

**KAUFMAN LEGAL GROUP**  
A PROFESSIONAL CORPORATION

August 21, 2018

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**VIA CERTIFIED MAIL & E-MAIL**

Alice Germond  
Chair  
Fair Political Practices Commission  
1102 Q Street, Suite 3000  
Sacramento, CA 95811

Re: **Request for FPPC Opinion Pursuant to Government Code Section 83114**

Dear Chair Germond:

On behalf of twenty-six interested parties, including: the American Association of Political Consultants; the California Political Attorneys Association; the Vice President of Insights, the national marketing research and data analytics association; five California political consulting firms and eighteen California-based polling firms (see Attachment A for full list of those parties requesting this opinion), we respectfully request that the Commission issue an opinion on an issue of vital importance to the polling industry in California. The issue centers on whether professional polling companies will be permitted to continue performing political polling as they have done for over 80 years, or whether this important component of modern political campaigning will be effectively stifled in the face of technological advances in communications.

**Question Presented**

Do the electronic mass mailing campaign advertisement disclosure requirements under Government Code Section 84305 and FPPC Regulation 18435 apply to polls paid for by campaign committees that are sent to potential poll participants via e-mail?

**Background**

Political polling has been a part of American political campaigns dating back to 1824. Polling on behalf of individual campaigns has been conducted for over 80 years, and in the past 45 years,

political polling has become a necessary component of campaign strategy.<sup>1</sup>

Polling conducted on behalf of political campaigns is done for the purpose of informing campaigns about public opinion on numerous topics. Among these topics are: overall support for the candidate or measure within the electorate; overall support of the candidate or measure with the electorate versus his, her or its opponent(s); support for the candidate or measure among specific demographic groups; support for the candidate or measure among registrants of different political parties; and effectiveness of specific campaign messages. Campaigns rely on polling data to guide decisions of where, when and how to spend their campaign resources.

In order to be accurate and effective, political polls have to utilize the relevant technology of the day to reach potential voters and garner responses to the poll questions. Polls are not accurate unless they gather responses from representative samples of the electorate, or a relevant subset of the electorate. Without a representative sample, poll results are useless.

To obtain a representative sample of the electorate, the method by which people receive information is highly relevant. For years, professional polling was done via the telephone, as this was the primary means by which people communicated. However, the use of the telephone as the primary means of communication has changed rapidly with the advent of the internet and mobile communications.<sup>2</sup>

Representative sampling has evolved due to these changes in technology. Different demographic groups now receive information through different modes of communications. This is also true particularly for different age groups. For example, voters under the age of 30 generally do not possess land line phones. Therefore, in order to acquire accurate polling data and reflect all necessary demographic groups, it has become necessary to transmit polling data via alternative means of communication.

E-mail polls conducted by professional polling firms on behalf of political campaigns are identical to traditional telephonic polls in terms of their content. They are conducted by firms, such as those submitting this request for an opinion, and they solicit the participation of individuals who have been selected through a process involving a representative sampling of voters. The e-mail generally solicits the recipient to participate in the poll (or survey, as it is sometimes called), and asks the recipient to click on a link in the e-mail to respond to the listed questions.

In a traditional telephonic poll, the person placing the call (or automated system) solicits the recipient to participate in the poll or survey. If the call recipient agrees to participate, he or she is then asked to respond to questions read from a list orally by the person or system placing the call. Thus, there is no difference in content between a telephonic and an e-mail poll.

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<sup>1</sup> The Evolution of Election Polling in the United States D. Sunshine Hillygus *Public Opinion Quarterly*, Volume 75, Issue 5, 1 December 2011, Pages 962-981, <https://doi.org/10.1093/poq/nfr054>

<sup>2</sup> See The Evolution of Election Polling in the United States, *supra*.

Polls conducted by professional polling companies are not intended to influence voters. Individuals who are targeted for a poll solicitation are selected to form as accurate a representation of the electorate as possible. The poll questions, which vary in content, are not used for or intended to persuade voters. Even when questions are asked using language that states something positive about a candidate or measure, the purpose of the language is to identify which arguments the campaign can use most effectively, not to influence voters with the positive or negative information. In fact, poll questions are frequently paired with positive information about a competing candidate or measure. Again, this information is not presented to persuade voters, but rather to gather information to guide the campaign's future activities, including subsequent communications that may be intended to influence the electorate.

In the past, when polling was strictly done telephonically, there were no state statutes or regulations that required a poll to be identified as being paid for by a campaign or committee. As polling has shifted to include methods of communication such as e-mail, no statute, FPPC regulation or FPPC guidance has been developed to address changing technologies in the context of polling. No advice letters on this topic have been published, nor have regulations been promulgated, and the issue is not addressed in any FPPC manuals. The only "guidance" from the FPPC has come from a recent FPPC enforcement case.

That matter, FPPC case, No. 16/19843 (Moore), came before the Commission at its June 21, 2018 meeting. In the *Moore* case, the Commission classified an e-mail poll sent out by a professional polling firm on behalf of a city council candidate as a "mass mailing," and imposed a penalty on the campaign because the e-mail poll did not contain campaign advertising disclosure required of mass mailings. The Commission approved the decision by a 3-0 vote as part of its consent calendar, without discussion.

However, nothing in the materials presented by the Enforcement Division or other Commission staff highlighted the novelty of the issue being considered. Nor were the Commissioners made aware that they were making new policy via this enforcement decision without any input from the public.

Requiring advertising disclosure on legitimate e-mail polls renders them ineffective and valueless. First, if a recipient sees a disclaimer for a specific candidate or ballot measure campaign on the e-mail, he or she will be much less likely to participate. Second, those who choose to participate are likely to be individuals who feel strongly one way or the other about the candidate or measure, and will want to either "help" or "hurt" the candidate or ballot measure sponsoring the poll. Thus, knowledge about who paid for a poll skews the poll results and prevents the poll from receiving responses from a truly representative section of the electorate.

If, on the other hand, polling firms simply choose not to use e-mail solicitations, this too will skew the results because, as noted previously, a significant segment of the electorate now primarily receives its information through electronic modes of communication.

The purpose of this opinion request is to have the Commissioners consider this important policy issue and provide guidance to the public and the regulated community. We have made inquiries

with the Legal Division about the FPPC's policy on this issue and have not received any clarification. Further, we understand the Commission is without an Executive Director and General Counsel. However, this matter is urgent -- as the General Election is just over two months away and e-mail polls are already in the field or being planned. Literally, the way campaigns have operated for decades is being threatened. Given the urgency of this matter, the issue should be considered and addressed by the Commission immediately.

### **Relevant Law**

This issue arises under the statute and regulations governing "mass mailings." A "mass mailing" is defined under the Political Reform Act (the "Act") as "over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry." (Government Code §82041.5.) This definition has been in the Act in substantially the same form since its passage in 1974. Obviously, e-mail did not exist in 1974 when this section was originally written.

FPPC Regulation 18435 further defines "mass mailings." This Regulation was amended in 2012 to include e-mail communications. However, Government Code Section 84305 (Requirements for Mass Mailings) was amended by the Disclose Act in 2017 to include a definition of "mass electronic mailing" and the disclosure requirements associated with such communications. As a result, the Commission amended Regulation 18435 again in December 2017 to delete the reference to e-mail communications since it was provided for in the statute.

Thus, Government Code Section 84305 contains the current definition of "mass electronic mailing" and the applicable disclosure requirements. A "mass electronic mailing" means "sending more than two hundred substantially similar pieces of electronic mail within a calendar month." (Section 84305(e)(1).) A "sender" means "the candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing . . ." (Section 84305(e)(2).) The statute also states: "To 'pay for' a share of the cost of a mass mailing means to make, to promise to make, or to incur an obligation to make, any payment: (A) to any person for the design, printing, postage, materials, or other costs of the mailing, including salaries, fees, or commissions, or (B) as a fee or other consideration for an endorsement . . . in the mailing." (Section 84305(e)(3).)

Two things are clear from the history and content of the law regarding electronic mass mailings. First, nowhere is there any reference to a poll in the definition or disclosure requirements. Second, the regulation of mass electronic mailings is relatively recent and has undergone much change even in this short period of time.

We respectfully submit that professional polls e-mailed to potential poll respondents should not be placed within the definition of "electronic mass mailing." The definitions of the terms "mass mailing" and "electronic mass mailing" are clearly designed to ensure that campaign communications distributed by these means provide disclosure of the source of the

communication. Polling e-mails – just like polls conducted by telephone -- are not campaign communications in this sense. They are designed to gather impartial data for campaigns, not to influence the recipients of those communications one way or another. Committees do not pay polling companies for the polling communications themselves; rather, they pay for the poll results that occur *after* the communications are made.

For these reasons, the mass mailing disclosure requirements do not encompass polls under the current statutory and regulatory language, and the Act was never intended to include polling communications. The Enforcement Division has unilaterally chosen to extend these laws to polls without any guidance from the Commission, creating a chill on polling activities in California.

### **Standing for Opinion Request**

Any person may request an opinion from the FPPC with respect to their duties under the Act.<sup>3</sup> Under FPPC Regulation 18320, the Executive Director makes the initial determination as to whether an opinion request is granted or denied. Any member of the Commission may request a review of a denied request by the Executive Director.<sup>4</sup> Ultimately, the Commission itself is responsible for the policy articulated in the opinion and issuance of the opinion itself.<sup>5</sup>

As professional campaign vendors, political consultants and pollsters are required to comply with the Act. As such, their duties under the Act with regard to whether or not advertisement disclosures are required on e-mail polls is an appropriate matter for issuance of a Commission Opinion. No current guidance exists other than an enforcement decision that received no public input and no policy decision from the Commission.

Finally, FPPC Regulations identify relevant “criteria” under which an opinion request may be denied. None of those criteria are applicable to this request.<sup>6</sup>

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<sup>3</sup> **Government Code § 83114. Requests For and Issuances of Opinions; Advice.**

(a) Any person may request the Commission to issue an opinion with respect to his duties under this title. The Commission shall, within 14 days, either issue the opinion or advise the person who made the request whether an opinion will be issued. No person who acts in good faith on an opinion issued to him by the Commission shall be subject to criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request. The Commission’s opinions shall be public records and may from time to time be published.

<sup>4</sup> See FPPC Regulation 18321.

<sup>5</sup> See Government Code Section 83114.

<sup>6</sup> **FPPC Regulation 18320. Requests for Opinions.**

(a) Opinion requests may be submitted to the Commission by any person whose duties under the Act are in question or by that person's representative.

(1) The identity of the person whose duties are in question shall be provided with the opinion request. If the opinion request is submitted by the representative of several persons similarly situated, the identity of at least one such person shall be provided with the opinion request.

(2) The immunity provided by Government Code section 83114 shall extend only to the person or persons identified in the opinion request.

(b) Opinion requests shall present all material facts as concisely as possible and shall state the question or questions based on the facts.

(c) The Commission staff shall maintain a master file containing all opinion requests. This file shall be open to public inspection.

(d) The Executive Director shall determine whether to grant or deny opinion requests.

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## Conclusion

The requesting parties, who collectively represent the interests of all the political consultants and virtually all of the major political polling entities in California, respectfully and urgently request the Commission to consider and provide an opinion on this very important issue. The Enforcement Division has made a major policy decision unilaterally changing the law applying to polls in the middle of an election year – a decision that has thrown into chaos the ability of campaigns in California to effectively conduct polling -- and the Legal Division has been unable to provide clarity on this crucial issue.

As a result, the Commission itself should consider this issue, with appropriate public input, and provide guidance as quickly as possible through an FPPC opinion.

We thank you for your consideration of this request.

Sincerely,



Stephen J. Kaufman

Gary S. Winuk

SJK:VCC

cc: Commissioner Brian Hatch  
Commissioner Allison Hayward  
Commissioner Frank Cardenas

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(e) Within 14 days after the request is submitted, the person making the opinion request shall be notified in writing of the decision of the Executive Director. If the opinion request is denied, the notification shall state the reason for the denial and shall advise the person submitting the request of his right to appeal to the Commission pursuant to 2 Cal. Code Regs. section 18321.

(f) Among the criteria upon which denial of an opinion request may be based are the following:

- (1) The question raised is covered by Commission regulations.
- (2) The question raises no substantial question of interpretation and, therefore, requires only a routine reply more appropriately made by staff.
- (3) The person who made the request does not have sufficient interest (standing) in the question to justify an opinion being issued.
- (4) The question is hypothetical. However, opinion requests may be granted if the hypothetical facts stated represent an intended course of conduct which is contingent on the Commission's opinion.
- (5) The question is overbroad in that it asks for an interpretation of the Act in general terms.
- (6) The request does not present material facts and does not state a question based on the facts presented.
- (7) The question is outside the scope of the Political Reform Act.

# **ATTACHMENT A**

American Association of Political Consultants (AAPC)

California Political Attorneys Association (CPAA)

Mark Mellman, Chairman of the Board	AAPC Board Chairman, President & CEO, The Mellman Group
Tom Shepard, President	AAPC Board President, President & CEO, Tom Shepard & Associates
Rose Kapolczynski, Vice President	AAPC Board VP, President, Rose Kapolczynski Consulting
Rebecca Donatelli, Secretary/Treasurer	AAPC Board Secretary/Treasurer, President, Campaign Solutions
Jef Pollock	AAPC Executive Committee; President, Global Strategy Group
Trey Richardson	AAPC Executive Committee; Managing Partner, Sagac Public Affairs, LLC
Howard Feinberg	Vice President of Advocacy, Insights Association
David Metz	Partner & President, FM3
Amy Simon	Founding Partner, Goodwin Simon Strategic Research
Ben Tulchin	President, Tulchin Research
Christopher Wilson	Partner and CEO, WPAi
David Binder	President, Binder Research
Dave Mermin	Partner, Lake Research
Bryan Godbe	President, Godbe Research
Timothy McLarney, PhD	President, True North Research
Wayne Johnson	President, SmithJohnson Research
John Nienstedt, Sr.	President & CEO, Competitive Edge Research
Lisa Grove	Partner, Anzalone Liszt Grove Research
Paul Mitchell	Vice President, Political Data, Inc.



**Nathan Klein**

**Lead Pollster & Founder, Olive Tree Strategies**

**Shakari Byerly**

**Partner, EVITARUS, Inc.**

**Ruth Bernstein**

**President & CEO, EMC Research**

**Adam Probolsky**

**President, Probolsky Research**

**Joel Benenson**

**Founding Partner & CEO, Benenson Strategy Group**