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To: Chair Miadich, Commissioner Baker

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Subject: Pre-Checked “Contribution” Boxes Resulting in Involuntary Recurring Payments to Candidates and Committees – Alternatives to AB 775

Date: September 2, 2021

INTRODUCTION

At the July 15, 2021 Commission meeting, Legal Division staff presented a memo on the topic of pre-checked campaign “contribution” boxes resulting in involuntary recurring payments to candidates and committees. The focus of the discussion was AB 775, a bill that would require affirmative consent from a contributor making a recurring contribution. The Commission noted that AB 775 contains most, if not all of the elements, the Law and Policy Committee had been looking for in a regulation addressing the issue and, subsequently, the Commission voted to support and become a sponsor of the bill. Acknowledging the possibility that various issues could prevent AB 775 from being passed, however, some Commissioners indicated a desire for the Commission to explore potential regulatory action to address the issue of recurring campaign contributions in the event AB 775 did not pass this year. In light of AB 775 recently becoming a two-year bill, staff presents potential regulatory approaches the Commission could pursue to address recurring campaign contributions.

BACKGROUND

Pre-Checked Recurring “Contributions”

As discussed at the July Commission meeting, in recent months, numerous news outlets have reported on the increasingly common practice of campaign committees using “pre-checked” boxes or preset settings on campaign donation webpages, such that the default setting for a contribution is a recurring payment, rather than a single contribution. “Consumer advocates and campaign finance officials say the tactic misleads donors into giving more money than they intend because they must uncheck boxes to ensure their accounts are not regularly charged. Automatic deductions can be difficult to stop—let alone reverse—once they begin.”¹ The practice of pre-checked boxes signing donors up for recurring payments has been employed in a

¹ Jeremy B. White, *California Recall Candidates Use Auto-Donation Tactic Trump Made Famous*, POLITICO, (May 17, 2021, 6:14 PM EDT), <https://www.politico.com/states/california/story/2021/05/17/california-recall-candidates-use-auto-donation-tactic-trump-made-famous-1382586>.

variety of manners by various campaign committees. In some cases, the language accompanying the pre-checked box has been characterized as confusing or even threatening.²

In response to this emerging trend, at its May 6, 2021 meeting, the Federal Elections Commission (FEC) unanimously approved a legislative recommendation that Congress amend the Federal Election Campaign Act (FECA) to require those soliciting recurring contributions to receive the affirmative consent of the contributors, to disclose additional information to their financial supporters, and to immediately cancel recurring contributions upon request. In explaining the recommendation, the FEC's legislative memorandum noted, “[t]he Commission’s experience strongly suggests that many contributors are unaware of the ‘pre-checked’ boxes and are surprised by the already completed transactions appearing on account statements.”³ Since the FEC’s recommendation, one Senate bill (S.1786) and one House bill (H.R.3832) have been introduced to address the topic.

In California, AB 775 would require a candidate or committee to obtain affirmative consent from a person making a recurring contribution at the time of the initial contribution. The bill would also require a candidate or committee that accepts a recurring contribution to provide a receipt for each contribution, to provide information necessary to cancel the recurring contribution, and to immediately cancel a recurring contribution upon request. The bill, which was sponsored by the FPPC, did not pass this year, but the author plans to continue to pursue the legislation next year.

DISCUSSION

The Commission’s Regulatory Authority

Section 83112 of the Political Reform Act (Act) states:

The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission. These rules and regulations shall be adopted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 et seq.) and shall be consistent with this title and other applicable law.

As applicable to the Commission, the Administrative Procedure Act provides, “[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the

² Eric Bradner, *GOP Group Tells Online Donors: Give Every Month or ‘We Will Have to Tell Trump You’re a DEFECTOR’*, CNN (Apr. 8, 2021, 1:42 PM EST), <https://www.cnn.com/2021/04/08/politics/nrcc-prechecked-boxes-trump-defector/index.html>.

³ FEC, *Legislative Recommendations of the Federal Elections Commission 2021* (May 6, 2019), <https://www.fec.gov/resources/cms-content/documents/legrec2021.pdf>, p. 12.

statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” (Section 11374.)⁴

Also pertinent to this discussion are the purposes of the Act provided in Section 81002, which provides that the title was enacted to accomplish the purpose:

“(a) 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.”

Potential Regulatory Action

In exploring how the Commission could address through regulation the use of pre-checked boxes for recurring contributions resulting in involuntary recurring payments, staff initially considered approaches to prohibit the use of automatic check boxes for campaign fundraising.⁵ However, the Commission’s regulatory authority in this area is limited by the requirement that the Commission’s regulations “implement, interpret, make specific or otherwise carry out the provisions of the statute” the regulations relate to. The Act does not contain provisions regarding recurring contributions, nor does it generally empower the Commission to prohibit or limit the making or receipt of contributions of this nature. As a result, staff concluded the Commission does not have regulatory authority to directly address the practice of using pre-checked recurring contribution boxes in online fundraising solicitations.

The FEC reached a similar conclusion regarding its regulatory authority prior to the FEC voting to recommend that Congress prohibit the practice of pre-checked recurring contributions. FEC staff concluded “[w]ithout express statutory authority in FECA, Commission staff do not have much effective assistance to offer these frustrated contributors.” (See [FEC 2021 Legislative Recommendations](#), p. 12.) In the same vein, FPPC staff did not find any news of other states addressing the issue by regulation. However, at least one other state, New York, is in the process of addressing the issue by statute. (See NY A.B. 8189, A.B. 8193.)

Staff has identified two potential new campaign reporting requirements which would not prohibit the use of pre-checked boxes for recurring contributions, but would require additional disclosure regarding recurring contributions. Currently, a committee that has secured a commitment to receive a recurring contribution is not required to report the recurring nature of the contribution, except to report each contribution upon receipt. The lack of disclosure with respect to recurring contributions reduces transparency in campaign finance, one of the primary

⁴ As determined by Third Appellate District, the Fair Political Practices Commission’s procedures for adopting, amending, and repealing regulations are subject only to the pertinent provisions of the Administrative Procedure Act in effect on June 4, 1974, the date the voters adopted the Political Reform Act. (*Fair Political Practices Commission v. Office of Administrative Law* (April 27, 1992, 3 Civil C010924) [nonpublished opinion]).

⁵ For example, staff considered amending Regulation 18215 to define the term “contribution” to require an intentional act by the payor, rather than a payor mistakenly giving a committee continued access to the payor’s funds, thus deeming payments using a pre-checked recurring contribution box not “contributions.” But if the funds do not constitute a “contribution” under the Act, the Commission’s authority to limit or require the return or reporting of such funds is questionable.

purposes of the Act, as the public is unable to get a complete picture of who is contributing and to what extent. For example, as currently interpreted, a campaign statement is not required to include information for a contributor who has made an initial \$99 contribution during the period covered by the campaign statement, even where that contributor has agreed (affirmatively or otherwise) to make additional contributions in subsequent periods. Essentially, this reporting practice results in unnecessarily delayed transparency that gives an inaccurate impression of a candidate or committee's campaign finances.

Reporting Recurring Contributions in Advance

Section 84211 of the Act specifies the required contents of campaign statements. Under Section 84211, each campaign statement required under the Act must contain (among other things) “[t]he total amount of contributions received during the period covered by the campaign statement and the total cumulative amount of contributions received,” as well as “[t]he total amount of contributions received during the period covered by the campaign statement from persons who have given a cumulative amount of one hundred dollars (\$100) or more.” (Section 84211(a), (c).) Regulation 18421.1 relates to Section 84211 and further specifies that a monetary contribution is “received” on the date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the check or other negotiable instrument by which the contribution is made. (Regulation 18421.1(c).)

The Commission could amend Regulation 18421.1 to specify that recurring contributions are “received” on the date the committee receives the first payment and the full amount of the forthcoming payments must be reported as an account receivable. This would make specific the date on which payments are considered “received” by requiring the notation of a recurring contribution on a campaign statement, with future payments essentially being considered “accounts receivable.” It would also help implement and carry out the Act’s disclosure provisions by allowing the public to see who has pledged future payments to candidates and committees, whether knowingly or unknowingly.

Identifying Recurring Contributions on Statement and Reports

The Commission could also require a notation on campaign statements and reports for each recurring contribution. For example, a regulation could require a committee to include a notation such as “*automatic monthly contribution” below the name and address of the contributor in the field identifying the contributor. Similar to the option discussed above, this would provide greater disclosure of promised future contributions.

CONCLUSION

The Commission’s authority to adopt regulations is limited to implementing, interpreting, making specific or otherwise carrying out the provisions of an underlying statute. Because there is no provision in the Act addressing the practice of pre-checked recurring contribution boxes, or recurring contributions generally, the Commission’s authority to address the practice by regulation is limited. However, even if AB 775 is not passed, the Commission could adopt

further reporting requirements by regulation that would result in additional transparency concerning recurring contributions as detailed in this memorandum.