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VIA PDF EMAIL ONLY

TO: Lawrence T. Woodlock Esq.
Fair Political Practices Commission

FROM: Chip Nielsen

DATE: November 18, 2011

RE: Proposed FPPC Regulation 18412 (and Regulation 18215(b)(1))

In your agenda for your recent Interested Person's meeting on October 26, 2011, you ask a good question:

> "Do differences in organization, membership, size, sophistication, or other characteristics or circumstances complicate the use of a single clear rule for identifying contributors to various kinds of multi-purpose groups?"

My answer is yes. The FPPC should consider a separate rule for 501(c)(3) contributors and a separate rule for PAC contributors. The rule should also be sensitive to various practical realities of nonprofit organizations, leaving flexibility to comply through methods appropriate to the facts. And I believe you can make this draft more reasonable and clear.

It has been our experience that the "first bite rule" and the reporting as a recipient committee by a multi-purpose group once it has made its "first bite" are two of the most confusing FPPC rules, especially for contributions to (c)(3) non-profits and for contributions to other jurisdiction PACs. This is not only because of the many differences in these kinds of multi-purpose organizations, but also because often there is a long time gap between when the multi-purpose organizations solicit funds and when they receive them. Contributors may (a) need board approvals at periodic meetings, (b) require rigorous vetting by the contributor staff of the requesting organization or (c) see no urgency in making such contributions.

This makes the "accurate identification of contributors to all multi-purpose groups with reporting obligations" extremely difficult if the FPPC

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were to decide to adopt a "single standard." But I agree a regulation is needed, and hopefully it will be better than the current confusion.

One personal example highlights the difficulty for federal and out-of-state political organizations who contribute to California campaigns.

Some years ago, a federal PAC decided, for the first time, to make contributions that are reportable under the PRA. It had a sizeable cash-on-hand balance that had already been reported to the FEC, and it believed its only requirement would be to file Major Donor reports.

It learned otherwise and registered as a PAC with the SOS. At filing time, it called the FPPC and was told that its Schedule A Form 460 should disclose pro rata all its contributors during the entire year to equal the California contributions made. (*Priolo* Advice Letter (No. A-77-185).)

Because a number of its contributors' pro rata share equaled or exceeded $100, the PAC disclosed them and notified each such contributor what it had reported. Immediately the PAC received responses from a handful of the disclosed contributors who said they opposed what the PAC had supported, and they insisted that the PAC amend its report to delete them. The PAC agreed, and re-attributed larger amounts to the rest of the disclosed contributors, filed the amendment and notified those on the amendment of the new amount disclosed.

As you would guess, some of these second-noticed contributors had not carefully read the first notice, but they did read the second one, and some strenuously objected and insisted on being amended out. That's when the PAC called our firm to ask if there was a way to end amending each time a contributor wanted off their 460.

Because all the PAC's contributors were already public on the Federal Election Commission (FEC)'s website, shouldn't there be a different post "first bite" reporting rule for such organizations?

You may find it helpful to know that, to our knowledge, California is the only state that requires out-of-state PACs to determine whether a particular donor has "reason to know" that their contribution would be used in the state. Many states simply require federal PACs to be compliant with federal law. Others require disclosure of in-state donors (e.g., Oklahoma), in-state-expenditures only (e.g., North Carolina and Utah) or

on complete state forms (e.g., Pennsylvania) or state filings only when they reach a certain percent threshold in the state (e.g., Texas).

Specific Comments on Proposed 18412

1. I have read the October 21, 2011 letter from the Alliance For Justice and the October 25, 2011 letter from Remcho, Johansen & Purcell that are posted on your website. I think both provide excellent observations and suggestions, and I hope you will consider them.

I especially thought the comments from both authors about the unintended tax consequences on charitable organizations needs to be addressed in your Regulation, and I again see no reason why there shouldn't be a separate rule for 501(c)(3)s, especially since (c)(3)s cannot participate in candidate campaigns at all and they usually participate only in ballot measure campaigns that directly affect their public mission.

2. I do not understand why the Commission needs to move away from the *Rehig* Advice Letter (No. A-07-126), and if necessary the Commission should rescind or limit the *Strout/Abeeg* Advice Letter (No. A-11-143).

3. The "first bite" rule has always been troublesome for contributors. Few contributors actually know how their contributions have been, or will be, spent. To be told that they have "imputed knowledge" because the organization made a "general public" announcement or because it made a not-yet-public "first bite" California contribution is offensive to them.

4. The "first bite" rule works better on educating multi-purpose recipient organizations on how to handle their accounting and reporting once they decide to make California contributions after their "first bite."

The recipient organization, with the help of FPPC publications or counsel, can then decide to either (a) solicit (1) contributions earmarked for the California political purpose or (2) contributions that may not be used for California political purposes, or (b) they may create a California PAC for their California political contributions and avoid this multi-purpose rule.

5. I suggest you consider editing that Section 18412(b) to clearly distinguish between (a) contributions where there is actual agreement or

understanding between the contributor and the recipient and (b) contributions where there are different levels of "reason to know." Shouldn't there be a priority within this "reason to know" category on who should be disclosed before others are disclosed?

In the "reason to know" spectrum, at one end is the (1) contributor who receives a communication from the multi-purpose organization that explains the purpose of the solicitations, and, for example, it responds to a written solicitation that says its contribution (a) may be used for California candidate or ballot measure contributions but (b) allows the contributor to direct that its contribution may not be used for (California) campaign purposes, (2) who fills out the form and doesn't check the "don't use for campaign" box and, (3) who sends the executed form back with a check. That contributor knows that some or all of that contribution may be spent in California.

At the other end of the spectrum is a contributor who receives a general written solicitation ("Cure cancer; any amount appreciated") but who makes the contribution either (a) after the organization has made an announcement to the "general public" of its intension to support a California a ballot measure, which announcement the contributor did not see or hear and should not be responsible to have seen or heard or (b) even worse, after the organization has made its "first bite," which act at that time is known only within the organization?

Shouldn't contributors in response to the above written solicitation example be disclosed before contributors with no reason to know except an imputed knowledge defined by the FPPC?

Otherwise, for example, an organization could request funds that it says might be used to support a California ballot measure, and immediately thereafter it receives the amount it wants to contribute in California ("A" funds). But before writing the contribution checks to California committees, it receives an equal amount of money from people who have no direct knowledge of the possibility that their contributions might be spent on California contributions ("B" funds). The multi-purpose organization then makes the California contributions, and it reads this Regulation and concludes that "A" and "B" contributions are both from "reason to know" contributors, and apparently, they are both considered the same (equally available to be disclosed).

Therefore, does it disclose half of the "A" and "B" contributors? But that reasoning doesn't make sense because they know "A"s have more reason to know than "B"s. Would it then conclude that the safe choice is to default to LIFO because that is a preferred method allowed by the Regulation? But LIFO lets the solicited persons not be reported and the non-solicited persons be reported.

This can easily be avoided by ranking the levels of real and imputed knowledge of "reason to know" contributors.

6. Continuing the current rule to use "an accounting method" that "most accurately identifies the sources" of funding of its California contributions makes sense, but I believe examples would help the multi-purpose organizations better understand how to comply.

7. I support LIFO as a back-up "accounting method" when no other method works better. The rule should be crafted to appreciate the different circumstances of organizations; enforcement and advice can address unusual situations.

8. I support the Remcho suggestion that "reasons to know" contributors should be disclosed on Schedule I Form 460, not on Schedule A Form 46.

Current Regulation 18215(b)(1)

Since proposed Regulation 18412 is to clarify the reporting that is triggered by Regulation 18215(b)(1), I read 18215(b)(1) again, and I think it should be amended.

It seems to me that the first two sentences cover two situations. The first sentence covers contributors who know or have reason to know that they are funding California campaigning and who do not know that only a portion of their contributions may be used for California contributions. The second sentence applies to contributors who know or have reason to know that only a part of their contributions will be used for California campaigning.

But multi-purpose organizations don't solicit would-be contributors making an all or partial use distinction. There is no reason to separately identify "entire contributors" and "partial contributors." Shouldn't we drop

this distinction and answer whom should be disclosed in Regulation 18412?

If 18412 can clarify how to prioritize "reason to know contributors," then I suggest you use the *Priolo* Advice Letter so that a pro rata of the contributions received must equal the amount of the California contributions.

Thank you for the opportunity to provide my observations and comments.