STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

**To:** Chair Remke and Commissioners Audero, Cardenas, Hatch and Hayward

**From:** Jack Woodside, General Counsel
Karen Harrison, Commission Counsel

**Subject:** Adoption of Proposed Amendments to Regulation 18450.1

**Date:** March 12, 2018

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## Requested Action

Adopt the proposed amendments to Regulation 18450.1[1] to confirm the regulation to recent changes under Assembly Bill 249, "The Disclose Act," and select from the following amendment options regarding threshold definitions of "advertisement" for disclosure purposes:

Option 1: Proposed language defines "yard signs" as those no larger than six square feet and "large signs" as those larger than six square feet, such as road signs and billboards. Consistent with the current regulation defining advertisements, yard signs will require a disclosure in quantities over 200, while large signs will require a disclosure at any quantity.

Option 2: Proposed language groups yard signs in the category of "print advertisements larger than those designed to be individually distributed" along with road signs and billboards. This will require disclosures on yard signs at any quantity. Bright-line quantity thresholds defining other forms of communications as advertisements remain in place.

Option 3: Proposed language strikes all bright-line quantity thresholds defining advertisements and requires disclosures on advertisements at any quantity. This will require a case-by-case determination of whether a communication is "general or public" in nature and thus an "advertisement" under Section 84501.

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[1] The regulations of the FPPC are contained in sections 18110- through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to this source. The Political Reform Act (Act) is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code.

## Background

Prior to the passage of AB 249, Section 84501 provided a definition of "advertisement" for purposes of requiring campaign disclosures under the Act.[2] Regulation 18450.1, adopted in 2002, further defined what was and was not an "advertisement."[3] Under this regulation, disclosures were required on campaign yard signs, and certain other types of advertisements, only when produced in a quantity of more than 200. This provided a bright-line test for determining when a communication met the definition of "general or public" and thus constituted an "advertisement" under Section 84501. The types of disclosures required were set forth in article 5, "Advertisement," Sections 84501-84511. There were no references to quantity thresholds for defining advertisements expressly provided in the Act.

Prior to the passage of AB 249, the Commission requested staff to consider defining a maximum size for yard signs.[4] Staff proposed defining a yard sign as those "no larger than six square feet" and produced in quantities of more than 200. Larger signs, such as road signs and billboards, were defined as those "larger than six square feet" and produced at any quantity. This size is consistent with past informal advice, the common sizes for campaign yard signs, and the Federal Election Commission's common size for signs in the safe harbor provisions of its advertising disclaimer rules.[5]

With the passage of AB 249, and its significant overhaul of the Act's advertisement disclosure provisions, staff drafted additional amendments to conform Regulation 18450.1 to the Disclose Act. The additional amendments to Regulation 18450.1 remove duplicative language, update language regarding electronic communications, propose nonsubstantive clarifying language regarding the burden of proof for a claim of nondisclosure on electronic media communications due to impracticability, and relocate "aggregation rules" language for top contributors from another regulation.

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[2] Former Section 84501stated:

> "(a) 'Advertisement' means any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures.
>
> "(b) 'Advertisement' does not include a communication from an organization other than a political party to its members, a campaign button smaller than 10 inches in diameter, a bumper sticker smaller than 60 square inches, or other advertisement as determined by regulations of the Commission."

[3] Under existing Regulation 18450.1, substantially similar telephone calls, substantially similar direct mail, posters, door hangers and yard signs, as well as campaign buttons and bumper stickers over a certain size, require a disclosure statement when produced in quantities of more than 200. (Regulation 18450.1(a)(3)-(5), and (a)(7).) All billboards require a disclosure statement. (Regulation 18450.1(a)(6).)

[4] At the April 2017 Commission meeting, an attorney from the regulated community stated it was unclear if a large "road sign" required disclosure at a quantity of one and requested that the language be clarified.

[5] See 11 CFR 110.11.

At the Interested Persons Meeting for the proposed amendments reflecting AB 249, proponents of the Disclose Act requested changes in the proposed language regarding yard signs. The proponents contended that AB 249 requires disclosure statements on all yard signs without regard to quantity, due to the public nature of the signs. Accordingly, staff prepared Option 2 for the Commission's consideration, which groups yard signs in the same disclosure category as road signs and billboards, and thus eliminates the need for quantity thresholds or dimensions to distinguish types of signs.

Staff presented the proposed amendments to Regulation 18450.1 at the December Commission meeting. Prior to the meeting, and after the Interested Persons Meeting, proponents of AB 249 requested additional amendments to proposed Regulation 18450.1(a)(3)-(8). Broadening their initial contentions, the proponents stated that AB 249's language and intent is to apply disclosure requirements to ballot measure committees and independent expenditure committees at any quantity. They requested that the 200 quantity thresholds defining an advertisement in regards to telephone calls,[6] electronic media communications, direct mailing, print advertisements, and buttons or bumper stickers over a certain size, be limited to "advertisements paid for by a candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee" or deleted in their entirety.

At this time, the proponents contend that the thresholds are unnecessary under AB 249, emphasizing that new Sections 84504 through 84504.4 have no reference to quantities.[7] As stated by the proponents, AB 249 does not establish quantity thresholds because voters would not be aware that an advertisement is paid for by a ballot measure committee or an independent expenditure committee, and incorrectly assume it is paid for by a candidate, unless there is a disclosure on each of the advertisements. Thus, the proponents have stated: "it is okay if ads paid for by candidates in small numbers don't include disclosures. But it is not okay for ads regarding ballot measures or independent expenditures for and against candidates not to include disclosure, regardless of quantity." (See, Speaker pro Tempore Mullin's letter dated December 20, 2017, attached.)

[6] This request includes increasing the threshold for telephone calls for the three committee types to a threshold of 500 consistent with Section 84310.

[7] Section 84504 applies to radio or telephonic advertisements. Section 84504.2 applies to print advertisements. Section 84504.3 applies to electronic media advertisements. Each of these sections apply to advertisements paid for by a committee other than a candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee. Section 84504.4 applies to radio or television advertisement paid for by a candidate, candidate controlled committee or political party committee where the advertisement does not support or oppose a ballot measure and is not an independent expenditure.

The proponents further contend:

- Thresholds served a purpose of protecting individuals, and AB 249 amended Section 84501 to no longer apply to "a person."[8]
- Thresholds burden committees and cause confusion and record-keeping issues.
- The Commission's authority to define what is "not an advertisement" under Section 84501(a)(2)(F) is limited by AB 249 to types of advertisements other than those listed in Section 84501(a)(2)(A)-(E),[9] for which disclosures would be impracticable.

Staff did not recommend removing thresholds at the December Commission Meeting. The Commission requested that staff prepare an Option 3 for review that reflects the AB 249 proponents' request, and to further flesh out potential constitutional issues. After conferring with Trent Lange of the California Clean Money Campaign, staff prepared Option 3. This option reflects the proponent's alternative approach of striking the language in proposed Regulation 18450.1(a)(3) through (8).

Staff held a subsequent Interested Persons Meeting in January 2018, to provide an opportunity for comment on Option 3. Members of the public spoke in support and in opposition. Mr. Lange provided a letter and made public comments approving Option 3, with an additional

[8] The removal of the term "person" from Section 84501 is not as significant as the proponents argue given that it does not alter the Commission's application of the disclosure requirements. The Commission has not applied disclosure requirements to individuals unless the "person" qualified as a committee under Section 82013. "Person" is defined under the Act as "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert." (Section 82047.) Additionally, the disclosure requirements will often apply to individuals that qualify as independent expenditure committees by expenditures of $1,000 in a year or as a major donor committee by contributing $10,000 in a year. (Section 82013(b) and (c).)

[9] Section 84501(a)(2) states:

"'Advertisement" does not include any of the following:

"(A) A communication from an organization, other than a political party, to its members.

"(B) A campaign button smaller than 10 inches in diameter; a bumper sticker smaller than 60 square inches; or a small tangible promotional item, such as a pen, pin, or key chain, upon which the disclosure required cannot be conveniently printed or displayed.

"(C) Wearing apparel.

"(D) Sky writing.

"(E) An electronic media communication for which inclusion of the disclosures required by Section 84502, 84503, or 84506.5, 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.

"(F) Any other communication as determined by regulations of the Commission."

request to modify the language in Regulation 18450.1(a). (Trent Lange, Clean Money Campaign, letter dated January 16, 2018, attached.)[10]

Two attorneys from the regulated community spoke in opposition to Option 3's proposal to remove the thresholds. These comments are summarized as follows:

- Nick Warshaw, with the firm of Remcho, Johanson and Purcell, stated his firm's support of Option 1 or 2, and opposition to Option 3. Mr. Warshaw was concerned Option 3 may limit grass roots advocacy. He stated that the Option 1 or Option 2 thresholds adequately define the scope of the statute, requiring that an advertisement must be a "public communication" consistent with the Act's definition of public communications. He noted that without thresholds, a single email may fall under the disclosure requirements. He stated his concern that Option 3 will expose campaign advocates, such as committee agents and staff, to unnecessary liability.

- Jesse Mainardi, with Mainardi Law, raised concerns about Option 3 as well. He stated that without the thresholds, committee materials not clearly "general" or "public" may be swept up into the definition of "advertisement." He is concerned that committees will need to identify its top three donors on any written materials and does not believe that the benefit of requiring disclosure balances with the burden on committees in broadening the definition of an "advertisement." He noted that the definition of "advertisement" is a "general or public communication" and that this is essentially the same definition that existed prior to AB 249. He also noted that AB 249 is a detailed piece of legislation, but it did not change the thresholds in the legislation. Responding to earlier objections to thresholds as creating record-keeping issues or creating confusion for committees, he stated that it does not make sense to claim that the thresholds make it more difficult for committees to comply.

## Discussion and Summary of Proposed Actions

The language in Section 84501 defining an "advertisement" as "a general or public communication" for purposes of disclosure requirements under article 5 is subject to interpretation. As discussed below, the established quantity thresholds in Regulation 18450.1 provide a bright-line rule to determine when a communication with a limited public audience constitutes an advertisement. This avoids creating a trap for unwary committees, and helps to moderately tailor Section 84501 to the state interest of providing information to voters. Option 3 would apply the disclosure requirements broadly, and require case-by case determinations where the communications are less clearly "advertisements." As discussed below, a court could find that Option 3 is beyond the authority of the Commission if Regulation 18450.1 is deemed not "substantially related" to the state interest in requiring advertisement disclosures.

[10] Mr. Lange requested that the definition of advertisement stated in Section 84501(a) be restated in Regulation 18450.1(a)(3) as follows, "Any other general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures, except communications exempted in subdivision (a)(2) of Section 84501."

1. *The Commission has the authority to adopt and amend regulations to implement and interpret Section 84501 for its effective and efficient enforcement.*

The Commission is authorized with the primary responsibility for the impartial, effective administration and implementation of the Act, and authorized to adopt and amend rules and regulations to carry out the Act's purpose. (Section 83111 and Section 83112.) The Commission's regulations are valid when they are "consistent and not in conflict with the statute and are reasonably necessary to effectuate the purpose of the statute." (*Consumers Union of U. S., Inc. v. California Milk Producers Advisory Bd*., (1978) 82 Cal.App.3d 433, 447.) The Commission's regulations "must interpret, make specific or otherwise advance the provisions of the Act." (*Id*, p. 439.) The Commission is prohibited from implementing the Act in a manner that would abridge constitutional guarantees of freedom of speech. (Section 83111.5.) Additionally, under AB 249, Section 84501(a)(2)(F) continues the specific authority of the Commission to define what is not an advertisement for purpose of the section, with no explicit or implied restriction as to "type" or "practicability." The amendments to Section 84501 reorganized the language granting the authority, but did not change or limit the authority.

The language in Section 84501 defining an "advertisement" for purposes of article 5 disclosures as "a general or public communication" is subject to interpretation.[11] Former Section 84501 similarly defined an "advertisement" as "a general or public advertisement." Since its adoption in 2002, Regulation 18450.1 gave effect to this requirement by defining certain types of communications with a limited audience as "advertisements" when produced at a threshold of more than 200. Continuing the established bright-line quantity thresholds for certain communications to meet the definition of "advertisement" would provide for the efficient enforcement of the statutory language in Section 84501.

Without clarification of this definition, the Commission and the regulated community must engage in a case-by-case analysis to determine when committee communications with a limited or questionable public audience rise to this level. As the proponents to maintaining the thresholds contend, without quantity thresholds to define "general or public communication," the disclosure requirements may sweep committee communications such as a single letter for an endorsement, or a major donor's email to a few individuals with a signature line supporting a candidate, into the realm of "advertisements" requiring disclosures. This raises concerns that the disclosure requirements could be a trap for unwary neophyte committees. Additionally, committees may feel the need to include disclosures on a wide array of communications to ensure compliance and thus create a greater burden on free speech regarding documents less likely to be deemed "general or public communication," as discussed below.

[11] Section 84501(a)(1) defines "Advertisement" as "any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures."

2. *The thresholds in Regulation 18450.1 are a long-standing interpretation which should not be presumed overthrown absent clear legislative intent*.

The proponents of AB 249 contend that the Commission does not have the authority to maintain the existing quantity thresholds as proposed in Options 1 and 2. They contend that removal of the thresholds was part of the intent of AB 249, and therefore are no longer consistent with the implementation of its provisions. However, AB 249, and its legislative history, does not provide the Commission with such clear direction. The courts have held, "it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (*County of Los Angeles v. Frisbie* (1942) 19 Cal. 2d 634, 636.) The thresholds in Regulation 18450.1(a) have been in existence since 2002, interpreting former Section 84501. AB 249 is silent as to these long-standing thresholds.

Proponents of AB 249 argue that the lack of reference to numbers of communications in Sections 84504 through 84504.4 is indicative of the intent to overthrow the long-standing thresholds. However, the former advertisement disclosure statutes in article 5, "Advertisements," Sections 84501 through 84511, replaced or amended by AB 249, also contained no reference to numbers of communications. Case law supports a Commission regulation containing exceptions that "did not exist either explicitly or implicitly in the plain language of a section" where the regulation is consistent with the intent of the statute. (*Watson et al. v. FPPC et al.* (1990) 217 Cal.App.3d 1059, p. 1076.) Regulation 18450.1, as proposed in Options 1 and 2, interprets the definition of advertisement consistent with Section 84501's intent to reach "general" or "public" communications.

The proponents also point to the amendments to Sections 84305 and 84310 as indicative of a legislative intent to apply quantity requirements only in the context of mass mailings and telephone calls, and then only to those paid for by a candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee. However, these amendments do not provide "a clear intention by necessary implication" regarding Regulation 18450.1's existing thresholds. While Section 84310 has been so limited, the mass mailing quantity requirements are still applicable to other types of committees. (See Section 84305(a)(2) and (c)(2).)

Further, statements by the sponsor of AB 249, Clean Money Campaign, and the author, Speaker pro Tempore Mullin, as to their understanding of AB 249's intent following its enactment are not dispositive. The courts have held that these statements are not evidence of the Legislature's collective intent in passing the bill. "Material showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered…. This is because such materials are generally not evidence of the Legislature's collective intent." (*El Dorado Palm Springs, Ltd. v. City of Palm Springs* (2002) 96 Cal. App. 4th 1153, 1173 citing *Metropolitan Water Dist. v. Imperial Irrigation Dist*. (2000) 80 Cal. App. 4th 1403, 1426.) Also, post-enactment statements of intent by those who drafted or voted for a law are not a legitimate tool of statutory construction because, by definition, they could not have had an effect on the Legislature's vote. (*Coker v. JPMorgan Chase Bank*, 62 Cal. 4th 667, 690 citing *Bruesewitz v. Wyeth LLC* (2011) 562 U.S. 223, 242.)

Clean-up legislation is anticipated for AB 249, at which time the Legislature may clarify its intention as to thresholds or further address when communications with a limited public audience rise to an "advertisement" for purposes of requiring disclosures.

*3. Campaign disclosure requirements must be substantially related to the state interest of informing voters and providing transparency in the electoral process.*

Section 84501, and its interpretation under Regulation 18450.1 must satisfy an "exacting scrutiny standard." Campaign disclosure requirements are a "burden" on free speech, but do not prevent anyone from speaking. (*Doe v. Reed* (2010) 561 U.S. 186, 187 citing *Citizens United v. FEC* (2010) 558 U.S. 310, 366) As such, the Supreme Court subjects these requirements to exacting scrutiny which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. (*Citizens United v. FEC, supra*, p. 366, citing *Buckley v. Valeo*, (1976) 424 U.S. 1, 64 & 66.) Exacting scrutiny requires that the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." (*Doe v. Reed, supra*, p. 188, citing *Davis v. FEC* (2008) 554 U.S. 724, 744.) Here, the state interest in informing voters and providing transparency in the campaign process is sufficiently important.[12] It has been held that California has a "compelling interest" (a higher standard) in the disclosure of groups who seek to influence voters. (*Cal. Pro-Life Council, Inc. v. Randolph* (9th Cir. 2007) 507 F.3d 1172.)

Options 1 and 2 continue to define advertisement using the 200-quantity threshold, and thereby avoid sweeping communications with a low potential to reach the public from coming under the definition of "a general or public communication." The thresholds act to not "burden substantially" more speech than necessary and give meaningful effect to the intent of AB 249 in reaching those communications intended to influence the public. Committees would not have to be concerned that unintended communications might meet the definition, and face complaints or fines for lack of disclosure.[13] The thresholds in Option 1 and 2 operate to provide clarity to the regulated community and avoid application of unnecessary case-by-case analysis as to low-level communications which bear less relationship to the state interest.

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[12] The Legislative finding in AB 249 states:

> "(a) For voters to make an informed choice in the political marketplace, political advertisements should not intentionally deceive voters about the identity of who or what interest is trying to persuade them how to vote.
>
> "(b) Disclosing who or what interest paid for a political advertisement will help voters be able to better evaluate the arguments to which they are being subjected during political campaigns and therefore make more informed voting decisions."
>
> (AB 249, c. 546 of 2017, Section 2.)

[13] Section 84510(a) provides that any person that fails to disclose "committee major funding" under Section 84503, or "not authorized by a candidate or committee controlled by a candidate" under Section 84506.5, is liable in a civil or administrative action for a fine up to three times the cost of the advertisement, including placement costs. Intentional violations of the disclosures required under Sections 84504 through 84504.3, or Section 84504.5 result in the same liability and fines.

Option 3 applies the disclosure requirements in Sections 84504, 84504.1, 84504.2, 84504.3 and 84504.4 to advertisements without threshold quantities. The advantage of Option 3 is that it will require disclosures on all communications of a general or public nature. However, as stated, determining when certain communications rise to a "general or public" level under Option 3 will require a case-by-case analysis. To avoid running afoul of compliance, committees may have the "burden" of adding the three types of AB 249 disclosures ("paid for by," "major funding from" identifying the three top contributors paying for the communication, and whether the communication is "authorized") on any type of committee communication that could be deemed "general or public," including communications with a questionable public audience. Those new to committee status, such as a major donor, may not realize that an email advocating support for a candidate sent to a few friends could be considered an advertisement and require disclosures.

Where committees must place disclosures on communications that are less of a public nature, but may technically meet the definition of advertisement, a court could find that the state interest in providing voters with information and transparency in the electoral process is not "substantially related" to this burden on First Amendment rights. Removing thresholds increases the burden on First Amendment rights, while decreasing the relationship to the state interest of providing voters with information to facilitate their electoral decisions. Accordingly, it is unclear if Option 3 complies with the Act's requirement of implementing the Act in a manner that would not abridge constitutional guarantees of freedom of speech.

Other AB 249 Amendments

In light of the new Section 84501, staff proposes additional clarifying changes to Regulation 18450.1. The proposed amendments remove redundant language, harmonize new statutory language, and improve readability.[14] Significant amendments include the following:

- Clean-up and update the language in Regulation 18450.1(a)(2) defining advertisements as communications "placed in broadcast, print, or electronic media." The terms "video," "web site" and "social media" are added to further define "electronic media communications" and reflect the language of new Sections 84504.1(a) and 84504.3(f) & (g).[15] The term "generally accessible" is added to "electronic communication systems" to anticipate other methods for disseminating electronic media communications.

- Remove the duplicative language from Regulation 18450.1(b). New Section 84501(a)(2)(A) through (E) now incorporates the content of existing Regulation 18450.1(b) regarding communications that are exempted from the definition of

[14] Nonsubstantive changes reflect the Commission's direction during prenotice discussion at the October Commission Meeting. Specifically, the Commission noted "electronic media advertisement" was defined with the term "advertisement" in contradiction to good drafting principles.

[15] Newly added Section 84504.1 refers to advertisements including "videos disseminated over the Internet." Newly added Section 84504.3 regarding "electronic media advertisements," refers to advertisements made "via social media." (Section 84501.3, subdivisions (f) and (g).)

advertisement. As part of this clean-up, the second sentence in Regulation 18450.1(b)(3)(B), which states the burden of proof applicable to a claimed exception from disclosure on electronic media communications, is proposed as 18450.1(b), with nonsubstantive clarifications.[16]

- Relocate language from recently repealed Regulation 18450.4(b)(1) to Regulation 18450.1(c). New Section 84501(c)(1) states the definition of "top contributors" (persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of $50,000 dollars or more). Recently repealed Regulation 18450.4(b)(1) provided that the aggregation rules in Regulation 18215.1 apply in determining when a contributor has reached this $50,000 threshold.[17] Staff proposes that the definitional language in Regulation 18450.4(b)(1) be moved to Regulation 18450.1, with updated section references. Regulation 18450.4 was repealed in January 2018, because the remaining language in the regulation is not applicable under AB 249.

**Attachments:**

**Proposed Regulation 18450.1: Option 1 and Option 2;**
**Proposed Regulation 18450.1: Option 3**

**January 16, 2018 letter from Trent Lange, Clean Money Campaign, submitted at the January 2018 Interested Persons Meeting.**

**December 20, 2017 letter from Assembly Speaker pro Tempore Mullin, submitted for the December Commission Hearing.**

**December 20, 2017 letter from Clean Money Campaign, California Common Cause, Money Out Voters In, and Assembly Speaker pro Tempore Kevin Mullin.**

[16] As discussed at the December Commission meeting, Evidence Code Section 500 provides that a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. A committee claiming the exception under Section 84501(a)(2)(E) would be the claiming party and have the burden of proof.

[17] Regulation 18215.1 provides that contributions are aggregated when made by separate entities, or an individual and an entity, if the entities are controlled or directed by the individual or by a majority of the same persons.