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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, Hayward, and Wilson

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Update of Commission Regulations Due to the Enactment of AB 902 and AB 903
and to Confirm Regulation 18431's Consistency with U.S. Constitutional Law

Date: May 11, 2020

Requested Actions and Summary of Proposed Actions

Staff proposes technical and nonsubstantive revisions updating the regulations of the Fair Political Practices Commission (the "Commission") for prenotice discussion. The proposed update would harmonize those regulations with changes to the campaign disclosure provisions of the Political Reform Act (the "Act")¹ resultant from the enactment of Assembly Bill 902 (Stats. 2019, ch. 312; "AB 902") and Assembly Bill 903 (Stats. 2019, ch. 102; "AB 903"), and amend Regulation 18431 to clarify that while a subvendor payment to a firm or business entity that is paid to provide signature gathering or door-to-door solicitation of voters is a reportable campaign expense, the names of individual signature gatherers, door-to-door solicitors, or canvassers are not required to be reported.

Background

AB 902

AB 902 made temporary changes to processes associated with the Act's requirement that certain committees disclose their top 10 contributors to accommodate the pending completion of the Secretary of State's Cal-Access Replacement System ("CARS") Project, and codified numerous Commission Regulations relating to campaign disclosure.

The "California Automated Lobbyist and Campaign Contribution and Expenditure Search System" ("Cal-Access") is a publicly accessible database maintained by the Secretary of State that provides financial information supplied by state candidates, donors, lobbyists, and others.² Enacted in 2016, Senate Bill 1349 (Stats. 2016, ch. 845) established the CARS Project in order to replace Cal-Access with a more efficient, flexible, and sustainable system which is easier to use and

¹ The Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code unless otherwise indicated. Commission Regulations interpreting the Act are contained in 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.

² The Secretary of State developed Cal-Access in consultation with the Commission pursuant to the "Online Disclosure Act of 1997" (Stats. 1997, ch. 866), which added Chapter 4.6 (commencing with Section 84600) to the Act.

provides increased transparency. The Secretary of State is currently in the process of completing the CARS Project, and CARS is scheduled for implementation in February 2021. (See Senate Bill 84 (Stats. 2019, ch. 30).)

Section 84223 requires each committee primarily formed to support or oppose a state ballot measure or state candidate that raises \$1,000,000 or more to maintain and update a top 10 contributor list and submit the list to the Commission for publication. Prior to the passage of AB 902, any time a person on a top 10 contributor list made an additional contribution to the committee, the committee was required to amend the top 10 list to reflect the additional contribution. AB 902 added a threshold of \$5,000 so a committee would only be required to revise its top 10 contributor list if the person's additional contribution meets or exceeds that threshold.

We note that upon the Secretary of State's certification of CARS, current Section 84223 is repealed, and a new version of Section 84223 becomes operative. (Current Section 84223(e); new Section 84223(e) set forth in SEC. 13 of AB 902.) The new version of Section 84223 will place the duties to maintain and post top 10 contributor lists on the Secretary of State, and will require subsequent amendments to Regulation 18422.5 at that time.

AB 903

As pertinent to the update of the Commission Regulations at issue, AB 903 amended Section 87207 of the Act to clarify that any person required to file statements of economic interest must include each source of income's "street address" in those statements. Existing Regulation 18421.2(a) defines the term "street address" under the Act, but only for the purposes of campaign reporting provisions in Chapter 4. Current Regulation 18421.2(a) does not apply to Section 87207 or other references to "street address" outside of Chapter 4, including references in the Act's conflict of interest and gift provisions.

Regulation 18431

Section 84211 of the Act specifies what information must be disclosed on campaign statements. For expenditures of \$100 or more made to a single payee, committees must provide the name and address of the payee as well as the amount and a description of the payment. (Section 84211(k).) For payments made through an independent contractor or agent, commonly referred to as subvendor payments, Section 84211(k)(6) provides that committees must disclose the same information for "each person, if different than the payee, who has provided consideration for an expenditure of five hundred dollars (\$500) or more during the period covered by the campaign statement." In conjunction with Section 84211(k)(6), Section 84303(a) provides that a committee must report any expenditure of \$500 or more made by an agent or independent contractor on behalf of the committee as if the committee had made the expenditure itself, unless the expenditure is for "overhead or normal operating expenses."

Regulation 18431 sets forth what types of expenditures by a committee's agent or independent contractor must be reported under Section 84303, including payments to vendors and subvendors. Regulation 18431(a)(2)(D) currently provides that subvendor payments for "surveys, polls, signature gathering and door-to-door solicitation of voters" must be reported under Section 84303. However, as recently advised in the *Sutton* Advice Letter, No. I-19-190(a):

[W]e must read Regulation 18431(a)(2)(D) in conjunction with applicable case law. The U.S. Supreme Court in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), struck down a Colorado law requiring identification of each paid petition circulator and the total amount of money paid to each circulator. In light of *Buckley*, the Commission itself supported emergency legislation to repeal former Section 84211(r) which had required similar disclosure. Accordingly, while a subvendor must report any payment to a firm or business entity that is paid to provide signature gathering or door-to-door solicitation of voters, the names of individual signature gatherers or door-to-door solicitors need not be reported.

The Proposed Update

AB 902

Amend Regulation 18426.1

Prior to the enactment of AB 902, former Section 84100(a) provided that “[e]very committee shall have a treasurer.” New Section 84100(a) instead provides that “[e]very recipient committee, as defined by subdivision (a) of Section 82013, shall have a treasurer.” Therefore, AB 902 confirmed the Commission’s longstanding interpretation that neither independent expenditure committees nor major donor committees are required to have a treasurer. (See *Benedetti* Advice Letter, A-10-038; *Morton* Advice Letter, No. I-09-119.)

Existing Regulation 18426.1 requires that every recipient committee has a treasurer, authorizes such a committee to designate one assistant treasurer on its statement of organization, and authorizes the assistant treasurer to sign and verify a campaign statement on behalf of the committee if the assistant treasurer prepared and reviewed the statement and signs the statement under penalty of perjury. AB 902 incorporated these provisions of existing Regulation 18426.1 into new Section 84100(a). Therefore, the proposed update would strike the provisions of existing Regulation 18426.1 which AB 902 incorporated in new Section 84100 to avoid redundancy.

Amend Regulation 18427.1

Existing Regulation 18427.1 sets forth the notice requirements that certain specified candidates or committees must provide to a contributor regarding the contributor’s filing obligations under the Act. New Section 84105, added to the Act by AB 902, codified subdivisions (a) and (d)(2) of Regulation 18427.1. Therefore, the proposed update would amend Regulation 18427.1 by striking the provisions of the regulation rendered redundant by new Section 84105.

Amend Regulation 18616.4

AB 902 codified existing Regulation 18616.4(a), which sets forth the definition of a “lobbyist coalition,” as new Section 82038.3. Therefore, to avoid redundancy, the proposed update would amend existing Regulation 18616.4 by deleting subdivision (a) of the regulation.

Existing Regulation 18616.4(b) governs reporting by a lobbyist coalition, and requires a lobbying coalition to: (1) file the reports required of a lobbyist employer under Section 86116, and (2) additionally file a form prepared by the Commission which discloses certain specified information. New Section 82038.3(b) codifies the former requirement but not the latter. Although AB 902 did not codify the requirement that a lobbyist coalition also file the Commission-prepared form, it does not appear that it preempts that requirement. Therefore, the proposed update would also amend Regulation 18616.4 to clarify that the Commission-prepared form requirement is in addition to the statutory requirements of Sections 82038.3(b) and Section 86100(a).

AB 902 repealed former Section 86100 and added new Section 86100. New Section 86100(c) provides that a lobbying coalition that contracts for a lobbying firm's services and does not employ an in-house lobbyist is not required to register with the Secretary of State but is required to maintain records and file quarterly reports. In light of Regulation 18616.4 governing reporting by a lobbyist coalition, the proposed update would amend that regulation to comport with new Section 86100 and provide notice of new Section 86100(c)'s registration exception to those inquiring about lobbyist coalition reporting.

Amend Regulation 18729

Existing Regulation 18729(a) requires specified information to be provided whenever an official must disclose a leasehold interest. AB 902 added new Section 87206.5, which codified Regulation 18729(a). Therefore, the proposed update would strike subdivision (a) of existing Regulation 18729 to avoid redundancy and make non-substantive conforming changes.

Amend Regulation 18941

New Section 89503.5 codified a portion of existing Regulation 18941(a) which defines when a public official "receives" or "accepts" a gift. Therefore, the proposed update would strike the portion of Regulation 18941(a) which AB 902 codified as new Section 89503.5 to avoid redundancy and would also make non-substantive conforming changes to that regulation.

Amend Regulation 18422.5

Existing Regulation 18422.5 governs the submission and posting of a top 10 contributor list by a committee primarily formed to support or oppose a state ballot measure or state candidate that raises \$1,000,000, as required by Section 84223. However, current Regulation 18422.5 does not yet reflect the \$5,000 threshold for amending a top 10 list discussed above that was added by AB 902.

More specifically, both former Section 84223(c)(2) and current Section 84223(c)(2) require a top 10 contributor list to be updated upon the occurrence of certain specified events. However, former Section 84223(c)(2)(B) required a top 10 contributor list to be updated when a top 10 contributor "makes additional contributions to the committee," and current Section 84223(c)(2)(B) instead requires such a list to be updated when a top 10 contributor "makes additional contributions of five thousand dollars (\$5,000) or more in the aggregate to the committee." Existing Regulation 18422.5(a)(3) restates the requirement of former Section 84223(c)(2)(B). Therefore, the proposed

update would amend existing Regulation 18422.5(a)(3) to comport it with current Section 84223(c)(2)(B).

As stated above, we note that current Section 84223 is repealed upon that certification of CARS, transferring the duty to maintain and update top 10 contributor lists back to the Secretary of State. This proposal amends existing Regulation 18422.5 only in regard to current Section 84223. Staff recommends that the Commission delays updating Regulation 18422.5 to accord with future Section 84223 (set forth in SEC. 13 of AB 902) until after certification of CARS to ensure that the future update takes into consideration any new developments relating to CARS during the interim.

Repeal Regulations 18116, 18117, 18215.1, 18229, and 18996

AB 902 codified the following Commission regulations:

- Regulation 18116, which provides filing dates for reports and statements.
- Regulation 18117, which provides that a filing officer or filing official's failure to comply with any duty or provide notice of any filing or disclosure obligation does not affect the duty of a person to file statements or reports required by the Act.
- Regulation 18215.1, which governs when contributions are required to be aggregated under the Act.
- Regulation 18229, which provides that the term spouse includes registered partners recognized by state law.
- Regulation 18996, which governs the scope of audits and investigations of campaign statements and reports.

Because AB 902 codified the provisions of these regulations in their entirety, staff recommends repealing these regulations to avoid redundancy.

Amend Regulations 18427, 18428, 18438.5, 18450.1, 18450.3, 18530.4, 18530.45, 18531.62, 18700, 18943, 18992, and 18998

AB 902's codification of certain Commission Regulations and the proposed according changes to Commission Regulations described above require the amendment of Commission Regulations which contain obsolete cross references (set forth in the heading immediately above) to correct those cross references. Therefore, the proposed update would amend those regulations to correct accordingly.

AB 903

Repeal Regulation 18421.2 and Add Regulation 18250

Existing Regulation 18421.2 defines "street address" as "[t]he street name and building number, and the city, state and zip code," and provides that that definition only applies to Chapter 4

(commencing with Section 84100) of the Act. AB 903's amendment of Section 87207 pointed up the limited application of that definition because existing Regulation 18421.2 does not apply to that section. Current Section 87207's use of "street address" in a manner that accords with existing Regulation 18241.2's definition supports the application of that definition throughout the Act. Therefore, the proposed update would repeal Regulation 18421.2, and recast that provision's definition of "street address" as new Regulation 18250 (within Chapter 2 (Commencing with Regulation 18200) of Commission Regulations, which sets forth defined terms) applicable throughout the Act.

Amend Regulation 18431

Existing Regulation 18431 requires a candidate or committee to report an expenditure made by an agent or independent contractor, including any vendor or subvendor, that provides campaign services on behalf of, or for the benefit of, the candidate or committee, including the provision of surveying, polling, signature gathering, and door-to-door solicitation of voters (Subdivision (a)(2)(D)). Currently, the scope of Regulation 18431(a)(2)(D) can be read to require a committee reporting a subvendor payment to an individual signature gatherer, door-to-door solicitor, or canvasser to identify that individual if the individual is an independent contractor. However, consistent with previous staff issued advice and Commission actions, as well as applicable constitutional limitations, staff proposes revisions to Regulation 18431 to state that names of individuals are not required.

Summary

The proposed update would harmonize Commission Regulations relating to campaign disclosure with changes made to the Act by AB 902 and AB 903 and would amend Regulation 18431 to clarify that committees reporting subvendor payments to individual signature gatherers, door-to-door solicitors, or canvassers are not required to identify those individuals.

Attachments:

Proposed Adoption of New Regulation 18250
Proposed Amendment of Regulation 18422.5
Proposed Amendment of Regulation 18426.1
Proposed Amendment of Regulation 18427
Proposed Amendment of Regulation 18427.1
Proposed Amendment of Regulation 18428
Proposed Amendment of Regulation 18431
Proposed Amendment of Regulation 18438.5
Proposed Amendment of Regulation 18450.1
Proposed Amendment of Regulation 18450.3
Proposed Amendment of Regulation 18530.4
Proposed Amendment of Regulation 18530.45
Proposed Amendment of Regulation 18531.62
Proposed Amendment of Regulation 18616.4
Proposed Amendment of Regulation 18700
Proposed Amendment of Regulation 18729
Proposed Amendment of Regulation 18941

Proposed Amendment of Regulation 18943
Proposed Amendment of Regulation 18992
Proposed Amendment of Regulation 18998
Proposed Repeal of Regulation 18116
Proposed Repeal of Regulation 18117
Proposed Repeal of Regulation 18215.1
Proposed Repeal of Regulation 18229
Proposed Repeal of Regulation 18421.2
Proposed Repeal of Regulation 18996