



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

**To:** Law and Policy Committee

**From:** Thomas Jones, Executive Director  
Dave Bainbridge, General Counsel

**Subject:** CPAA Request for Regulatory Changes in 2019

**Date:** May 31, 2019

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## **BACKGROUND AND SUMMARY**

The Commission adopted a regulation schedule for 2019 at its February 21, 2019 meeting. The California Political Attorneys Association (CPAA) submitted a letter to the Commissioners dated April 1, 2019 requesting additional regulatory changes in 2019.

In response to the CPAA letter, the Commission at its May 16, 2019 meeting instructed staff to consider CPAA's proposed regulatory changes and advise the Law and Policy Committee on the requests, as well as how it would impact the current regulation schedule.<sup>1</sup>

FPPC staff has reviewed the proposals. While some of the recommendations present minor changes to the current regulations, the recommendations as a whole concern significant policy considerations for the Commission. Since none of the proposed changes present critical or emergency situations that would compel the disruption of the current regulations schedule adopted by the Commission, staff recommends the Commission consider these proposals in developing the 2020 regulations schedule. In the alternative, an item currently on the regulation calendar for later this year could be moved to next year to make room for these proposals.

## **PROPOSALS**

The proposals from CPAA are largely aimed at reducing reporting burdens for independent expenditures. Staff has performed an initial analysis of the proposals, which is summarized below.

### **1. Top 10 Contributor List**

Background: Committees primarily formed to support state ballot measures committees, and committees primarily formed to make independent expenditures supporting/opposing state candidates, that receive contributions of \$1 million or more for an election must provide a list of their top 10 contributors of \$10,000 or more.<sup>2</sup> The lists are filed with the Commission and published on the Commission's website.

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<sup>1</sup> The proposal concerning disclosures on large sign advertisements is not discussed in this memo because that provisions of law is the subject of pending legislation.

<sup>2</sup> Gov't Code §84223

**(a) \$10,000 threshold:**

CPAA is requesting a regulatory change whereby the committee would not need to update the list unless the additional contributions totaled \$10,000 or more. Section 84223(c)(2)(B) requires a committee to provide an updated top 10 contributor list to the Commission when “a person who is an existing top 10 contributor makes additional contributions to the committee.” This proposal would not greatly impact disclosure of campaign activity and could lessen the reporting burden on those committees that are required to file top 10 list.

Whether creating the \$10,000 threshold would exceed the Commission’s regulatory authority is an issue to consider since the statute requires an updated list when a top 10 contributor makes additional contributions. The Commission can adopt regulations that carry out the purposes and provisions of the Act.<sup>3</sup> Any regulation adopted by an agency must be consistent with the statute and reasonably necessary to effectuate the purpose of the statute.<sup>4</sup> Creating a \$10,000 threshold for amending a top 10 list where there was none would place a limitation on the effect of the statute, so staff recommends the issue be researched further in order to present a recommendation to the Commission.

**(b) Disclosure of top contributors:**

Section 84223(b)(1) authorizes the Commission to require a committee filing a top 10 list that lists another committee on its top 10 list to identify top contributors to the contributing committee. As a result, the Commission adopted Regulation 18422.5(a)(5), which requires a committee that lists a state recipient committee on its top 10 list to also disclose the top two contributors of \$50,000 or more to that committee.

CPAA is requesting the Commission eliminate this requirement to simplify the process for completing and updating the top 10 list.

Eliminating this requirement would make it more difficult for the public to find meaningful information but it would not eliminate the disclosure of this information since contributors would be disclosed on campaign statements and reports for the contributing committee. However, the information would no longer be summarized in one place but instead would require a person reviewing the top 10 list to go to the SOS website and review campaign statements to determine who contributed to a contributing committee.

**2. Independent Expenditure Reporting**

Background: In general, the reporting requirements for independent expenditures are stricter. Independent expenditures are, by definition, communications to the public regarding a candidate or measure. Therefore, timely disclosure of those independent expenditures is more urgent than a contribution, which is not typically a direct communication. Also, the source of an independent expenditure is often less clear than a communication by a candidate or ballot measure, which

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<sup>3</sup> Gov’t Code §83112

<sup>4</sup> Gov’t Code §11374 circa 1974.

may heighten the importance of timely disclosure. These differences likely account for the current differences identified by CPAA between the rules for reporting independent expenditures and contributions. As discussed below, some of the requested proposal would have very limited effect on the timing of disclosure of independent expenditures while others would potentially have more significant impact on disclosure.

**(a) Deadline for reporting IEs made on a weekend or holiday:**

CPAA proposes to allow 24-hour reports for independent expenditures to be filed on the first business day after a holiday or weekend, if the report due date falls on a holiday or weekend.

Permitting committees to file late independent expenditure reports on the first day following a holiday or weekend, except on the weekend before an election, would not significantly impact disclosure.

**(b) Payroll date as the date of an independent expenditure:**

CPAA proposes to allow committees to use the payroll date as the date that an independent expenditure is “made,” insofar as it relates to staff time.

This exception would make reporting this category of independent expenditures simpler. But this exception would also delay disclosure of these independent expenditures by a couple weeks in some circumstances. If the Commission is inclined to adopt this exception to the 24-hour reporting requirement, staff recommends the exception not include any delay in reporting if the pay period ends on or after the relevant election.

**(c) Disclosing contributions on late independent expenditure reports:**

CPAA proposes to eliminate the requirement that a committee report contributions on a late independent expenditure report (Form 496) if the contributions were previously reported on a late contribution report (Form 497).

This requested regulatory change appears to conflict with the statute governing late independent expenditure reports. Late independent expenditure reports are required to report the late expenditure(s) made by the committee that triggered the report, as well as contributions received by the committee since its previous campaign statement.<sup>5</sup> This requirement helps to identify likely funding sources for independent expenditures on the report. The Commission could not do away with this statutory requirement through regulation. It would require a legislative change.

Further, the place of filing a late independent expenditure report and a late contribution report is not the same. An independent expenditure report is filed in the jurisdiction of the candidate or measure for whom the independent expenditure is made. A late contribution report is filed in the jurisdiction where the committee making or receiving the contribution files its campaign statements. Not requiring both reports would lead to incomplete disclosure in many instances.

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<sup>5</sup> Gov't Code §84203(b)

Lastly, the requirement to report contributions received on a late independent expenditure report is not overly burdensome since it does not require the filing of an additional report, it simply requires the disclosure of information the committee is required to maintain and disclose on campaign statements.

To the extent the Commission seeks to consolidate reporting requirements and alleviate the likelihood that a committee overlooks one of the two separate reporting requirements, the Commission may want to explore combining the late independent expenditure report and the late contribution report into a single form with clear instructions as to when the form must be filed in multiple jurisdictions.

**(d) 20 percent margin of error on late independent expenditure reporting:**

CPAA proposes to allow a 20% margin of error for estimates on its 24-hour independent expenditure reports, making it similar to the regulation relating to 24-hour in-kind contribution reports. A committee that estimated its independent expenditures within 20% of the actual cost would not be required to file an amended independent expenditure report.

While this proposed regulatory change would somewhat reduce the accuracy of late independent expenditure reporting, it likely would not significantly impact disclosure. However, the Commission may want to consider whether the justification for the 20% margin of error is similarly justified in the context of independent expenditures. A committee making an independent expenditure is in a better position to accurately determine the cost of those expenditures as compared to a committee receiving contributions.

**REGULATION SCHEDULE**

The regulatory changes requested by CPAA, while simple in concept, touch on some significant policy considerations for the Commission and require additional analysis by staff. As a result, if the Commission is inclined to consider moving forward with some or all of these recommendations, staff suggests that this be done on next year's regulation calendar. While the proposed changes touch on campaign issues that will be relevant during the 2020 election year, the requested changes do not address gaps or ambiguity in the law so the potential regulatory changes are not urgent.

In the alternative, the Commission could choose to prioritize one of the listed proposals to replace a current regulation project for the second half of the year. That regulation change would then be postponed to next year. If the Commission elects to move one of the currently scheduled regulation projects, staff would recommend delaying the Sponsored Committee Regulation scheduled for adoption in October or the Multipurpose Organization Regulation scheduled for adoption in September because these projects are still conceptual in nature.

Attachments: CPAA letter  
Regulation calendar for 2019