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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich and Commissioners Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel
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Subject: Adoption of Proposed New Regulation 18421.10, Reporting Payments in Connection with Amplification of Online Communications

Date: November 8, 2021

Requested Action and Summary of Proposal

Staff presents for Commission adoption a proposed new regulation related to reporting of payments by committees for amplification of online advertisements and online communications under the expenditure reporting requirements of the Act.¹ Staff presented this proposed new regulation at the Commission’s September 2021 meeting for prenotice discussion. The proposed regulation has been updated based on instruction from the Commission at the September meeting.

Background

Amplification

At the April 2021 Commission Meeting, Commissioner Wood raised the issue of the lack of transparency around campaign reporting of expenses to amplify online communications, including campaign advertisements. “Amplification” in this context refers to the practice of creating or increasing the appearance of support or opposition for a candidate or measure online to give it a veneer of popularity. For example, various services sell social media “likes,” “followers,” “views,” etc., often through subcontractors in conjunction with other digital strategy services. Often, these “followers” are not real people, but actually amplification “bots”—automated accounts that retweet, like, and/or share, the customer’s content.

As celebrities, public officials, and “influencers”² compete for clicks and views in the so-called online attention economy, the battle for ever-higher engagement numbers has become big

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.

² An “influencer” in the context of online advertising is an individual with the ability to shape the behavior of others online, such as by encouraging their Instagram followers to buy a certain product, or to vote for a certain candidate in an election. Many influencers earn advertising dollars based on how many followers/friends they have on social media.

business. A 2018 New York Times investigation found that a single company, Devumi, boasted 200,000 customers, ranging from reality TV celebrities to professional athletes, as well as candidates for public office and public officials. This one company alone sold its customers over 200 million Twitter followers, often for pennies per follower.³ Devumi reportedly maintained a stock of at least 3.5 million bots, designed to simulate real people “liking,” and sharing content online. While this particular company shut down in 2019 following the New York times exposé and resulting government scrutiny,⁴ the broader practice of amplifying online communications through bots remains widespread. A study of 2016 election cycle tweets by researchers at the University of Southern California revealed that nearly 15% of Twitter users tweeting during the election were bots, who in turn accounted for nearly 20% of all election tweets.⁵ Likewise, in 2018, Facebook disclosed that up to 60 million Facebook accounts (2-3% of its total users globally) were actually bots—twice as many as previously thought.⁶

Amplification via bots is not limited to social media influencers, reality TV stars, or professional athletes. Among the now-defunct Devumi’s clients were politicians and candidates for public office, including a challenger to then-US House Speaker Paul Ryan.⁷ Beyond Devumi, numerous prominent state and federal candidates/officeholders across parties have been reported to have significant numbers of fake followers on social media.⁸ Whether these candidates or their campaign staff are aware of these fake followers is not always clear. Indeed, it is probable that most high-profile public figures have thousands of fake followers without having done anything to acquire them.⁹ Nevertheless, in some cases, clients approach a firm like Devumi directly with the intent of boosting their apparent popularity online. In other cases, a candidate’s campaign staff might enlist an outside campaign consultancy, which in turn subcontracts with a vendor like Devumi as part of the consultancy’s digital strategy services. In either case, thanks to services like Devumi, the public are led to believe that the candidate or measure in question is more popular (or unpopular) than it is in reality.

³ Nicholas Confessore, Gabriel J.X. Dance, Richard Harris, and Mark Hansen. The Follower Factory, N.Y. Times, Jan 27, 2018, <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>.

⁴ Press Release, New York State Office of the Attorney General, Attorney General James Announces Groundbreaking Settlement With Sellers Of Fake Followers And “Likes” On Social Media (Jan. 30, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-announces-groundbreaking-settlement-sellers-fake-followers>. See also, Press Release, Federal Trade Commission, Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence (Oct. 21, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators>.

⁵ Ian Chaffee. *Real or not? USC study finds many political tweets come from fake accounts*, USC News, Nov. 8, 2016, <https://news.usc.edu/110565/rigged-usc-study-finds-many-political-tweets-come-from-fake-accounts/>.

⁶ Scott Shane and Mike Isaac. *Facebook Says It’s Policing Fake Accounts. But They’re Still Easy to Spot*. N.Y. TIMES, Nov. 3, 2017, <https://www.nytimes.com/2017/11/03/technology/facebook-fake-accounts.html>.

⁷ Confessore, *supra*.

⁸ Boyles, Ann, *What Can Twitter Teach You about the Top 6 US Presidential Candidates?* Moz.com, Feb 10, 2016, <https://moz.com/blog/twitter-top-6-presidential-candidates>.

⁹ Casey Quackenbush. *Celebrities Are Losing Millions of Followers as Twitter Slashes Fake Accounts*, TIME, Jul. 13, 2018, <https://time.com/5337863/twitter-fake-accounts-bots-purge-celebrities/>.

Campaign Expenditure Reporting

A central purpose of the Act is to ensure that “Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.” (Section 81002(a).) To this end, Section 84211(k) of the Act requires a committee, for each person to whom it makes an expenditure of \$100 or more, to report the following information on its campaign statements and reports:

- (1) Their name.
- (2) Their address.
- (3) The amount of each expenditure.
- (4) A brief description of the consideration for which each expenditure was made.

Existing law therefore requires a candidate or committee that makes an expenditure to pay for amplification services to report the expenditure, including a “brief description of the consideration for which each expenditure was made.” Beyond this general requirement, however, there is no explicit requirement that an expenditure made to amplify electronic advertisements or online communications be described with sufficient specificity to inform the public that a committee paid for a communication to be amplified. For example, when reporting an expenditure for amplification of social media messaging on its campaign statements and reports, a committee in describing the consideration for which each expenditure was made might use the codes CNS (campaign consultants), LIT (campaign literature and mailings), or WEB (information technology costs)—none of which tells the public much about the purpose of the payment. By contrast, it would be much more informative if a committee reported an expenditure of \$100 paid to “XYZ Strategies for 10,000 Twitter followers.”

If the communication in question falls under Regulation 18421.5,¹⁰ a committee paying a third party to disseminate favorable or unfavorable online content may be required to report additional information, or, alternatively, ensure that the third party includes a disclosure statement on the communication itself.

However, neither the heightened expenditure reporting requirements nor optional disclosure statement in Regulation 18421.5 would necessarily indicate to the public that a committee had paid for a communication to be amplified. Likewise, current law requires committees to include disclosures on campaign advertisements that identify the committee that paid for or authorized the communication,¹¹ but the advertisement disclosure rules themselves do not require a committee to inform the public with any specificity about payments to amplify advertisements through third parties.

¹⁰ Regulation 18421.5 requires committees to include additional details on campaign reports or, in some cases, include a disclosure statement on the content itself when they pay third parties to provide favorable or unfavorable content about a candidate or ballot measure on a website other than the committee’s own website. In August, the Commission approved updates to Regulation 18421.5 to better address the expansion of platforms on which such paid content now more frequently appears, such as paid posts by social media influencers.

¹¹ “Advertisement” generally means any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures. (Section 84501 et seq.)

Proposed New Regulation

As discussed at the September Commission Meeting, one way in which the Commission could address the lack of transparency around amplification of campaign advertisements and online communications is by adding one or more new, more informative codes to the campaign forms, such as on Form 460, Schedule E, (Payments Made). However, the Secretary of State's Office, which oversees electronic campaign filings, is currently working on the CAL-ACCESS Replacement System (CARS) and may be unable to implement such a change at this time. Therefore, it may be prudent to wait until the system is launched to add any new fields or codes to the campaign forms.

Thus, proposed new Regulation 18421.10 would instead require a committee that makes a reportable expenditure for amplification measures to specifically describe the payments on its campaign statements, including by providing information about the number of likes, retweets, follows, views, etc. the committee purchased.

Changes since Prenotice

At the September Commission Meeting, the Commission instructed staff to revise the definition of “amplification” in subsection (a)(1) of proposed new Regulation 18421.10. Specifically, there were concerns that defining amplification to include “efforts to [...] Boost, prolong, or increase the audience, presence, or visibility of a communication through sharing or other similar means,” would encompass too broad a scope of activities that are not inherently misleading about the level of support or opposition for a candidate or measure —such as search engine optimization,¹² mass emails, or other common online advertising and marketing practices. Staff received similar feedback from USC Gould School of Law Professor Erin Miller, an expert in free speech rights and their application to mass media, who noted that an overly broad definition of amplification might raise constitutional concerns, while providing the public with information that is not particularly useful.

In response to these concerns, staff has deleted subsection (a)(1) of proposed new Regulation 18421.10, as originally written, which instead now defines amplification in subsection (b)(1) as:

efforts to create or increase the appearance of support or opposition for a candidate, committee, or measure online through the purchase of followers, friends, shares, follows, reposts, comments, likes, dislikes, or similar electronic registrations of approval or disapproval that are visible to other users of an online platform, service, web application, digital application, or Internet site.

These changes narrow the scope of the proposed new regulation to focus on ensuring truthful disclosure of expenditures where there is currently a lack of transparency—namely, the practice of paying to manufacture or inflate support for or

¹² Generally speaking, search engine optimization (“SEO”) is the process configuring a website so that it is more easily discoverable in search engine results. (*See, e.g.*, GOOGLE SEARCH CENTRAL, <https://developers.google.com/search/docs/beginner/seo-starter-guide> (last visited Oct. 20, 2021)).

opposition against a candidate or measure—without altering the disclosure requirements for expenditures for less misleading, routine digital advertising practices. Staff has also now included definitions for the terms “web application” and “digital application” that were recently adopted as part of Regulation 18421.5, as the same terms are also used in this proposed regulation.

Additionally, at the September Commission meeting, there was discussion of removing the requirement to disclose the *number* of certain types of amplification purchased. Current regulations do not require reporting of the number of items purchased by a committee in other contexts. However, the ability to artificially enhance one’s apparent popularity through the purchase of bots and other services online does not have an equivalence in traditional campaign practices. In other instances, existing regulations require more specific reporting on campaign statements for certain types of expenditures to ensure adequate public disclosure. For example, Regulation 18421.5 requires a committee that pays for favorable or unfavorable content in the form of a blog, social media platform post, or online video to report “specific details of the payment,” including the name of the payee, the name of the individual providing content, and the name of the website or the URL on which the communication is published, unless the communication itself contains a disclosure.

Similarly, when reporting an itemized expenditure for a gift, a committee is required to briefly describe the political, legislative, or governmental purpose of the expenditure. (Regulation 18421.7.) Further, the Act recognizes the need for additional disclosure in situations where the public is likely to be confused or misled regarding support or opposition for a particular candidate. For example, Section 84511 requires disclosure of a paid spokesperson on campaign advertisements. Similarly, an advertisement supporting or opposing a candidate paid for by an independent expenditure must include a disclaimer indicating the advertisement was not authorized by a candidate. (Section 84506.5.)

Staff offers the option to remove the following language from lines 6-8 of page 1 of the proposed draft regulation should the Commission decide not to require the disclosure of the number of types of amplification purchased: “and a detailed description of the number of shares, follows, reposts, comments, likes, dislikes, or similar electronic registrations of approval or disapproval purchased”.

Summary

Proposed new Regulation 18421.10 would provide the public with more information about payments by committees to amplify online advertisements and communications by requiring committees that make expenditures for amplification to include more specific information about such payments on the committee’s campaign statements.

Attachment:

Proposed New Regulation 18421.10