminate automatically every year, similar to major donors. The regulation has some provisions fleshing out the automatic termination of committee status for these filers.

**c. Last In, First Out (LIFO) Reporting Rules.** SB 27 provides that when a multipurpose organization is required to identify donors of funds, it will do so using the LIFO accounting method. Under LIFO, after making a political expenditure, a multipurpose organization identifies donors who gave to the organization, working backwards chronologically. Using the LIFO accounting method ensures that those donors who have given to the organization near the time of the election and the expenditure are disclosed. Regulation 18422(c) fills in some details of LIFO reporting. Donations to the organization become contributions under the Act when the organization makes an expenditure, so the date the organization “receives” contributions is the date it makes an expenditure on a candidate or ballot measure. The regulation requires an organization to identify donors by LIFO no later than three business days following its expenditure. Specifying a time frame to perform LIFO is necessary, because the organization’s filing deadlines and deadlines for sending notices to contributors, are triggered by the date contributions are received and expenditures are made.

**d. Major Donor Notices.** SB 27 strengthens major donor notice requirements. All committees receiving contributions routinely send their contributors of \$5,000 or more a “major donor notice,” *within two weeks* of receiving the contribution, informing the contributor that they may have filing obligations under the Act. SB 27 adds to the major donor notice provisions by requiring (1) that a committee receiving \$10,000 from a contributor during the 16 days before an

election must send a major donor notice to the contributor within *one week* and (2) that the notice should refer to the multipurpose organization filing requirements under Section 84222. (Section 84105, as amended.) Regulation 18422(d) provides that a multipurpose organization shall send a major donor notice within the requisite one or two week time frames following the date the organization receives the contributions and identifies the contributors by LIFO, as discussed above.

**e. Multi-Layer Reporting.** SB 27 provides that if a multipurpose organization identifies another multipurpose organization as its source of funds, and the contributing organization independently qualifies as a committee under the Act, the contributing organization is required to file expedited campaign statements disclosing its donors, if applicable. The provision seeks to trace back to the actual donors when funds used for political expenditures are contributed through several multipurpose organizations, as in the Americans for Responsible Leadership case. (Section 84222(e)(5).)

Section 84222(e)(6) of SB 27 provides that the FPPC will establish, by regulations, notice requirements and reasonable filing deadlines for donors reported as contributors based on the LIFO accounting method. Under Section 84222(e)(5), if a multipurpose organization is identifying donors by LIFO and comes to a donor that gave more than \$50,000, which is itself a multipurpose organization, the contributing organization qualifies as a committee and may have to report donors. Regulation 18422(e) provides for expedited notice and filing in this situation.

It requires the organization that received the contribution to send a “nonprofit filer notice” to the contributing organization. The notice is sent within 24 hours of identifying the contributor during the 90-day period before an election, and within five business days outside that period. The contributing organization may then be required to file a statement of organization and report on Form 460 listing its donors, within 24 hours (or the next business day) following its committee qualification during the 16-day period before an election, and within 10 business days at other times.

In the weeks before an election, sometimes funds are contributed from organization A to organization B to organization C, obscuring the names of the original donors and preventing the names from appearing on required campaign advertising disclaimers. Given the time involved in reporting transfers through several multipurpose organizations, it is important to keep the deadlines expeditious for multi-layer reporting of contributions moving through several organizations. As the California Supreme Court’s unanimous order in the Americans for Responsible Leadership case demonstrates, it is much more useful to voters to know who is donating funds for a particular measure before the election. This regulation takes the approach of applying the expedited notice requirements to a small number of contributors – only those multipurpose organizations that have contributed more than \$50,000 to another multipurpose organization – and imposing quick filing deadlines to obtain disclosure of donors before the election, if possible.

Two concerns raised in comments on the draft version of this regulation were addressed. First, the draft regulations provided that a multipurpose organization that contributed funds to another multipurpose organization, might also qualify as a committee

required to file reports showing its donors, on the date it receives the nonprofit filer notice or a major donor notice, when it is otherwise put on notice, *or when its funds are reported on the first recipient organization's campaign statements*. Several comments objected that this would require a multipurpose organization to monitor the campaign filings of other groups, and the clause was deleted. In addition, provisions in the draft regulations requiring a multipurpose organization sending expedited notice to another multipurpose organization to obtain *confirmation* that the notice was received were deleted based on comments received.

#### **4. Adopt 18422.5 - Top Contributor Disclosure by Committees Primarily Formed for State Ballot Measures or Candidates.**

This regulation implements provisions in new Section 84223 that provide for top contributor disclosure by state ballot measure committees and state candidate independent expenditure committees that have raised \$1,000,000 or more. Under Section 84223, these committees provide updated top 10 contributor lists to the FPPC for posting online. In addition, the bill requires the FPPC to post lists of the top 10 contributors supporting and opposing each state ballot measure.

The FPPC will post these lists for the first time for the November elections. Because of the effective date of SB 27, the regulation specifies that the first lists of top contributors are due to be submitted to the FPPC by September 5, and that any lists that would have been due before then are not required. Comments expressed concerns that committees be able to file the top 10 contributor disclosure reports, not only on a PDF form, but also as useable data on a spreadsheet. The regulations were revised to provide that committees will submit a list on a form provided by the Commission in a substantially similar form or spreadsheet approved by the Executive Director. In addition, a comment asked whether the FPPC will be able to confirm that a list has been received, and the FPPC will send such confirmation.

A committee that raises \$1,000,000 or more and is required to file under Section 84223 will provide lists of top contributors to the FPPC within 24 hours (or the next business day) during the 90-day period before an election, and within 10 business days outside this time period. As provided in Section 84223(c)(4), the FPPC will post the lists provided by committees within 48 hours during the 16 days before the election and within five business days outside this period.

With respect to the list of top contributors supporting and opposing state ballot measures required by Section 84223(e), the regulation provides that the FPPC will make the list using the top contributor lists provided by committees as described above. The regulation also specifies that the FPPC will state on its website the methodology it uses in compiling the ballot measure top contributor lists and will post and update the lists as timely as practicable.

#### **5. Amend 18427.1 - Notification to Contributors of \$5,000 or More.**

SB 27 amended the Act's major donor notice requirements in Section 84105. That section requires a candidate or committee that receives contributions of \$5,000 or more from any person to inform the contributor within two weeks that he or she may be subject to the Act's reporting requirements. Section 84105 of the new legislation also requires that the candidate or

committee inform the contributor within one week for a contribution of \$10,000 or more received during the 90 day-period before an election. In addition, the legislation requires the notifications to reference the reporting requirements for multipurpose organizations. Accordingly, changes to the major donor notice regulation, 18427.1, are needed.

Attachments - Reg. 18215 – Contribution

Reg. 18412 – Identifying Funding Sources for Contributions and Independent Expenditures Made by Certain Tax Exempt Organizations

Reg. 18422 – Multipurpose Organizations Political Activity Transparency

Reg. 18422.5– Top Contributor Disclosure by Committees Primarily Formed for State Ballot Measures or Candidates

Reg. 18427.1 – Notification to Contributors of \$5,000 or More

FPPC Fact Sheet: Multipurpose Organizations Reporting Political Spending