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March 9, 2017

Jodi Remke, Chair  
Fair Political Practices Commission  
428 J Street, Sixth Floor  
Sacramento, CA 95814

Via electronic and regular mail

Re: Proposed Regulation 18216.5

Dear Chair Remke:

We write on behalf of the Senate and Assembly Democratic and Republican Legislative Caucuses to express opposition, as presently drafted, to proposed regulation 18216.5 defining a controlled candidate committee. Our collective opposition is based on our view that the proposed regulation is inconsistent with the current statutory definition of a controlled committee, creates a vague and uncertain test, and will likely result in unintended consequences that could actually undermine the purposes of the Political Reform Act.

### **Background**

As you know, the Political Reform Act contains a definition of a candidate controlled committee (section 82016). As your staff memorandum points out over many years the Commission staff has issued a number of advice letters interpreting the statutory definition, but has never seen the need to further define the terms used in the statute by regulation. For the most part the advice letters have taken a very broad approach to interpreting when a candidate might control a committee, and more recently has expanded the interpretation of the statute.

As the staff memorandum points out your staff has long advised that a candidate serving on a campaign committee's governing body would per se make that committee a controlled committee of the candidate even though the candidate could easily be out voted by the remaining non-candidate board members. It also doesn't matter that the candidate may abstain from voting on matters that might relate to the candidate's own election.

The Commission staff has also advised that candidate's involvement in the committee's decision making is sufficient to make the committee controlled. This is true even if the candidate is not a formal member of the committee governing body or holds any official management position. The advice letters have also concluded that involvement in the development of campaign strategy or implementing that strategy is enough to convert the committee into controlled status.

While the letters have identified certain candidate involvement in a committee that does not per se make the committee controlled (e.g., raising funds for the committee) the staff has more recently suggested a combination of otherwise non-controlling activities, when taken together can convert a committee to candidate controlled status.

FPPC staff has now proposed a regulation for the first time further defining a term used in the statute ("significant influence"). As drafted the proposed regulation sets forth three separate tests for determining significant influence and thus controlled committee status. First, in subdivision (b) a specified list of activities is provided, if any of which are met, will automatically result in a finding of significant influence (e.g., serving on a committee governing board). Next, in subdivision (c) a list of activities, if done solely, are provided which do not result in significant influence (e.g., raising funds for a committee). Finally a third rule is stated in subdivision (d) providing that raising an "extensive amount" of committee funds or engaging in more than one activity identified in subdivision (c) may result in significant influence.

We read the regulation to set forth a list of activities that would conclusively presume a committee is controlled (subdivision (b)). There is also a list of activities which do not result in a controlled committee if done alone, but if done in any combination creates the possibility of a controlled committee (subdivisions (c) and (d)). In addition, there is a situation that might result in a finding of significant influence if the candidate raises an "extensive amount" for the committee (subdivision (d)). Extensive amount is not defined and could apparently result in a controlled committee even though a candidate made only one fundraising call and otherwise had no influence over the activities of the committee, assuming the one call resulted in an "extensive amount" of money.

As the staff memorandum accompanying the proposed regulation points out, there are consequences for a committee if controlled and provides several examples of such consequences. Not mentioned in the staff memorandum is the fact a candidate controlled committee could also be subject to contribution limits otherwise imposed on candidates seeking elective office. Further a candidate controlled committees cannot also be "sponsored" committees, which would affect the committee name and possibly undermine public disclosure.

### **Proposed Regulation Broader than the Statutory Definition**

The statute provides a candidate controls a committee when the candidate "has a significant influence on the actions or decisions of the committee." The term "significant influence" is not defined in the statute, although as noted above the Commission staff has issued a number of letters indicating when significant influence is exercised. To a significant degree, the proposed regulation incorporates the standards articulated in the letters.

However, this does not mean that the letters themselves correctly define the term or that the regulation will now do so. For example, the mere fact a candidate serving on the governing board of a committee is deemed to have significant influence over the committee overlooks the possibility the candidate may in fact have no influence or possibly only minor influence over the committee's actions. The same could be said for participation in the committee's decision making. Under prior advice letters and the proposed regulation, any participation, even minor inconsequential participation will constitute significant influence. And, developing a campaign strategy, even if not used by the committee, would equate to significant influence under the draft regulation.

While it may be possible for the Commission to establish a per se rule for significant influence, that rule should at least adhere to the plain meaning of the statute--any candidate involvement should at a minimum be "significant." Absent incorporation of rules that involve actual significant influence, the regulation should do no more than create a rebuttable presumption of significant influence. Since the regulation fails this basic test it should not be adopted as drafted.

### **Proposed Regulation Creates a Vague and Uncertain Test**

As noted above, the regulation attempts to set out a series of activities that would not create any presumption of significant influence, but act more like a “safe harbor”. However, the regulation undermines the value of that list by stating a combination of these activities (e.g., raising funds and providing a contributor list) will instead be “relevant facts” although “not dispositive” to whether a candidate is exercising significant influence. So, on the one hand the regulation appears to provide a safe harbor for candidates, but with the other hand it suggests that harbor may be subject to rough sailing under certain other circumstances.

To complicate the regulation further, the proposal would create the same uncertain non-dispositive test for candidates who raise an “extensive amount” of committee funds. No definition of “extensive” is provided, and it seems quite plausible that a candidate could, through minimal effort, raise an extensive amount, but play no other role in influencing how those funds are spent or the committee operated. That candidate would be left to wonder whether the committee she helps is now controlled by her.

As a result, the regulation leaves candidates uncertain as to whether some activities, particularly when done in a certain combination, may or may not result in a committee becoming controlled. The only recourse for those candidates will be to seek written advice from the Commission, begging the question of what purpose the regulation serves.

### **Proposed Regulation May Have Unintended Consequences**

As the staff memorandum points out, there are consequences of a committee becoming controlled. Some of those consequences, including those cited in the staff memorandum may be innocuous enough. However, others may not be. By adopting a regulation that casts a broad net in favor of finding committees controlled by candidates, the Commission may significantly undermine one of the important purposes of the Act, public disclosure of who is actually controlling a particular committee.

By way of example, the Act currently requires committees that are “sponsored” by other entities (e.g., labor unions, corporations, trade associations, industries, nonprofit organizations, etc.) to identify the sponsor in the name of the committee. So if the tobacco industry sponsors a local ballot measure committee, it must identify itself along the lines of “Committee of Concerned Citizens, sponsored by the tobacco industry.” The same would be true for a labor union, nonprofit or trade association. The committee name would then appear on communications sent to voters via broadcast, print and social media. Thus, voters would know they are receiving a communication from tobacco companies or some other interest group, not just a group of concerned citizens. However, under the proposed regulation, the same committee could ask a candidate/elected official, say a councilmember from a small city, to serve on the governing board of the committee who would have little or no influence over the committee’s operations. But as a board member, the committee would be conclusively presumed “controlled” under the proposed regulation. Since committees cannot be sponsored if they are controlled, the actual name of the committee could be Committee for Concerned Citizens and Jane Smith. That would be the name provided to voters when advertisements appear paid for by the committee. It is not hard to see how the proposed regulation could be manipulated to avoid real disclosure of those behind a particular committee.

The point is, being a controlled committee has consequences. Some of those may be positive, some may be innocuous and some may undermine a key purpose of the Political Reform Act.

**What Should be Done Now**


At this point, the Commission could, of course, reject the regulation as drafted. Certainly doing so would be preferable to adopting a clearly flawed and expansive regulation now proposed by staff.

As an alternative we would suggest the Commission consider the attached regulation. It has the advantage of being consistent with the statute, provide clarity in nearly all instances and not result in any unintended consequences. The alternative regulation would do this by the following:

1. Create a rebuttal presumption, as opposed to a conclusive presumption, for finding significant influence and thus control using the same criteria now proposed by staff. This preserves the core purpose of the regulation, but still requires that the candidate have significant influence over a committee. If he does not, then he should be allowed to rebut the presumption.
2. Create a real safe harbor around raising funds for a committee using the criteria now proposed by staff such that these activities would not be construed as exercising significant influence, even if engaged in different combinations.
3. Eliminate the uncertainty associated with that part of the staff proposal designed to identify non-dispositive "specific facts" such as combinations of activities or raising "extensive funds."

Thank you for your attention to this important matter.

Sincerely,



KEVIN DE LEÓN  
President pro Tempore  
Twenty-Fourth Senate District



ANTHONY RENDON  
Speaker of the California State Assembly  
Sixty-Third Assembly District



JEAN FULLER  
Senate Republican Leader  
Sixteenth Senate District



CHAD MAYES  
Assembly Republican Leader  
Forty-Second Assembly District

CC: FPPC Commissioners



Adopt 2 Cal. Code Regs., Section 18216.5 to read:

**§18216.5. Controlled Committee: “Significant Influence” Defined.**

(a) *General Rule.* Under Section 82016, to determine whether a candidate or state measure proponent exercises “significant influence” over the actions or decisions of a committee, such that he or she controls the committee, it is necessary to examine the degree of his or her involvement in the committee by considering the factors specified in subdivision (b)-specific facts of each case.

(b) *Actions or Decisions Creating a Rebuttable Presumption Regarding Resulting in Committee Control.* A candidate or state measure proponent shall be presumed to exercises significant influence over the actions or decisions of a committee if he or she:

- (1) Is a voting member of the committee’s leadership body or holds a management position within the committee;
- (2) Participates in the committee’s decision-making or directs the activities of the committee; or
- (3) Develops ~~or~~ and implements campaign strategy, ~~including fundraising strategy,~~ for the committee.

(4) A candidate or committee may rebut this presumption upon a showing that the candidate does not exercise significant influence over the actions or decisions of a committee.

(c) *Actions or Decisions Not Resulting in Committee Control.* A candidate or state measure proponent does not exercise significant influence over the actions or decisions of a committee if he or she ~~solely~~:

- (1) Serves as honorary chairperson of the committee and appears in the committee’s letterhead;
- (2) Provides the committee access to his or her contributor list;
- (3) Assists in soliciting funds for the committee; or
- (4) Is featured on an invitation to a fundraising event and speaks at the event.

~~(d) *Other Relevant Facts.* To determine if a candidate or state measure proponent exercises significant influence over the actions or decisions of a committee under subdivision (a), while not dispositive on the issue, other relevant facts include whether he or she:~~

- ~~(1) Personally raised an extensive amount of a committee’s funds to support a claim that the candidate or state measure proponent developed or implemented the committee’s fundraising strategy under subdivision (b)(3);~~
- ~~(2) Participated or assisted in multiple activities listed under subdivision (c).~~

~~(de) *Agents.* For purposes of this regulation, the terms “candidate” and “state measure proponent” include their agents, when the agent is acting within the scope of his or her authority. In addition, it includes representatives of any committee he or she controls.~~

Note: Authority cited: Section 83112, Government Code. Reference: Sections 82016, Government Code.