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To: Chair Remke, Commissioners Audero, Casher, Hayward and Wynne

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Subject: Adoption of Regulation 18216.5
Controlled Committee: “Significant Influence” Defined

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I. Proposed Action

Section 82016 of the Government Code has long defined the term “controlled committee.” The determination of whether a committee is controlled is significant because, as discussed below, controlled committees are treated differently from non-controlled committees in various parts of the Political Reform Act.¹ Although the Commission has issued numerous advice letters describing various situations where a committee is considered to be controlled, or not controlled, it has never adopted a regulation implementing the statutory definition. Additionally, numerous letters address the impact of fundraising on the issue of whether a committee is controlled. This memorandum alone references 16 different advice letters on controlled committees, written over an almost 30-year period.

The proposed regulation seeks to: (1) codify some of the more common principles stated in the advice letters about controlled committees; and (2) clarify some of the more important aspects of the fundraising advice in this area. In sum, the goal is to consolidate our existing controlled committee advice into a single, straightforward regulation.

II. Background and Current Law

From the time the Act was passed by California voters in 1974, it contained a definition for the term “controlled committee” in Section 82016, which provides:

(a) “Controlled committee” means a committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee

¹ The Political Reform Act (Act) is set forth in Government Code Sections 81000 through 91014, and all further statutory references are to this code. The Commission’s regulations are contained in Division 6, Title 2 of the California Code of Regulations, and all regulatory references are to this source.

or state measure proponent² in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.

(b) Notwithstanding subdivision (a), a political party committee, as defined in Section 85205, is not a controlled committee.

Section 82016 therefore provides two circumstances under which a committee will be considered a controlled committee: (1) where a candidate, his or her agent, or another committee he or she controls, has a significant influence on the actions or decisions of the committee; and (2) where a candidate, his or her agent, or his or her controlled committee acts jointly with the committee in connection with the making of expenditures.³ The first circumstance is the focus of the proposed regulation.

Controlled committees are treated differently from non-controlled committees in various parts of the Act. For example, committees that receive contributions must file a statement of organization with the Secretary of State within 10 days after qualifying as a committee. (Section 84101.) Among other things, the statement of organization must show whether the committee is “controlled,” and if it is controlled, the name of each person controlling the committee. (Section 84102(e).)

In addition, the name of a committee that is controlled by a candidate must include the candidate’s name. (Regulation 18402(c)(1).) When a committee sends a mass mailing, it must include the name, street address, and city of the committee on each piece of mail in the mass mailing. (Section 84305(a).) If the committee is a “controlled committee,” the committee must also include on the mailing the name of the person or persons who control the committee. (Section 84305(c).)

Finally, the Act requires that all contributions or loans made to a candidate, or to the candidate’s controlled committee, be deposited into a single campaign bank account. (Section 85201.) The Commission has interpreted this requirement to mean that a candidate for elective office may have only one campaign bank account and one controlled committee for each election. (Regulation 18521.) This is commonly referred to as the “one bank account rule.” The Act’s requirement that a candidate have only one bank account per election facilitates compliance with applicable contribution limits and tracking of the candidate’s campaign activity for an election.

² Consistent with the statute, the proposed regulation addresses controlled committees for both candidates and state measure proponents, but for efficiency purposes this memorandum only refers to candidates, and all references to candidates include a candidate’s agent or controlled committee.

³ At the Interested Persons meeting, it was suggested that the language in Section 82016, subdivision (a), stating that a committee is controlled if a candidate *acts jointly with the committee in the making of expenditures* is part of both the tests for control. However, this has never been the interpretation in the Commission’s prior advice, most of which has focused on a candidate controlling a committee because he or she exerts significant influence on the actions and decisions of the committee.

III. Proposed Regulation Based on Commission Advice Letters

A. Significant Influence Defined – General Rule

In light of the Act's rules pertaining to controlled committees, the Commission has issued numerous advice letters over the years providing direction as to whether a committee is controlled for purposes of Section 82016. The vast majority of the letters address whether a candidate's involvement in various committee activities will have a "significant influence" on the actions or decisions of a committee such that it becomes controlled by the candidate. The Commission has advised, as reflected in subdivision (a) of proposed Regulation 18216.5, that each determination is fact specific and focused on the degree of the candidate's involvement in committee activities:

To determine whether a candidate controls a committee under the second part of Section 82016(a), one looks at the degree of the candidate's involvement in the committee's activities. (*Madden* Advice Letter, No. A-85-197.) The applicable standard is whether an elected official exerts "significant influence" over the actions or decisions of a committee. There is a spectrum of an elected official's involvement with another committee that runs from minimal or tangential involvement to full participation and control. The Commission's advice letters determine, based on specific factual situations, whether a given elected official is so significantly influencing the activities of a committee that the official is considered to be controlling the committee. (*Shaffer* Advice Letter, No. A-12-122.)

Furthermore, although it is not enough that a candidate is somehow associated with a committee, "[t]he Commission has interpreted the definition of 'controlled committee' broadly to include any significant participation in the actions of a committee by a candidate, his or her agent, or representatives of any other committee he or she controls." (*Ibid.* citing *Higdon* Advice Letter, No. I-94-189; *Kopp* Advice Letter, No. A-97-108.)

In addition to the general guidelines set forth above, advice letters have identified certain activities that, by themselves, result in the determination that a committee is controlled or not controlled by a candidate. Therefore, as described below, subdivision (b) of the proposed regulation includes instances where a committee will be considered controlled; subdivision (c) will act as a safe harbor for those activities that, by themselves, will not result in a candidate controlling the committee; and subdivision (d) will consist of other relevant facts to be considered in any determination whether a committee is controlled. While most of the situations in these subdivisions have been referenced in previous advice letters, as specified below, certain new situations have been added that are consistent with existing advice.

On January 20, 2017, the Commission held an Interested Persons meeting. The meeting yielded some useful comments that informed a revision to the proposed regulation language. The proposed regulation should be helpful to candidates, committees, the regulated community, and the Commission by not only consolidating some of the more common aspects of our existing

advice into a single regulation, but also clarifying certain aspects, particularly in the area of fundraising.

B. Actions or Decisions Resulting in Committee Control

The following are some of the common situations recommended for inclusion in subdivision (b) of proposed Regulation 18216.5, where a candidate exercises significant influence over the actions or decisions of a committee such that he or she controls it for purposes of Section 82016.

1. Voting member or management position - Proposed subd. (b)(1)

We have repeatedly advised that a candidate who is a voting member of a committee's leadership body controls the committee since the candidate or state measure proponent exercises significant influence on the committee's actions or decisions. (See, e.g., *Gastelum* Advice Letter, No. A-96-113; and *Ferguson* Advice Letter, No. A-86-044.) And because the definition of "controlled committee" is broadly interpreted, this is true even when a candidate abstains from decision-making on matters directly relating to his or her campaign if he or she is authorized to vote on other matters. (*Erenbaum* Advice Letter, No. I-01-242 citing *Trimbur* Advice Letter, No. A-00-067.)

Like the voting member, a candidate who holds a committee *management position* is in a position to exercise significant influence on the committee's actions or decisions. Therefore, staff has added holding a management position to the proposed regulation as a means to control a committee.

2. Participates in decision-making or directs the activities - Proposed subd. (b)(2)

We have similarly advised that involvement in the committee's decision-making is sufficient to result in committee control. (*Shaffer* Advice Letter, No. A-12-122; *Helms* Advice Letter, No. I-91-390; *Nerhus* Advice Letter, No. I-90-467; see also *Rosen* Advice Letter, No. A-05-145 [a candidate who participates in the decision-making process of a committee exerts significant influence over the actions or decisions of the committee].) Similar to decision-making, a candidate who is not a voting member or in a management position may nonetheless be in a position to direct the activities of a committee, thereby exerting significant influence over its actions or decisions.

The inclusion of decision-making and directing committee activities is also particularly relevant to smaller committees that lack officially designated management positions and voting members. It also affirms that a candidate may not exert significant influence over a committee, while asserting he or she does not control the committee by virtue of the fact that he or she does not hold any official position with the committee.

3. Develops or implements campaign/fundraising strategy - Proposed subd. (b)(3)

We have advised that a candidate controls a committee where the candidate is involved with developing or implementing campaign strategy for the committee. (*Shaffer* Advice Letter, No. A-12-122 citing *Helms* Advice Letter, No. I-91-390; see also *Madden* Advice Letter, No. A-

85-197 [developing or implementing strategy with an independent committee will almost always result in a candidate controlling the committee].)

As with campaign strategy, a candidate who develops or implements a committee's fundraising strategy should similarly be considered to control the committee. Fundraising strategy is simply a subset of, and thus included within, the more general campaign strategy category. Therefore, a candidate who develops or implements a strategy for a committee, whether it be general campaign strategy or fundraising strategy specifically, should be treated the same and considered to control the committee.

A candidate who develops or implements campaign or fundraising strategy is doing more than lending his or her name and goodwill to a committee, or providing valuable fundraising assistance – activities that may well be confined to influencing other persons to support a committee. Instead, it suggests that he or she has a role on the inside directing the committee's activities or influencing the committee's decision-making body such that it should be considered controlled.

C. Actions or Decisions Not Resulting in Committee Control

On the flipside, the Commission has advised that certain activities, by themselves, will not support the determination that a candidate exercises significant influence over the actions or decisions of a committee to deem it controlled by the candidate. Therefore, the following situations will be included in subdivision (c) of proposed Regulation 18216.5.

1. Candidate as “honorary” member - Proposed subd. (c)(1)

Commission advice letters have consistently advised that a candidate does not exert significant influence on a committee when he or she is an “honorary” member of committee's governing body. (See, e.g., *Erenbaum* Advice Letter, No. I-01-242 citing *Trimbur* Advice Letter, No. A-00-242 [“we have also noted that when a candidate is an ‘honorary’ member of a committee's governing body, one who may appear on the committee's letterhead, but who does not vote, make decisions about committee funds, or otherwise influence the actions of the committee, the candidate is not considered to ‘control’ or exert a “significant influence” on the committee”].)

2. Access to contributor list - Proposed subd. (c)(2)

The Commission has advised on multiple occasions that a candidate does not control a committee where the candidate merely provides it with his or her contributor list. (*Erenbaum* Advice Letter, No. I-01-242; *Pirayou* Advice Letter, No. I-10-159.)

3. Assists in soliciting funds for the committee - Proposed subd. (c)(3)

Although the Commission has consistently advised that fundraising is a relevant factor in the determination of committee control, it has also regularly advised that the solicitation of funds, by itself, does not result in control. (See, e.g., *Woodruff* Advice Letter, No. I-89-180 [soliciting funds by itself would not indicate control, however, such activity is relevant to whether the committee is controlled by the candidate]; *Roberti* Advice Letter, No. I-90-339 [a candidate can write a letter to committee members soliciting contributions on behalf of the

committee without creating a presumption of control, provided that was the only action taken]; *Barker* Advice Letter, No. A-97-478 [“candidate does not control a committee if that candidate’s only activity with regard to the committee is soliciting funds for the committee.”]⁴

4. Featured on invitation to fundraising event and speaks - Proposed subd. (c)(4)

As with the other activities in this proposed subdivision, the Commission has advised that a candidate featured on an invitation to a fundraising event where he or she will speak, by itself, does not result in control. (*Erenbaum, supra; Pirayou, supra.*)

D. Other Relevant Facts

As explained, a candidate’s involvement with another committee can run from minimal involvement to full participation and control. And in order to control a committee for purposes of Section 82016, a candidate must exert influence over the committee that rises to the level of being “significant.” The activities or situations listed in subdivision (c) will not by themselves meet this threshold, but when considering all of the circumstances of a particular matter, each may still be relevant as a contributing factor in the ultimate determination of committee control, as set forth in proposed subdivision (d).

1. Evidence of fundraising strategy - Proposed subd. (d)(1)

Again, as set forth in subdivision (c)(3) of the proposed regulation, soliciting funds, without more, will not result in committee control. But where a candidate personally raises an *extensive amount* of a committee’s funds, he or she may be doing more than simply providing fundraising assistance limited to influencing other persons to support a committee. Such heightened involvement in the committee’s fundraising should be considered relevant evidence to support a claim that the candidate *may* have had a role in implementing or developing the committee’s fundraising strategy.

By way of example, the Enforcement Division handled a recent matter in which there were allegations but no final finding of a candidate controlling a small committee by directing its fundraising activities. The candidate was personally responsible for raising well over \$100,000, which constituted more than 85% of the total contributions received by the committee. There was evidence that the candidate had a prior association with the individuals in the small committee, and was almost primarily and exclusively responsible for the committee’s fundraising. However, without an implementing regulation to provide any guidance, the enforcement matter was obstructed due, in part, to the candidate’s ability to contend she was unaware that such activity could result in control of a committee.

The example shows the significance of heightened involvement in fundraising as indicia of possible control by a candidate. For similar situations that may arise in the future, the provision would, at a minimum, provide notice to candidates that raising an extensive amount of a committee’s funds is relevant evidence to support a claim that the candidate controlled the

⁴ But see proposed subdivision (d)(1), below, which provides personally raising an extensive amount of a committee’s funds, while not itself dispositive on the issue of control, may nonetheless be used as evidence in support of a claim that a candidate controls the committee because he or she implemented or developed its fundraising strategy.

committee through involvement in fundraising strategy. And although the proposed regulation neither defines the term “extensive,” nor provides any bright line tests to make such a determination, the term itself suggests that the bar is high. The intent is that such finding will only be made where, similar to the example provided, the funds a candidate personally raises for a committee is extensive in both the amount of funds raised and the percentage of the committee’s total funds.

2. Participation in Multiple Activities - Proposed subd. (d)(2)

This is really a commonsense provision. As mentioned, under subdivision (a) it is necessary to examine the degree of a candidate’s involvement in a committee to determine whether he or she exercises significant influence over the committee. While a candidate who engages in only one activity under subdivision (c) is not considered to exert significant influence over a committee, one who engages in multiple activities under that subdivision may exert, depending on the specific facts of the case, sufficient influence to control the committee. (See, *Brainerd* Advice Letter, No A-90-039 [“although certain activities of a candidate or elected official are not sufficient by themselves to constitute control, each is a factor to be considered in determining whether the candidate controls the committee”]; *Pirayou* Advice Letter, No. I-10-159 [“(t)hough none of these activities standing alone may have been sufficient to constitute control of the committee by an officeholder, taken together, several of these activities could constitute control by the officeholder”].)

IV. Conclusion

The Commission has issued numerous advice letters over the years that concern whether a candidate exerts significant influence over a committee such that he or she controls it. A regulation incorporating and clarifying some of the more common principles would be beneficial to all those subject to the Act. Staff recommends adoption of proposed regulation 18216.5.

Attachment: Proposed Regulation 18216.5