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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, Hayward, and Wilson

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Update of Commission Regulations in Response to the Enactment of AB 902 and AB 903 and to Codify Recently Issued Formal Written Advice

Date: July 6, 2020

Requested Action and Summary of Proposal

Staff proposes technical and nonsubstantive revisions to the Commission’s regulations in response to the enactment of legislation updating the Political Reform Act (the “Act”)¹ and to codify recently issued formal written advice. The proposed update would harmonize those regulations with changes to the campaign disclosure provisions of the Act resultant from the enactment of Assembly Bill 902 (Stats. 2019, ch. 312; “AB 902”) and Assembly Bill 903 (Stats. 2019, ch. 102; “AB 903”), both of which were sponsored by the Commission. The proposed update would amend Regulation 18431 to codify recently issued formal written advice clarifying that, while a subvendor payment to a firm or business entity that is paid to provide canvassing, door-to-door solicitation, or signature gathering is a reportable campaign expense, the name of an individual canvasser, door-to-door solicitor, or signature gatherer is not required to be reported. The proposed update would also make other conforming and nonsubstantive changes to the Commission’s regulations.

Background

AB 902

AB 902 made temporary changes to processes associated with the Act’s requirement that certain committees disclose their top 10 contributors to accommodate the pending completion of the Secretary of State’s Cal-Access Replacement System Project (“CARS”), and codified numerous Commission Regulations relating to campaign disclosure.

¹ The Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code unless otherwise indicated. The Commission’s regulations interpreting the Act are contained in 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

The “California Automated Lobbyist and Campaign Contribution and Expenditure Search System” (“Cal-Access”) is a publicly accessible database maintained by the Secretary of State that provides financial information supplied by state candidates, donors, lobbyists, and others.² Enacted in 2016, Senate Bill 1349 (stats. 2016, ch. 845) established CARS to replace Cal-Access with a more efficient, flexible, and sustainable system which is easier to use and provides increased transparency. The Secretary of State is currently in the process of completing CARS, which is scheduled for implementation in February 2021. (See Senate Bill 84 (Stats. 2019, ch. 30).)

Section 84223 requires each committee primarily formed to support or oppose a state ballot measure or state candidate that raises \$1,000,000 or more to maintain and update a top 10 contributor list and submit the list to the Commission for publication. Prior to the passage of AB 902, any time a person on a top 10 contributor list made an additional contribution to the committee, the committee was required to amend the top 10 list to reflect the additional contribution. AB 902 added a threshold of \$5,000 to that requirement so a committee would only be required to revise its top 10 contributor list if the person’s additional contribution meets or exceeds that threshold. This change to Section 84223 is only in effect until the Secretary of State’s certification of CARS.

Upon the Secretary of State’s certification of CARS, current Section 84223 is repealed, and a new version of Section 84223 becomes operative. (Current Section 84223(e); new Section 84223(e) set forth in SEC. 13 of AB 902.) The new version of Section 84223 will place the duties to maintain and post top 10 contributor lists on the Secretary of State, and will require subsequent amendments to, or rescission of, Regulation 18422.5 upon becoming effective.

AB 903

As pertinent to the update of the Commissions Regulations at issue, AB 903 amended Section 87207 of the Act to clarify that any person required to file statements of economic interest must include each source of income’s “street address” under the Act, but only for the purposes of the campaign reporting provisions of Chapter 4. Current Regulation 18421.2(a) does not apply to Section 87207 or other references to “street address” outside of Chapter 4, including the Act’s conflict of interest and gift provisions.

Regulation 18431

Section 84211 of the Act specifies what information must be disclosed on campaign statements. For expenditures of \$100 or more made to a single payee, committees must provide the name and address of the payee as well as the amount and a description of the payment. (Section 84211(k).) For payments made through an independent contractor or agent, commonly referred to as subvendor payments, Section 84211(k)(6) provides that committees must disclose the same information for “each person, if different from the payee, who has provided consideration for an expenditure of five hundred dollars (\$500) or more during the period covered by the campaign statement.” In conjunction with Section 84211(k)(6), Section 84303(a) provides that a committee

² The Secretary of State developed Cal-Access in consultation with the Commission pursuant to the “Online Disclosure Act of 1997” (Stats. 1997, ch. 866), which added Chapter 4.6 (commencing with Section 84600) to the Act.

must report any expenditure of \$500 or more made by an agent or independent contractor on behalf of the committee as if the committee had made the expenditure itself, unless the expenditure is for “overhead or normal operating expenses.”

Regulation 18431 sets forth which types of expenditures by a committee’s agent or independent contractor must be reported under Section 84303, including payments to vendors and subvendors. Regulation 18431(a)(2)(D) currently provides that subvendor payments for “surveys, polls, signature gathering and door-to-door solicitation of voters” must be reported under Section 84303. However, as recently advised in the *Sutton* Advice Letter, No. I-19-190(a):

[W]e must read Regulation 18431(a)(2)(D) in conjunction with applicable case law. The U.S. Supreme Court in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), struck down a Colorado law requiring identification of each paid petition circulator and the total amount of money paid to each circulator. In light of *Buckley*, the Commission itself supported emergency legislation [Senate Bill 231 (Stats. 1993, ch. 1140)] to repeal former Section 84211(r) which had required similar disclosure. Accordingly, while a subvendor must report any payment to a firm or business entity that is paid to provide signature gathering or door-to-door solicitation of voters, the names of individual signature gatherers or door-to-door solicitors need not be reported.

The Proposed Update

AB 902

Amend Regulation 18422.5

Existing Regulation 18422.5 governs the submission and posting of a top 10 contributor list by a committee primarily formed to support or oppose a state ballot measure or state candidate that raises \$1,000,000, as required by Section 84223. However, existing Regulation 18422.5 does not reflect the \$5,000 threshold for amending a top 10 list discussed above that was added by AB 902.

More specifically, both former Section 84223(c)(2) and current Section 84223(c)(2) require a top 10 contributor list to be updated upon the occurrence of certain specified events. However, former Section 84223(c)(2)(B) required a top 10 contributor list to be updated when a top 10 contributor “makes additional contributions to the committee,” and current Section 84223(c)(2)(B) instead requires such a list to be updated when a top 10 contributor “makes additional contributions of five thousand dollars (\$5,000) or more in the aggregate to the committee.” Existing Regulation 18422.5(a)(3) restates the requirement of former Section 84223(c)(2)(B). Therefore, the proposed update would amend existing Regulation 18422.5(a)(3) to comport it with current Section 84223(c)(2)(B).

As noted above, current Section 84223 is repealed upon the Secretary of State’s certification of CARS, and as a result, the duty to maintain and update top 10 contributor lists is transferred back to the Secretary of State. This proposal amends existing Regulation 18422.5 only in regard to

current Section 84223. Staff recommends that the Commission delays updating Regulation 18422.5 to accord with future Section 84223 (set forth in SEC. 13 of AB 902) until after certification of CARS to ensure that the future update takes into consideration any new developments relating to CARS during the interim.

Amend Regulation 18426.1

Prior to the enactment of AB 902, former Section 84100(a) provided that “[e]very committee shall have a treasurer.” New Section 84100(a) instead provides that “[e]very recipient committee, as defined by subdivision (a) of Section 82013, shall have a treasurer.” Therefore, AB 902 confirmed the Commission’s longstanding interpretation that neither independent expenditure committees nor major donor committees are required to have a treasurer. (See *Benedetti* Advice Letter, No. A-10-038; *Morton* Advice Letter, No. I-09-119.)

Existing Regulation 18426.1 requires that every recipient committee has a treasurer, authorizes such a committee to designate an assistant treasurer on its statement of organization, and authorizes the assistant treasurer to sign and verify a campaign statement on behalf of the committee if the assistant treasurer prepared and reviewed the statement and signs the statement under penalty of perjury. AB 902 incorporated these provisions of existing Regulation 18426.1 into new Section 84100(a). The proposed update, however, would not delete these provisions of Regulation 18426.1 which were incorporated into new Section 84100(a) in order to maintain the clarity of that regulation. The proposed update would amend Regulation 18426.1 to correct a cross reference within, and to make another nonsubstantive change to, the last sentence of that regulation.

Amend Regulations 18427.1, 18616.4, 18729, and 18941

The proposed update would amend Regulations 18427.1, 18616.4, 18729, and 18941 to delete the portions of those regulations rendered redundant by AB 902. More specifically:

- Existing Regulation 18427.1 sets forth the notice requirements that certain specified candidates or committees must provide to a contributor regarding the contributor’s filing obligations under the Act. New Section 84105, added to the Act by AB 902, codified subdivisions (a) and (d)(2) of Regulation 18427.1.
- AB 902 codified existing Regulation 18616.4(a), which sets forth the definition of a “lobbyist coalition,” as new Section 82038.3.
- Existing Regulation 18729(a) requires specified information to be provided whenever an official must disclose a leasehold interest. AB 902 added new Section 87206.5, which codified Regulation 18729(a).
- AB 902 codified a portion of existing Regulation 18941(a), which defines when a public official “receives” or “accepts” a gift, as new Section 89503.5.

Repeal Regulations 18116, 18117, 18215.1, 18229, and 18996

AB 902 codified the following Commission Regulations:

- Regulation 18116, which provides filing dates for reports and statements. (See Section 81005.)
- Regulation 18117, which provides that a filing officer or filing official’s failure to comply with any duty or provide notice of any filing or disclosure obligation does not affect the duty of a person to file statements or reports required by the Act. (See Section 81010.5.)
- Regulation 18215.1, which governs when contributions are required to be aggregated under the Act. (See Section 82015.5.)
- Regulation 18229, which provides that the term spouse includes registered partners recognized by state law. (See Section 82048.8.)
- Regulation 18996, which governs the scope of audits and investigations of campaign statements and reports. (See Section 90002.)

Because AB 902 codified Regulations 18116, 18117, 18215.1, 18229, and 18996 in their entirety, the proposed update would repeal these regulations to avoid redundancy.

Amend Regulations 18428, 18438.5, 18450.1, 18450.3, 18530.4, 18530.45, 18531.62, 18700, 18943, 18992, and 18998

AB 902’s codification of certain Commission Regulations and the proposed according changes to the Commission’s regulations described above require the amendment of the Commission Regulations, which now contain obsolete cross references (set forth in the heading immediately above), to correct those cross references.

AB 903

Repeal Regulation 18421.2 and Add Regulation 18250

Existing Regulation 18421.2 defines “street address” as “[t]he street name and building number, and the city, state and zip code,” and provides that that definition only applies to Chapter 4 (commencing with Section 84100) of the Act. AB 903’s amendment of Section 87207 pointed up the limited application of that definition because existing Regulation 18421.2 does not apply to that section. Current Section 87207’s use of “street address” in a manner that accords with existing Regulation 18421.2’s definition supports the application of that definition throughout the Act. Therefore, the proposed update would repeal Regulation 18421.2, and recast that provision as new Regulation 18250,³ which would apply the definition of “street address” throughout the Act.

³ Proposed new Regulation 18250 would be located within Chapter 2 (Commencing with Regulation 18200) of the Commission’s regulations, which sets forth defined terms.

Amend Regulation 18431

Existing Regulation 18431 requires a candidate or committee to report an expenditure made by an agent or independent contractor, including any vendor or subvendor, that provides campaign services on behalf of, or for the benefit of, the candidate or committee, including the provision of surveying, polling, signature gathering, and door-to-door solicitation of voters (subdivision (a)(2)(D)). Currently, the scope of Regulation 18431(a)(2)(D) can be read to require a committee reporting a subvendor payment to an individual canvasser, door-to-door solicitor, or signature gatherer to identify that individual if the individual is an independent contractor. However, consistent with previous staff issued advice and Commission actions, as well as applicable constitutional limitations (see *Buckley, supra*, 525 U.S. 182), staff proposes revisions to Regulation 18431 to clarify that names of individual canvassers, door-to-door solicitors, or signature gatherers who are independent contractors are not required to be disclosed.

Record Keeping Requirements for Ballot Measure Petitions

During the May Commission meeting's prenotice discussion of the proposed update, Commissioner Hatch asked about the record keeping requirements to which petitions and signature gatherers are subject in California. Staff research found the Elections Code requires retention of information about signature gatherers. Specifically, Elections Code Section 17200 requires: (1) petitions to be preserved for eight months after the certification of the election results at issue, and (2) petitions to be destroyed thereafter except in certain circumstances, including the election official's receipt of a written request that the petitions be preserved for use in an investigation into election regularities from the Commission or other specified state and local government agencies; and Elections Code Section 104 requires the signature gatherer to sign each section of a petition under the penalty of perjury, thereby affirming a specified declaration which provides certain required information pertaining to the signature gatherer and the petition.

More specifically, Elections Code Section 17200(a) requires the election official charged with receiving the petition to preserve it for eight months after the certification of the results of the election for which the ballot measure qualified or attempted to qualify for placement on the ballot. Subdivision (b) of that section requires the petition to be destroyed unless any of the following conditions is satisfied: (1) the petition is in evidence in some action or proceeding then pending; (2) the elections official has received a written request that the petition be preserved for use in an investigation regarding election irregularities from the Commission, the Attorney General, the Secretary of State, a district attorney, a grand jury, or the governing body of a county, city and county, or district, including a school district; or (3) the proponents of the petition have commenced an examination pursuant to Section 6253.5, in which case the petition shall be preserved for one year from the date the proponents last examined the petition.⁴

⁴ Section 6253.5(a), a provision of the California Public Records Act, provides that petitions, and all memoranda prepared by county elections officials in the examination of the petitions indicating which voters have signed particular petitions, are neither public records nor open to inspection, except by the public officials and employees charged with receiving, examining, or preserving the petitions, unless the petitions are found to be insufficient. If the petitions are found to be insufficient, the proponents of the petitions and their designated representatives are authorized to examine the petitions and memoranda to determine which signatures were disqualified and the reasons therefor. (*Ibid.*) However, the Commission, the Attorney General, the Secretary of State, a district

Elections Code Section 104(a) requires each section of a petition to have attached to it a declaration containing: (1) the name of the circulator; (2) the address of the circulator’s residence (or sufficient information to ascertain the residence’s location); and (3) the dates between which all signatures to the petition were obtained. Elections Code Section 104(b) further requires the declaration to confirm that: (1) the circulator witnessed the appended signatures being written; (2) each signature is genuine; (3) the circulator is 18 years of age or older; and (4) the circulator showed each signer a valid and unfalsified “Official Top Funders” sheet if the petition does not include the “Official Top Funders” disclosure statement required by Elections Code Section 107(b). Elections Code Section 104(c) requires the circulator of a section of a petition to certify that the declaration is true and correct by signing the section under the penalty of perjury.⁵

Amendment of Regulation 18754

Finally, the proposed update would Amend Regulation 18754 to update an obsolete cross reference in subdivision (a)(3)(D) of the regulation and make other technical and nonsubstantive changes to the regulation.

Summary

The proposed update would harmonize the Commission’s regulations relating to campaign disclosure with changes made to the Act by AB 902 and AB 903, make other conforming and nonsubstantive changes to the Commission’s regulations, and would amend Regulation 18431 to clarify that a committee reporting subvendor payments to an individual canvasser, door-to-door solicitor, or signature gatherer is not required to identify that individual.

Attachments:

- Proposed Adoption of New Regulation 18250**
- Proposed Amendment of Regulation 18422.5**
- Proposed Amendment of Regulation 18426.1**
- Proposed Amendment of Regulation 18427.1**
- Proposed Amendment of Regulation 18428**
- Proposed Amendment of Regulation 18431**
- Proposed Amendment of Regulation 18438.5**
- Proposed Amendment of Regulation 18450.1**
- Proposed Amendment of Regulation 18450.3**

attorney, a school district or a community college district attorney, or a city attorney may examine the petitions and memoranda upon approval of the appropriate superior court. (*Ibid.*)

⁵ In addition to these record keeping requirements, Elections Code Section 9609 requires the person, company official, or other organizational officer who is in charge of signature gathering to execute and submit to the proponents a signed statement that acknowledges it is a misdemeanor to knowingly or willfully allow the signatures on a petition to be used for any purpose other than qualification of the proposed ballot measure (under Elections Code Section 18650), and certifies the circulator will not knowingly or willfully allow the signatures to be used for any other purpose. In addition, Elections Code Section 9610 requires a paid circulator to submit to the person, company official, or other organizational officer in charge of signature gathering the same signed statement required by Section 9609.

Proposed Amendment of Regulation 18530.4
Proposed Amendment of Regulation 18530.45
Proposed Amendment of Regulation 18531.62
Proposed Amendment of Regulation 18616.4
Proposed Amendment of Regulation 18700
Proposed Amendment of Regulation 18729
Proposed Amendment of Regulation 18754
Proposed Amendment of Regulation 18941
Proposed Amendment of Regulation 18943
Proposed Amendment of Regulation 18992
Proposed Amendment of Regulation 18998
Proposed Repeal of Regulation 18116
Proposed Repeal of Regulation 18117
Proposed Repeal of Regulation 18215.1
Proposed Repeal of Regulation 18229
Proposed Repeal of Regulation 18421.2
Proposed Repeal of Regulation 18996