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To: Chair Germond, Commissioners Cardenas, Hatch, and Hayward

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Subject: Recent Federal Court Decision re Donor Disclosures

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SUMMARY OF FEDERAL DISTRICT COURT DECISION

In *Citizens for Responsibility & Ethics in Wash. (CREW) v. FEC*, 2018 U.S. Dist. LEXIS 130774 (*CREW v. FEC)*, the court granted CREW's motion for summary judgment, holding that the FEC's independent expenditure disclosure rule for persons other than political committees is invalid. The court vacated the regulation at 11 CFR 109.10(e)(1)(vi), but stayed vacatur for 45 days to give the FEC time to issue interim regulations consistent with the Federal Election Campaign Act (the Federal Act).

Under the Federal Act and FEC regulations, an independent expenditure is made by a person for a communication that expressly advocates the election or defeat of a clearly identified candidate that is not coordinated with a federal candidate or political party. Political committees and other persons whose independent expenditures total more than $250 in a calendar year for a given election must report those expenditures to the FEC, in some cases within 24 or 48 hours. Under the FEC regulation governing persons other than political committees, or non-political committees, those reports must, among other things, identify each person who made a contribution in excess of $200 for the purpose of furthering the independent expenditure disclosed. This meant that even if a donor made a contribution earmarked for the organization's independent expenditure program, or responded to a solicitation asking for donations for independent expenditures in general, there was no disclosure requirement because the donor was not giving money for a particular independent expenditure.

In *CREW v. FEC*, the court found that this regulation was invalid because the FEC did not give effect to all parts of the underlying statute, 52 U.S.C. § 30104(c)(1), and the Federal Act requires broader disclosure than the FEC regulation. The court ruled that the statute applies to "all contributions received" by the reporting nonpolitical committees and requires disclosure of all donors of over $200 annually making contributions intended to influence elections. The statute, along with First Amendment precedent, requires organizations making over $250 in independent expenditures in one year to disclose the identity of donors who contributed over $200: (1) for the organization's "independent expenditure activity, even if the donors did not specify the precise form of the independent expenditures that the[ir] contribution[s] would ultimately fund;" or (2) "for other political purposes in support or opposition to federal

candidates by the organization," such as "contributions directly to candidates, candidate committees, political party committees, or super PACs."

THE CREW v. FEC DECISION DOES NOT IMPACT CALIFORNIA LAW

In California, the Political Reform Act requires broad disclosure of donors, and the FPPC has adopted regulations that give effect to the underlying disclosure statutes. Section 84222 requires "multipurpose organizations," defined as any association or group of persons acting in concert for purposes other than making and contributions and expenditures, to disclose the identity of all donors of $100 or more provided for the purpose of making contributions and expenditures if the organization qualifies as a committee under one of several committee qualification thresholds. More specifically, donors of $100 must be identified any time: (1) a contribution is provided for the purpose of making a contribution or expenditure; (2) a contribution is provided subject to a condition, agreement, or understating that the payments may be used for making contributions or expenditures; or (3) funds were previously received and a subsequent agreement or understanding with the contributor is made to use the funds for making contributions or expenditures. (Section 84222(e)(1)(C).)

Accordingly, in direct contrast to the federal regulation at issue in *CREW v. FEC*, the Act requires that a donor's contribution earmarked for an organization's independent expenditure be disclosed, regardless of whether the money was given for a particular independent expenditure. Moreover, the $200 contribution threshold that prompts the disclosure of donor identity under the FEC regulation is only $100 under the Act.

Lastly, the Act is much broader than federal rules in requiring disclosure of the source of funds used by a multipurpose organization to make contributions or expenditures when the funds are not specifically provided for the purpose of making contributions or expenditures. Under Section 84222(e)(1) and (2), a multipurpose organization must also report the identity of the donors of $1,000 or more accounting for the balance of contributions and expenditures made by the organization based upon a last in, first out accounting method, unless the donor has expressly restricted the use of the funds for purposes other than making contributions or expenditures. Thus, California's disclosure scheme is already far more encompassing than the federal regulation in question and it does not appear that the holding in *CREW v. FEC* implicates existing California law.