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MEMORANDUM

To: Chair Remke, Commissioners Audero, Casher, Wasserman and Wynne

From: Jack Woodside, Senior Commission Counsel
Hyla P. Wagner, General Counsel

Subject: Independent Expenditures – Adoption of Amendments to Regulation 18225.7 Made at the Behest; Independent versus Coordinated Expenditures; Repeal of Regulation 18550.1.

Date: October 5, 2015

Introduction

Californians may contribute to state candidates' campaigns subject to contribution limits to prevent candidates from appearing or becoming beholden to large donors. But outside groups, not affiliated with the candidate, may raise and spend unlimited amounts for independent expenditures. Independent political spending totaled more than $80.6 million in California's 2014 election cycle, an eight-fold increase from the 2002 cycle.[1] Once reserved for hit pieces and attack ads, independent expenditures are playing an increasingly central role in campaigns.

California's rules for the disclosure and reporting of independent expenditures are some of the strongest in the nation. A Brennan Center report concludes California has "strong regulation" of coordination; it "provides fairly detailed guidance about what constitutes coordination"; and the "regulator agency has been very active, chiefly by issuing many publicly available advice letters to clarify the scope of the law and in some enforcement cases demanding penalties."[2]

The Political Reform Act[3] and FPPC regulations contain guidelines to ensure that political expenditures made by outside groups and entities are truly independent of the candidate they are supporting. California's regulations on independent expenditures seek to require the highest degree of separation that is constitutionally permissible between the outside spender and

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[1] John Myers, "A New Way to Track California's Biggest Political Cash" KQED September 29, 2015.

[2] Brennan Center for Justice, After Citizens United: The Story in the States (Oct. 9, 2014) (Brennan Report) at p. 18.

[3] The Political Reform Act (Act) is set forth in Government Code Sections 81000 through 91014, and all further statutory references are to this code. The Commission's regulations are contained in Division 6, Title 2 of the California Code of Regulations, and all regulatory references are to this source.

the candidate. In order to maintain the highest standards, the rules are being updated to keep pace with new strategies being used by outside groups.

Under the proposed amendments, an outside group's spending may be considered coordinated with the candidate and not independent if:

- the outside group and the candidate use the same political consultants (time period extended from one election to the primary and general election combined,
- the candidate participates in fundraising for the outside group, by soliciting funds or appearing as a speaker at a fundraiser for the outside group,
- the outside group is established or run by former staffers of the candidate, or
- the outside group is established or principally funded by family members of the candidate.

Discussion

Under the Act, an "expenditure" is a payment made for a political purpose. (Section 82025; Regulation 18225.) A "contribution" is a payment "made at the behest of" a candidate. (Section 82015; Regulation 18215.) An "independent expenditure," by contrast, is an expenditure that is *not* made to or at the behest of a candidate. (Section 82031.)

Most significantly, staff is proposing new presumptions to describe specific situations where an expenditure will be considered to have been coordinated with a candidate or committee, while adding an additional safe harbor provision concerning the use of links to a candidate's or committee's website or social media page.

Additionally, staff is proposing to merge two regulations governing the same "coordination" conduct. Since 1995, the Commission's guidelines on what constitutes "coordination" have been found in regulation 18225.7, which defines expenditures "made at the behest of" a candidate or committee. In 2003, the Commission adopted a second "coordination" regulation (Regulation 18550.1) to implement Section 85500(b), a statute enacted in 2001 by Proposition 34. Although Section 85500(b) does not use the expression "made at the behest of," it employs the language used in Regulation 18225.7 defining that term.

Regulations 18225.7 and 18550.1 contain virtually the same descriptions of typical expenditures considered to be, presumed to be, or considered *not* to be "made at the behest of" or coordinated with a candidate or committee.[4] Given this overlap and no justifiable reason to have two regulations governing the same conduct, staff is proposing to merge the two "coordination" regulations into one Regulation 18225.7.

[4] Note, however, that Regulation 18550.1 applies only in circumstances where it is necessary to distinguish between an "independent expenditure" and a "contribution" with respect to candidate elections, not ballot measure contests, as the broader Regulation 18225.7 does.

Finally, various other amendments are proposed to provide Regulation 18225.7 with more clarity and context as described below.

Proposed Regulation Language

Additional/Amended Presumptions

Proposed Regulation 18225.7 would add three new presumptions to describe specific situations where an expenditure will be considered to have been coordinated with a candidate or committee. In general, presumptions in this area are helpful to the regulated community and the Enforcement Division because they provide useful boundary markers that represent the legal line between those expenditures viewed as truly independent and those considered coordinated with a candidate or committee. Staff identified current trends in the area of coordinated expenditures occurring here in California and nationally where it is reasonable to suspect underlying conduct that would meet the definition of "coordination" if all the facts were known. The objective is to keep up with the ongoing evolution of spending by outside groups,[5] and to ensure that such expenditures are truly independent of candidates and committees.

Fundraising. The first new presumption concerns fundraising. More specifically, it would be presumed that an expenditure was coordinated with a candidate where the candidate who benefits from the expenditure solicits funds for or appears as a speaker at a fundraiser for the person making the expenditure in the course of the current campaign. (Proposed Regulation 18225.7(d)(5).) The concern here is an obvious one -- if candidates raise unlimited funds for outside groups who, in turn, promote the candidate with the money raised, there are issues with the appearance of corruption and evasion of the limits on direct contributions.[6]

Planning for the 2016 national elections, the Democrats' top election lawyers have requested an advisory opinion from the Federal Election Commission asking if candidates can appear as "special guests" at fundraisers held by an independent expenditure group supporting that candidate.[7] In another example, Governor Rick Scott of Florida engaged in fundraising for

[5] The proposed regulation uses the term "the person making the expenditure" to refer to the outside group, independent expenditure committee, or whoever else is making the expenditure. "Person" is defined broadly in Section 82047 of the Act to mean "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert."

[6] Brennan Report, *supra*, at p. 23 ["States have also begun to restrict spending by outside groups to promote candidates who have raised money for the group, viewing the act of fundraising as an act of coordination;" see also Note, *Working Together For An Independent Expenditure: Candidate Assistance With Super Pac Fundraising* (2015) 128 Harv. L.Rev. 1478, 1480 ["as the number of Super PACs continues to grow, the FEC and state election agencies should redefine 'coordination' between candidates and Super PACs to include candidate-assisted Super PAC fundraising activities in order to ensure that Super PACs maintain the appropriate level of independence"].)

[7] "Democrats Plan Increased Role for 'Super PACs,'" by Nicholas Confessore, The New York Times, September 14, 2015.

the group 'Let's Get to Work,' a group dedicated to his re-election that spent millions of dollars to promote him. (Brennan Report, *supra*, at p. 23.) A report by the Center for Public Integrity revealed that he had raised more money for 'Let's Go to Work' than for his own campaign. (*Ibid*.) In California, candidates fundraising for an independent expenditure committee formed to support them has not yet been the phenomenon that it has been nationally. However, without further clarification, that could change quickly. In fact, the FPPC's press office received a call in June asking whether a California elected official could solicit donations for an independent committee that spends on mailers against his opponents. Staff thus believes the concerns raised by a candidate soliciting funds for a supportive and unlimited spender, as shown by these examples, warrant this presumption.

Former Staff. The second new presumption concerns the former staff of a candidate. Under the proposal "coordination" with the candidate would be presumed where the committee or other "person making the expenditure is established, run, or staffed in a leadership role, by an individual who previously worked in a senior position or advisory capacity on the candidate's or officeholder's staff within 12 months prior to the date of the election in which the expenditure is made." (Proposed Regulation 18225.7(d)(6).)

Much of the growth in outside spending is from groups dedicated to the election of a single candidate and run by former advisers and staff who possess important knowledge of the candidate's strategies or goals. This trend can easily be seen at the federal level where "former campaign and government staffers have moved over to these groups to help their candidates tap unlimited support from the outside." (Brennan Report, *supra*, at p. 10.) In fact, this Commission reached settlement with Assemblyman Luis Alejo two years ago after it determined that his 2010 campaign manager had coordinated the publication of three mailers supporting Assemblyman Alejo with Voters for a New California, an independent expenditure committee where the same campaign manager was a principal officer. (*In the matter of Voters for a New California and Joaquin Ross*, FPPC Case No. 10/470.)

California would not be the first state to regulate this type of conduct. For example, the law in Connecticut presumes that spending is coordinated if the spender has worked for the relevant campaign in the same election cycle. Maine has a similar law but uses a one-year cooling off period. Staff believes that the new presumption is necessary to dissuade this type of conduct where candidate-specific independent expenditure committees "enjoy a special degree of synchronicity with candidates, as former associates possess intimate knowledge of a candidate's strategies, goals, and support network, and candidates can have confidence in the work of the outside group." (Brennan Report, *supra*, at p. 22.)

Candidate's Family. The third new presumption, similar to the second, would presume coordination with a candidate where the committee or other person making the expenditure is established, run, staffed in a leadership role or principally funded by an individual who is an immediate family member of the candidate. (Proposed Regulation 18225.7(d)(7).) Nationally, single-candidate Super PACs are often set up and funded by former aides, family, or close

friends of the favored candidate for the express purpose of electing that candidate. (See Note, *Working Together For An Independent Expenditure: Candidate Assistance With Super Pac Fundraising* (2015) 128 Harv. L.Rev., *supra*, at p. 1483.) Here, the FPPC's advice line was recently asked whether a district attorney candidate's spouse could contribute $10,000 to an independent expenditure committee making expenditures supporting the candidate and opposing his challenger.

Campaign Needs. In addition to the new presumptions, staff proposes amending certain existing presumptions to provide more clarity and context to them. For example, Regulation 18225.7(d)(1) currently presumes an expenditure is coordinated where it is based on information about the candidate's or committee's campaign needs or plans and the information has been provided to the expending person by the candidate or committee. The proposed amendment would specify the types of information (i.e., campaign messaging, planned expenditures or polling data) relevant to the presumption. It will include information that is provided by the candidate or committee to the outside group directly or indirectly. As recently observed:

> Among other techniques for aligning the messaging strategy of candidates and supportive outside groups, campaigns have posted online their talking points for criticizing opponents, which may appear in outside groups' ads. In another method, which gained wide attention when a committee of Republicans in Congress debuted it shortly after the *Citizens United* decision came down, a campaign will release publicly its ad buying strategy. Because it is public, this move does not violate current federal and many states' coordination laws. But, as the former political director of the U.S. Chamber of Commerce explained to *Politico*, it allows outside groups to "see where the holes are" in an advertising strategy and work to fill them.
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> Last year, 2010 Vermont gubernatorial candidate Brian Dubie agreed to pay a $20,000 penalty after his campaign gave confidential polling data to an outside group, the RGA, that then spent $242,000 on what it claimed were independent advertisements in support of his candidacy.

(Brennan Report, *supra*, at p. 14.)

In another instance of communicating campaign needs, federal committees reportedly tweeted "important messages" and independent expenditure groups came out with ads a few days later in the relevant state Senatorial races. In another instance, CNN reported that candidates and outside groups used anonymous Twitter accounts to share internal polling data ahead of the midterm elections.

Common Consultants. Similarly, a proposed amendment to Regulation 18225.7(d)(3) concerning common consultants extends the presumption that currently applies to each election separately to the primary and general campaigns combined. For example, if a candidate's

campaign consultant in the primary election moved to an independent expenditure committee designing ads supporting that candidate in the general election, the expenditures of the outside group would be presumed to be coordinated with the candidate.

The proposed amendment also adds examples of a common consultant that could trigger the presumption, "such as a political, media or legal consultant, or polling firm, who provides either the candidate or the committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy for the current campaign." The presumption is not triggered unless the consultant is providing professional services relating to *campaign or fundraising strategy*. In addition, a sentence has been added clarifying that the presumption does not apply to an attorney providing professional services to a candidate or committee on compliance or reporting under the Act.

A recent FPPC case involved a consultant who was candidate Luis Alejo's paid campaign manager and simultaneously a principal officer of an independent expenditure committee spending to support that candidate.[8] Another recent FPPC case where there were allegations but no final finding of coordination involved an outside group, Common Sense Voters SF, supporting a supervisor candidate, and sharing two common consultants, a common treasurer, and common donors with the candidate's committee.[9] These cases show the significance of common consultants as indicia of likely coordination between a candidate and an outside group.

Republication. Coordination is presumed where an outside group republishes the same or substantially the same communication sent by the candidate. Regulation 18225.7(d)(4) would be amended to state that coordination will also be presumed where an outside group "uses video footage or outtakes posted online by the candidate or committee." Again, the Brennan Report noted that placing footage or outtakes online in order to be available for use by outside groups has become increasingly more common for candidates and committees:

> In another form of collaboration, campaigns publish online flattering footage of candidates – smiling, visiting with senior citizens, signing bills, wearing a hard hat, walking farm fields – for outside groups to use in advertisements supporting the candidates' election. The tactic of providing free "B-roll" for supporters' use famously took on the label, "McConnelling," after a foray by U.S. Sen. Mitch McConnell's campaign inspired late-night television parodies and an internet meme.
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> Outside groups supporting state and local candidates are also mining campaign B-roll for material. In the 2013 Detroit mayoral elections, the

[8] *In the matter of Voters for a New California and Joaquin Ross* (FPPC Case No. 10/470).

[9] *Common Sense Voters, SF; Mark Farrell and Mark Farrell for Supervisor; Chris Lee* (FPPC Case No. 10/973).

> super PAC supporting eventual victor Mike Duggan produced a series of television commercials that featured footage identical to footage appearing in his campaign video of 10 months earlier. In this year's heated gubernatorial campaign in Maine, the Republican Governors Association's (RGA) television spots supporting Gov. Paul LePage's re-election campaign also use footage identical to footage provided on the LePage campaign's website.

(Brennan Report, *supra*, at pp. 13-14.)

In a recent California legislative race, there were blog reports that a candidate was posting pieces on their Facebook page and website that were quickly used by an independent expenditure committee.

Staff believes the three new presumptions, as well as the proposed amendments to existing presumptions, focus on circumstances where coordination is especially likely, serving to alert members of the regulated community of conduct that may cross the legal line. They are not unreasonable in scope as there have been well-documented situations demonstrating the need for such change in this area of the law.

Additional "Safe Harbor" Provision

There are currently seven "safe harbor" rules that identify situations where an expenditure is not considered to be made at the behest of a candidate or committee and is considered independent. Staff proposes to add an additional provision that would similarly find no coordination between the expending person and a candidate or committee where the expending person simply places a hyperlink on a communication that leads to the website or other social media page of a candidate or committee.[10]

Merging Regulation 18225.7 and Regulation 18550.1

Regulation 18225.7 defines the term "made at the behest of," a term used in Sections 82015, 82031, 85303 and 85310 to describe coordination between a candidate or committee and some other person who makes a payment that qualifies as an expenditure under Section 82025. The presence of "coordination" is significant because coordinated expenditures are subject to more government regulation under the First Amendment. (*Buckley v. Valeo* (1976) 424 U.S. 1 [expenditures are subject to governmental regulation if they contain express advocacy or are coordinated with a candidate – in which case the expenditure is essentially a disguised contribution].) Regulation 18225.7 thus provides the guidelines to identify conduct that does and does not amount to "coordination" in political expenditures.

As mentioned, Regulation 18550.1 was adopted in 2003 to implement Section 85500(b),

[10] This codifies advice provided in the *Nolan* Advice Letter, No. I-10-193.

a statute enacted in 2001 by Proposition 34. Although Section 85500(b) does not employ the term "made at the behest," it addresses the same conduct described in Regulation 18225.7(a), and applies only when that conduct occurs in circumstances where it is necessary to distinguish between an "independent expenditure" and a "contribution" to a candidate.

This is not the first occasion where the Commission has called into question the necessity of having two regulations that govern the same conduct. Prior to the implementation of Regulation 18550.1, a memorandum to the Commission dated February 21, 2003, provided the following justification for a second "coordination" regulation:

> Even though regulation 18225.7 has served as the Commission's "coordination" rule for a number of years, there is now some justification for a separate regulation governing "coordination" between a candidate and a person engaged in express advocacy on the candidate's behalf. But the utility of a separate rule has nothing to do with differences in the nature of coordination that might warrant segregation into different regulations. Indeed, their descriptions of "cooperation, consultation, coordination" and so on should be the same in all cases, unless a plausible reason for divergent rules can be articulated.
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> The justification for a separate regulation must be based on the language of § 85500(b). This new statute does not use the expression "made at the behest of," and to that extent there is an obvious problem when the Act's "coordination" rules are found in a regulation defining a term that does not occur in § 85500(b). Certain peculiarities of language in § 85500(b) also recommend a regulation drafted with that particular statute in mind. Differences in the opening sentences of regulations 18225.7 and 18550.1 illustrate this point.

The primary justification given for separate regulations, therefore, appears based on the idea that Regulation 18225.7 provides the definition for the term "made at the behest of," which is a term that does not appear in Section 85500(b). But staff does not believe the absence of this term in Section 85500(b) necessitates a separate "coordination" regulation where aside from some language differences reflected in their opening sentences, and in the application of Regulation 18225.7 to committees, the two regulations govern the same conduct. [11] In fact, at another point in the same 2003 memorandum, it was stated that a "separate regulation 18550.1 is not necessary, although it may be desirable." Here, while agreeing that Regulation 18550.1 is unnecessary, staff also contends that it is no longer desirable.

[11] Staff notes that it could only locate three advice letters that reference Regulation 18550.1 from the date of its inception to the present while its counterpart has been referenced in advice letters at least 141 times. This disparity suggests the Legal Division relies almost exclusively on the broader Regulation 18225.7 when dealing with potential "coordination" issues.

The proposed amendments to Regulation 18225.7 contain the necessary provisions to determine whether "coordination" occurred between a candidate and a person expressly advocating on the candidate's behalf. Where such coordination is found, the expenditure will be considered a contribution to the candidate instead of an independent expenditure. In light of this, staff sees no reason to continue employing a separate Regulation 18550.1 to such situations.

Miscellaneous Amendments

Staff believes there are changes to Regulation 18225.7 that will improve its clarity. Most notably is explanation of the different applications of the term "made at the behest" in the Act. As mentioned, Regulation 18225.7 is the Commission's definition of the term "made at the behest of," which is used in Sections 82015, 82031, 85303 and 85310. However, the term is used in three different contexts in the Act.

Staff believes that adding a provision at the beginning of the regulation that briefly describes the three different applications of the term within the Act will provide helpful context to all who consult Regulation 18225.7:

> The term "made at the behest" is used in three contexts in the Act: (i) for "contributions" and "expenditures" defined in Sections 82015 and 82025; (ii) for "independent expenditures" defined in Sections 82031 and 85500, to differentiate between expenditures that are made in coordination with a candidate or committee versus those that are made by a person independent of the candidate or committee; and (iii) for "behested payments" reports filed by an elected officer or a Public Utilities Commissioner who solicits funds for charitable, legislative or governmental purposes as specified in Section 82015(b)(2).

(Proposed Regulation 18225.7(a)(1).)

To avoid any confusion, a new provision will then explain that the definition provided for the term "made at the behest" applies to all uses of that term in the Act (Proposed Regulation 18225.7(a)(2)), while noting that the remainder of the regulation (subdivisions (c)-(f)) applies only to independent expenditures.

Proposed Regulation 18225.7(d)(2) provides a definition for the term "current campaign" as that term is used in the regulation: "For purposes of this regulation, the 'current campaign' means the primary and general election combined for an elective office, and also means any special election and special runoff election for an elective office."[12]

[12] The definition also clarifies that the term "current campaign" has a different meaning than the term "election cycle," which is defined in Section 85204 for purposes of the 24-hour reports as 90 days prior to an election.

Finally, proposed Regulation 18225.7(g) expresses the current rule that coordinated expenditures are treated as contributions to a candidate or committee unless such expenditures are exempted from the definition of contribution by the Act or its regulations.

Conclusion

In order to maintain the highest degree of separation that is legally permissible between outside spenders and candidates, staff strongly recommends adopting the proposed amendments to the coordination presumptions. Also, given the substantive overlap between Regulations 18225.7 and 18550.1, staff believes merging the two "coordination" regulations is a logical step in an attempt to simplify the Commission's regulations. Therefore, staff recommends adopting the proposed amendments to Regulation 18225.7 and repealing Regulation 18550.1.

Attachments:

Amend -- Regulation 18225.7
Repeal -- Regulation 18550.1