



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

To: Chair Remke, Commissioners Audero, Cardenas, Hatch, and Hayward

From: Jack Woodside, General Counsel
Sukhi Brar, Senior Commission Counsel

Subject: Proposed Amendments to Regulations Affected by AB 249

Date: January 8, 2018

I. Requested Action

Adopt the proposed amendments to Regulations 18401, 18420.1, 18432.5, 18440, 18450.4, 18531.10, 18533, and 18901.1 to incorporate changes made to the Act¹ by AB 249 along with grammatical and other minor amendments as described below.

II. Background

On October 7, 2017, Governor Brown signed AB 249 (the Disclose Act) into law. The substantive provisions of the bill went into effect on January 1, 2018. The Disclose Act significantly changes various provisions in the Act. These changes include an overhaul of the Act's advertising disclosure provisions.

In light of AB 249, staff is proposing amendments to implement the bill including harmonizing existing language and removing redundant language. The first phase of regulatory amendments was adopted by the Commission at its December meeting. This memorandum addresses the second phase of regulations.

III. Summary of Proposed Regulatory Actions for January Meeting

During the second phase of the AB 249 regulatory process, staff is recommending amendments to the following eight regulations:

1. Regulation 18401 – Required Recordkeeping.

Existing Section 84104 requires each candidate, treasurer, principal officer, and elected officer to maintain detailed accounts, records, bills, and receipts necessary to prepare campaign

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.

statements, to establish that they were properly filed and to otherwise comply with the Act. Regulation 18401 further clarifies these recordkeeping requirements. AB 249 amends Section 84305 to include a definition of mass electronic mailing as well as sender identification requirements for mass electronic mailings. AB 249 also includes amendments to Section 84501 that reference the intermediary requirements of Section 84302, adding a requirement to disclose the names, and street addresses, in addition to occupation and employer information, of the contributors who earmarked funds, along with the amount of the earmarked contribution, when an earmarked contribution is received by a primarily formed committee from another primarily formed committee.

In response to comments received at an interested persons meeting staff proposes additional recordkeeping requirements for earmarked contributions including retention of documentation showing which funds received by a committee have been earmarked and documentation showing when such funds have been contributed by one committee to another. Also, staff provides an example of a reasonable accounting method to be used for purposes of Sections 84501(c)(3)(A) and 85704(d) and requires documentation showing the method used to make the determination of which top contributors are disclosed by a committee that has received some earmarked funds but given some of those funds to another committee.

Staff also proposes requiring committees to keep original source documentation for electronic mass mailings including information about the time and date any such mailings were sent, along with a sample of the electronic mass mailing. This is similar to the recordkeeping requirements for non-electronic mass mailings. The staff proposal also includes clarification that retention of the last four digits of a credit card number, rather than the full number, is sufficient when keeping records of contributions received via electronic transactions. Finally, staff proposes adding a provision to this regulation requiring committees to keep a copy of campaign statements and reports filed as part of their records.

2. Regulation 18420.1 – Payments by State or Local Agencies for a Campaign Related Communication.

Current Regulation 18420.1 clarifies when a payment of public moneys by a governmental agency for a communication that expressly advocates for or against a candidate or measure is a contribution under Section 82015 or an independent expenditure under Section 82013. The regulation also contains examples of “mass media advertising” that include only television or radio spots.

Staff proposes amending Regulation 18420.1 to replace a reference to Regulation 18225 with a reference to Section 82025 because AB 249 has moved the provisions found in Regulation 18225 into Section 82025. At its December meeting, the Commission approved repeal of Regulation 18225 for this reason. Additionally, staff proposes modernizing this regulation’s examples of “mass media advertising” to include electronic media.

3. Regulation 18432.5 – Intermediary.

Existing Section 84302 prohibits any person from making a contribution on behalf of another person, or from acting as an intermediary or agent of another, without providing to the recipient of the contribution the full name, address, occupation and employer of the true source of the contribution as well as his or her own name, address, occupation and employer. The recipient of such a contribution must disclose both the intermediary and the true source of the contribution. AB 249 amends Section 85704 to incorporate intermediary disclosure requirements of Section 84302 for earmarked contributions. Staff proposes amendments to Regulation 18432.5 to incorporate this change.

4. Regulation 18440 – Telephone Advocacy.

Existing Section 84310 prohibits a “candidate, committee, or slate mailer organization” from expending campaign funds to pay for telephone calls that are similar in nature and aggregate 500 or more in number if those calls advocate support of, or opposition to, a candidate, ballot measure, or both, unless the organization that authorized or paid for the call is disclosed to the recipient of the call. AB 249 amends Section 84310 so that the prohibition applies to a “candidate, candidate controlled committee established for an elective office for the controlling candidate, political party committee, or slate mailer organization” rather than a “candidate, committee, or slate mailer organization.” AB 249 also amends Section 84310 by adding new subdivision (d) to that section, which provides that “[t]his section does not apply to a telephone call that is paid for by an independent expenditure.” Staff proposes amendments to Regulation 18440 to incorporate these changes.

5. Regulation 18450.4 – Contents of Disclosure Statements. Advertisement Disclosure.

Current Regulation 18450.4 clarifies the disclosure requirements in existing Sections 84503, 84504, 84506 and 84506.5 for video, audio, print media and electronic media advertisements. AB 249 redefines criteria for disclosure statements on radio, telephone, television, video, print, and electronic media advertisements. (See Sections 84501 through 84504.5.) Therefore, most of the provisions of Regulation 18450.4 are no longer applicable or needed. A reference to the use of aggregation rules in Regulation 18215.1 to determine when a contributor has reached the \$50,000 disclosure threshold is one piece of existing regulation 18450.4 that is not covered by AB 249. Staff proposes moving this provision into Regulation 18450.1, which is also noticed to be heard before the Commission, and the repeal of Regulation 18450.4 for these reasons.

6. Regulation 18531.10 – Communications Identifying State Candidates.

Section 85310 requires any person who makes a payment of \$50,000 or more for a communication disseminated within 45 days of an election that clearly identifies a candidate for elective state office, but does not expressly advocate for the election or defeat of the candidate to file a report with the Secretary of State within 48 hours. Regulation 18531.10 defines terms used in Section 85310 and includes a reference to Regulation 18225, which defines the term

“expenditure” under the Act. Regulation 18225 was approved for repeal by the Commission at its December meeting due to its provisions now being contained in Section 82025. Staff proposes amending Regulation 18531.10 to replace a reference to Regulation 18225 with a reference to Section 82025, which now contains the substance of Regulation 18225.

7. Regulation 18533 – Contributions from Joint Checking Accounts.

Section 82015 of the Political Reform Act defines the term “contribution” to mean a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes. Regulation 18533 specifies the person or persons to whom a specific contribution is attributed when the contribution is made from a joint bank account. AB 249 sets forth specific statutory disclosure requirements when a contribution is earmarked. Staff proposes amendments to Regulation 18533 to incorporate a reference to AB 249’s earmarking provisions as they relate to contributions made from joint checking accounts.

8. Regulation 18901.1 – Campaign Related Mailings Sent at Public Expense.

Current Section 89001 states that no newsletter or mass mailing shall be sent at public expense. Regulation 18901.1 further defines when this prohibition applies. Regulation 18901.1 includes a reference to Regulation 18225, which defines the term “expenditure” under the Act. Regulation 18225 was approved for repeal by the Commission at its December meeting due to its provisions now being contained in Section 82025.

Staff proposes amendments to Regulation 18901.1 to replace a reference to Regulation 18225 with a reference to Section 82025, which now contains the substance of Regulation 18225. Staff also proposes deleting a reference to Regulation 18901 and replacing it with a reference to Section 89002 because Senate Bill 45 (Stats. 2017, Ch. 827) signed by the Governor on October 15, 2017 moves relevant provisions of existing Regulation 18901 into Section 89002.

IV. Interested Persons Meeting Comments

An Interested Persons meeting for this second phase of regulations was held on December 12, 2017. Staff received positive feedback on these regulations as well as the following comments:

- Recordkeeping for Advertisements: Regulation 18450.1 currently provides exceptions from disclaimers for certain advertisements if less than 200 items are distributed. While the Commission is separately considering these thresholds, staff was asked to consider additional recordkeeping if the Commission maintains these thresholds. However, Staff believes current recordkeeping requirements are adequate to address these concerns.

- Contributions under \$500 to Membership Organizations: Section 85704(c) provides that funds paid to a membership organization or its sponsored committee in the form of dues, assessments, fees, and similar payments of less than \$500 per calendar year from a single source for the purpose of making contributions or expenditures are not earmarked. Staff received a comment asking for clarification on whether this \$500 threshold is per donor, per candidate or per committee. Staff believes Section 85704(c) is clear as drafted. This threshold is a per calendar year, per donor, per committee threshold. Staff has consulted with California Clean Money Campaign on this interpretation.
- Definition of Earmarking: Staff was asked to clarify how new Section 84501(c)(3) functions with the definition of earmarking found in new Section 85704(b). Section 84501(c)(3) provides that when a primarily formed committee gives earmarked contributions to other primarily formed committees to support or oppose the same candidate or measure the receiving committee must disclose the donor who earmarked funds as a top contributor on its advertisements if the definition of top contributor is met. This pattern would follow the earmarked funds for each committee the funds pass through. There was some concern from interested persons that this language meant that funds given to a committee primarily formed to support or oppose candidate or measure are automatically earmarked because they have been given to a "primarily" formed committee. It is staff's interpretation that the statute is clear as written and that a contribution is not earmarked unless it meets the definition of earmarked as provided in new Section 85704². This interpretation is consistent with the language in AB 249 as new Section 84501(c)(3)(C) clearly states "for purposes of this paragraph, funds are considered "earmarked" if any of the circumstances described in subdivision (b) of Section 85704 apply." Staff consulted with Clean Money Campaign on this interpretation.
- Recordkeeping for Online Contributions: Staff received a comment related to proposed Regulation 18401(a)(2)(B). Currently, Regulation 18401(a)(2)(B) requires a committee to retain a campaign contributor's full credit card number in its records when a contributor

² Section 85704 provides the following definition for earmarked funds:

"For purposes of subdivision (a), a contribution is earmarked if the contribution is made under any of the following circumstances:

(1) The committee or candidate receiving the contribution solicited the contribution for the purpose of making a contribution to another specifically identified committee, ballot measure, or candidate, requested the contributor to expressly consent to such use, and the contributor consents to such use.

(2) The contribution was made subject to a condition or agreement with the contributor that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate.

(3) After the contribution was made, the contributor and the committee or candidate receiving the contribution reached a subsequent agreement that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate."

makes a contribution through an electronic transaction on the internet. In 2016, staff issued the *Piercy Advice Letter*, No. A-16-174, which advises that it is permissible to retain only the last four digits of the credit card number because industry standards and laws that protect against credit card fraud restrict the disclosure, use, and storage of full credit card numbers. Staff received a comment at the interested persons meeting stating that it is burdensome for a committee to retain credit card numbers in part or full from contributors that make contributions through the internet because some vendors do not readily supply this information. Staff believes it is important for enforcement and tracking purposes for committees to retain this information in their records.

- Reasonable Accounting Method and Recordkeeping for Earmarked Contributions: Sections 84501(c)(3)(A) and 85704(d) provide that a committee use a reasonable accounting method when determining which top donors meet the monetary thresholds for being disclosed on a campaign advertisement under certain circumstances. Staff received comments from interested persons requesting clarification on what is considered a “reasonable accounting method” for purposes of those sections. Staff has addressed these issues in proposed Regulation 18401 as described above. Staff was asked to include more detail in Regulation 18401 regarding recordkeeping for earmarked contributions and this has also been addressed as described above.

Attachments:

Amendments to Regulation 18401

Amendments to Regulation 18420.1

Amendments to Regulation 18432.5

Amendments to Regulation 18440

Repeal of Regulation 18450.4

Amendments to Regulation 18531.10

Amendments to Regulation 18533

Amendments to Regulation 18901.1