

California Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery and Rotunda

From: Zackery P. Morazzini, General Counsel
Hyla P. Wagner, Senior Commission Counsel

Subject: Amendment of Regulation 18423 – Payments for Personal Services as Contributions and Expenditures;
Regulation 18539 – Online Disclosure of Contributions; and
Regulation 18550 – Online Disclosure of Independent Expenditures

Date: November 28, 2011

I. Introduction

The Commission will consider amendment of three regulations to codify current FPPC staff advice. The amendment to Regulation 18423 clarifies the date that an in-kind contribution of the services of salaried personnel to a committee is considered to be made, as being the payroll date of the salaried personnel. The amendments to Regulations 18539 and 18550 clarify that the definition of the term “election cycle” in Section 85204, which applies to the 90-day reports filed under Sections 85309 and 85500, means 90 days before a *state election* in which the candidate or measure in connection with which the contribution or independent expenditure was made is on the ballot.

II. Background

Launching its regulation clarification project, the FPPC held a series of interested persons meetings on April 14, April 21, and June 9, 2011, to take comments on areas of the Political Reform Act (the “Act”)¹ that could be improved. At these interested persons meetings, FPPC staff solicited general public comment and suggestions on revising FPPC regulations or regulatory schemes and thus enable individuals and entities subject to the Act to better comply with it. A number of large regulatory projects grew out of these meetings such as revisions to the gift rules, changes to enforcement regulations, and changes to several campaign regulations. These minor changes to campaign regulations were suggested as well.

III. Proposed Amendments

1. Regulation 18423 - Payments for Personal Services as Contributions and Expenditures. This regulation is being amended to codify longstanding FPPC staff advice

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.

providing that an in-kind contribution of the services of salaried personnel to a committee and the expenditure by the person making the salary payment are considered to be made on the payroll date of the salaried personnel. It will assist committees that are preparing reports or being audited to have the payroll date specified in the regulation, rather than being contained in informal staff advice.

2. Regulations 18539 - Online Disclosure of Contributions and 18550 - Online Disclosure of Independent Expenditures. These regulations are being amended to clarify Section 85204's definition of "election cycle," for purposes of the 24-hour reports required by Sections 85309 and 85500 to mean the election cycle for a state election in which the candidate or measure (that the contribution or independent expenditure was made for or against) will be listed on the ballot.

Section 85309, enacted by Proposition 34 in 2000, requires that a candidate for elective state office who files electronically with the Secretary of State, shall file reports disclosing receipt of a contribution of \$1,000 or more received during an "election cycle" within 24 hours of receipt of the contribution. Section 85500, enacted by Proposition 34, requires a committee that files electronically with the Secretary of State and makes independent expenditures of \$1,000 or more during an "election cycle" in connection with a candidate for elective office or state ballot measure, to file an online report disclosing the independent expenditure within 24 hours.

Section 85204, also enacted by Proposition 34, contains a special definition of election cycle for purposes of the 24-hour reports required by Sections 85309 and 85500. It differs from the traditional concept of "election cycle" covering the two-year or four-year term of an elected office.

Section 85204 defines "election cycle" as follows:

“ ‘Election cycle,’ for purposes of Sections 85309 and 85500, means the period of time commencing 90 days prior to an election and ending on the date of the election. For purposes of the Board of Administration of the Public Employees' Retirement System and the Teachers' Retirement Board, 'the date of the election' is the deadline to return ballots.”

The definition is ambiguous in the context of the requirement that candidates and committees primarily formed to support state ballot measures must file online 24-hour reports with the Secretary of State disclosing contributions of \$1,000 or more received during an election cycle. It is unclear whether the requirement attaches during any election, or just during the election in which the candidate or measure is actually on the ballot.

Construing the new statutes in 2001, the FPPC was asked whether an Assembly Member or State Senator who is *not listed* on a particular state ballot would be required to comply with Section 85309. The *Fishburn* Advice Letters, Nos. A-01-282 and A-01-283, state that only an Assembly Member or State Senator who is listed on the ballot in the upcoming state election would be subject to Section 85309(a)'s 24-hour disclosure of \$1,000 contributions received 90 days preceding the election.

The *Fishburn* Advice Letters reason as follows:

“While there is very little discussion of these provisions in the ballot pamphlet, the argument in favor of Proposition 34 did state: ‘Proposition 34 requires candidates and initiatives to disclose contributions of \$1,000 or more on the Internet within 24 hours for a full three months *before the end of the campaign.*’ This suggests that the voters intended to apply this enhanced disclosure during the candidate’s own campaign, and not every election. The alternative result appears to place a substantial burden on candidates and committees that goes beyond regulation of their “campaign.”

Based on these factors and rules of statutory construction, we would construe ‘election cycle’ in the context of §§ 85309 and 85500 to mean the election cycle for the election in which the candidate or measure will be listed on the ballot.”

The proposed amendments to Regulations 18539 and 18550 will codify current FPPC advice contained in the *Fishburn* Advice Letters.

IV. Conclusion and Staff Recommendation

Staff held an interested persons meeting on October 4, 2011, where these minor amendments were discussed, and they proved noncontroversial. The adoption of these amendments will not increase costs of compliance with the Act. Staff recommends adopting the amendments to Regulations 18423, 18539 and 18550.

Attachments

- Regulation 18423 – Payments for Personal Services as Contributions and Expenditures
- Regulation 18539 – Online Disclosure of Contributions
- Regulation 18550 Online Disclosure of Independent Expenditures.