



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Germond, Commissioners Cardenas, Hatch, and Hayward

From: Brian Lau, Acting General Counsel
John Feser, Senior Commission Counsel

Subject: Opinion re Application of Section 84305 and Regulation 18435 to Polls
Conducted by Email and Paid for by Campaign Committees.

Date: September 6, 2018

By letter dated August 21, 2018, Stephan J. Kaufman and Gary S. Winuk of the Kaufman Legal Group, on behalf of twenty-six interested parties, requested that the Commission issue an Opinion pursuant to Government Code section regarding the following issue:

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?

The letter stated the request was urgent due to the upcoming November election and requested that the Commission “provide guidance as quickly as possible through an FPPC opinion. The Commission, through its Acting Executive Director, Loressa Hon, granted the request on September 4, 2018. This matter has been scheduled as an agenda item for action by the Commission at the next meeting on September 20, 2018.

As mentioned, the primary issue centers on whether the disclosure requirements of Section 84305 apply to e-mail polls paid for by campaign committees. Section 84305, recently amended by the Disclose Act in 2017 to include a definition of mass electronic mailing, states in relevant part:

(c)(1) A candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee shall not send a mass electronic mailing unless the name of the candidate or committee is shown in the electronic mailing preceded by the words “Paid for by” in at least the same size font as a majority of the text in the electronic mailing.

...

(e) For purposes of this section, the following terms have the following meaning:

(1) “Mass electronic mailing” means sending more than two hundred substantially similar pieces of electronic mail within a calendar month.

(2) “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 which are reportable pursuant to Sections 84200 to 84217, inclusive.

(3) 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 or, in the case of a ballot measure, support or opposition, in the mailing.

(f) This section does not apply to a mass mailing or mass electronic mailing that is paid for by an independent expenditure.

Staff has therefore prepared two draft Opinions for the Commission’s consideration. Should the Commission decide that the statutory language is clear and unambiguous, the Draft Opinion, Attachment A, concludes that polls sent by campaign committees to potential poll participants by electronic mail fall squarely within the plain language of Section 84305, and therefore the disclosure requirements apply. On the other hand, if the Commission determines that the plain language of the statute is ambiguous with respect to this issue and that neutral polls should be excluded from the disclaimer requirement because of their unique nature, as urged by the Requestors, the Draft Opinion, Attachment B, concludes that the electronic mass mailing disclosure requirements under Section 84305 do not apply to legitimate polls conducted by e-mail that are not intended to influence voters.

Attachments:

1- Kaufman Draft Opinion – Attachment A

2- Kaufman Draft Opinion – Attachment B

Attachment A
DRAFT ONLY

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)
)
Opinion requested by)
Stephen J. Kaufman, Esq.)
and Gary S. Winuk, Esq.)
_____)

No. O-18-001
September 6, 2018

BY THE COMMISSION: Stephen J. Kaufman and Gary S. Winuk, on behalf of twenty-six interested parties, have requested an opinion of the Fair Political Practices Commission (“Commission”) on the following question:

QUESTION

Do the electronic mass mailing campaign advertisement disclosure requirements under Government Code Section 84305¹ and FPPC Regulation 18435 apply to polls paid for by campaign committees that are sent to potential poll participants via e-mail?

CONCLUSION

Yes. Section 84305 sets forth disclosure requirements for “mass electronic mailing” of more than two hundred substantially similar pieces of electronic mail within a calendar month. Polls sent by campaign committees to potential poll participants by electronic mail fall squarely within the plain language of Section 84305. If polls by electronic mail were not subject to Section 84305, then the Legislature could have easily done so by enacting an express statutory exception or requiring a disclosure only when the mailing advocates support of, or opposition to, a candidate, ballot measure, or both as required for telephone communications.

BACKGROUND

The following background information was taken verbatim from the letter, dated August 21, 2018, requesting this opinion:

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.²

¹ All statutory references are to the Government Code, unless otherwise indicated.

² The Evolution or 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>

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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.³

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

³ See The Evolution of Election Polling in the United States, *supra*.

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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.

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

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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.

ANALYSIS

A. The Mass Mailings Statute Expressly Applies to Polling by Electronic Mail.

In determining legislative intent, courts look first to the words of the statute, giving them a plain and commonsense meaning. (*People v. Overstreet* (1986) 42 Cal.3d 891, 895.) When the words are clear and unambiguous, there is no need for statutory construction or resort to other indicia of legislative intent, such as legislative history. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal. 4th 342, 349.)

Section 84305, the mass mailings statute, clearly and unambiguously applies to polls sent by campaign committees to potential poll participants by electronic mail. The statute provides in relevant part:

(c)(1) A candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee ***shall not send a mass electronic mailing unless*** the name of the candidate or committee is shown in the ***electronic mailing*** preceded by the words “Paid for by” in at least the same size font as a majority of the text in the electronic mailing.

(2) A committee, other than a candidate controlled committee established for an elective office for the controlling candidate or a political party committee, ***shall not send a mass electronic mailing*** that is not required to include a disclosure pursuant to Section 84502 or 84504.3 ***unless*** the name of the committee is shown in the electronic mailing preceded by the words “Paid for by” in at least the same size font as a majority of the text in the electronic mailing.

(Emphasis added.) Section 84305, subdivision (e)(1) further states that “Mass electronic mailing” means sending more than two hundred substantially similar pieces of electronic mail within a calendar month.

The foregoing statutory language clearly and unambiguously imposes disclosure requirements when more than two hundred substantially similar electronic mail polls are sent by campaign committees to potential poll participants.

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In their letter, the requestors acknowledge that Section 84305 applies, but they analyze the statute's legislative history without first recognizing that the plain and commonsense meaning of Section 84305 applies to polling by electronic mail. As discussed above, the statutory language is clear and there is no need for construction of Section 84305.

B. Requestors' Arguments Further Demonstrate That the Mass Mailing Statute Applies to Polls by Electronic Mail.

The requestors assert that polls by electronic mailing should not be subject to Section 84305 disclosure requirements because (1) there is no reference to a poll in the statute, and (2) mass *electronic* mailing was only recently added to the statute in 2017.

The requestors' arguments are misplaced. Section 84305 applies broadly to all mass electronic mailing without reference to any content or purpose of the communication. Thus, the absence of a reference to polling merely demonstrates the statute's broad application.

The language recently added to Section 84305 provides no basis for the Commission to remove polling from the definition of "mass electronic mailing." If the Legislature intended to exclude polling from Section 84305, then it would have done so. "It is a settled principle of statutory construction that the Legislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. Courts may assume, under such circumstances, that the Legislature intended to maintain a consistent body of rules and to adopt the meaning of statutory terms already construed." (*People v. Scott* (2014) 58 Cal.4th 1415, 1424 [citations and quotations omitted].)

Section 84305, subdivision (f) provides an express exception for mass electronic mailing paid for by an independent expenditure. Applying the principles of statutory construction, the Legislature is deemed to be aware of the express exception set forth under Section 84305, subdivision (f), but it included no express statutory exception for polling.

Requestors explain that, prior to electronic mail, polling was strictly done telephonically without statutory disclosure requirements. However, Section 84305 and its disclosure requirements do not apply to telephonic polls. Neutral telephonic polls are not required to contain a disclosure statement because the Act requires a disclosure statement in a telephone call only if the call is made for the purpose of supporting a candidate, ballot measure, or both. (See Sections 84310, 84501 and 84504.) If the Legislature intended the law to apply equally between telephonic polling, as it has for several years, and polling by electronic mail, then it would have enacted statutory law to reflect that intent.⁴

⁴ See also Commission's opinion *In re Sobieski* (1976) 2 FPPC Op. 73 (finding that disclosure requirements under Section 84305 applied to voter registration card mailings by a committee of the Democratic Party, even though the Commission determined that the mailings did not mention or encourage support of, or opposition to, state candidates).

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For these reasons, the electronic mass mailing disclosure requirements under Section 84305 and FPPC Regulation 18435 apply to polling by electronic mail.

[Optional Language: However, we also recognize that a disclosure statement in an e-mail poll could thwart the very purpose of the poll. Considering the unique purposes of polls, we further find that a disclosure statement is required only at the conclusion of the poll. Under Section 84305(c), a disclosure statement is required “in the electronic mailing.” Accordingly, allowing the disclosure statement at the conclusion of the poll alleviates the possibility of skewing the poll while serving the purposes of the disclosure required under Section 84305.]

WE CONCUR:

[Concurring Commissioners]

Attachment B
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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)
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Opinion requested by)
Stephen J. Kaufman, Esq.)
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No. O-18-001
September 6, 2018

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QUESTION

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?

CONCLUSION

No. The electronic mass mailing disclosure requirements under Section 84305 and Regulation 18435 do not apply to legitimate polls conducted by e-mail that are not intended to influence voters.

BACKGROUND

The following background information was taken verbatim from the letter, dated August 21, 2018, requesting this opinion:

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.¹

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.

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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.²

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.

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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.

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

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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.

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ANALYSIS

Sound public policy reasons dictate that the electronic mass mailing disclosure requirements under Section 84305 should not apply to legitimate polls conducted by e-mail that are not intended to influence voters. Initially, as the requestors' letter explains:

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.” (Section 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).)

It is axiomatic that statutes must be construed so as to give a reasonable and commonsense construction that is consistent with the apparent purpose and intention of the lawmakers, that is practical rather than technical, and that leads to wise policy rather than mischief or absurdity. (*People v. Turner* (1993) 15 Cal.App.4th 1690, 1696, overruled on another

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ground in *People v. Flores* (2003) 30 Cal.4th 1059). Where a statute is susceptible of more than one reasonable interpretation, courts will look to such things as the evils to be remedied, public policy and the statutory scheme of which the statute is a part. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744).

Here, it is not clear that the Legislature intended to include polling within the realm of Section 84305 and its disclosure requirements. To begin, there are no references to polling in the history and content of the law regarding electronic mass mailings. And although they can be viewed as campaign communications in a technical sense, their real purpose, as mentioned, is to gather information from a representative sample of the electorate in order to provide campaigns with useful information about public opinion on several topics.

Moreover, although the process of acquiring this information is different now, the content of current professional polls conducted by e-mail is the same as those that were traditionally conducted by telephone, which never had any disclosure requirements. Placing such requirements on polls conducted by e-mail will only frustrate their purpose by affecting participation, especially with younger voters, and skewing poll results. Indeed, campaigns will be unable to gather information from a representative sample of voters.

What is clear, however, is the important role political polling has played, and continues to play, with respect to individual campaigns and their strategies. As mentioned, it is a tool for campaigns to gather helpful information about topics such as overall support for the candidate or measure within the electorate or among registrants of different political parties, and the effectiveness of specific campaign messages. In general, polling data provides campaigns with a compass on how best to expend campaign resources.

It is noteworthy that polls conducted by professional polling companies are not intended to influence or persuade voters. Instead, they are a tool to gather information to guide the campaign's future activities, including subsequent communications that actually may be intended to influence the electorate.

For these reasons, the electronic mass mailing disclosure requirements under Section 84305 and FPPC Regulation 18435 do not apply to legitimate polls conducted by e-mail that are not intended to influence voters.

WE CONCUR:

[Concurring Commissioners]