



California Political Attorneys Association

c/o Bell McAndrews and Hiltachk LLP

455 Capitol Mall, Suite 600

Sacramento, CA 95814

Telephone: (916) 442-7757

Facsimile: (916) 442-7759

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Honorable Jodi Remke, Chair
Honorable Commissioners Maria Audero, Brian Hatch, and Allison Hayward
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Re: Proposed Regulation 18450.1 Amendments

Dear Chair Remke and Commissioners:

We appreciate the opportunity to participate in the Interested Persons meeting regarding this regulation and the other regulations identified for the first phase of implementation of AB 249, and write to provide additional input on the drafting of Regulation 18450.1 for consideration at the December Commission hearing.

Specifically, we have two substantive comments regarding the exception for disclaimer requirements on electronic media communications contained in subdivision (b) of the draft regulation dated November 7, 2017. First, the draft regulation places the burden on the committee paying for an advertisement to establish that the exception has been met. This approach is both inconsistent with the statute and problematic as a matter of due process.

Effective January 1, 2018, the statute will permit an electronic media communication to be disseminated without a disclaimer if inclusion of the required language is impracticable or would severely interfere with the committee's ability to convey the intended message because of the nature of the technology used to make the communication.¹ While AB 249 codified some of the language in the current version of the regulation related to impracticability, the bill clearly does not establish a basis for the current regulation's burden shifting approach. This suggests that the Legislature's intent was to adopt the criteria for the exception but not to shift the burden of proof to the committee paying for the advertisement.

As a matter of public policy, this burden shifting approach is problematic because it turns due process on its head and requires those regulated by the Act to prove that they are in compliance rather than requiring the Commission's Enforcement Division to fulfill its statutory duties to investigate and prove violations of the Act. CPAA has concerns with this approach in

¹ See Cal. Gov. Code § 84501(a)(2)(E) (effective 1/1/18).

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this regulation and in general, particularly since regulations proposed by Commission staff are using this approach with increased frequency.

Second, the regulatory exception goes beyond the statutory exception in requiring proof that the committee “could not” include the disclaimer. While the statutory standard is high in that it requires impracticability or severe interference with the committee’s messaging, the standard is not one of impossibility. Use of the language “could not” in the current regulation suggests that the only time the exception applies is when it would be impossible to include the required disclaimer.

Both of these issues can be remedied by removing subdivision (b) from the regulation altogether. The criteria for the statutory exception are clear and the draft regulatory language does not further clarify the meaning of that exception. Instead, the draft regulatory language changes the standard for the exception and requires the committee paying for the advertisement to prove that the exception is met, neither of which are consistent with the statutory language.

We thank you for the opportunity to present our comments and are happy to discuss them further if you would like to do so.

Very truly yours,



Joseph A. Guardarrama
CPAA Regulatory Committee