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To: Chair Silver, Commissioners Baker, Ortiz, Wilson, and Wood

From: Dave Bainbridge, General Counsel
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Subject: Adoption of Proposed Regulation 18450.10 – Advertisements by a Paid Third-Party Influencer; and Proposed Amendments to Regulation 18450.9 – Website Advertisements and Social Media Advertisements

Date: June 3, 2024

Executive Summary

Senate Bill 678 (“SB 678”), effective January 1, 2024, added Section 84513 to the Act¹ and requires specific disclosures for third-party campaign advertisements posted online. In response to SB 678, staff presents new Regulation 18450.10 and amendments to existing Regulation 18450.9 for adoption to clarify how the new law applies. These are presented today for adoption by the Commission.

Reason for Proposed Regulatory Action

Due to newly enacted Section 84513 and recent amendments to existing Section 84504.3, which addresses electronic media advertisement disclosures, clarification is needed as to which types of campaign advertisements new Section 84513 applies to and which are covered under existing Section 84504.3. Staff proposes new Regulation 18450.10 to make clear when Section 84513 applies. Additionally, because of the newly enacted Section 84513 and the recent amendments to Section 84504.3, staff proposes amendments to Regulation 18450.9 to repeal subdivision (b) since it is now redundant.

Background

Section 84513, added by SB 678, provides that if a committee pays a person to post content on an internet website, web application, or digital application to support or oppose a candidate for elective office or a ballot measure, the person shall include a disclosure with that content stating that the committee paid the person in connection with the post. Section 84513 states that its requirements do not apply to electronic media advertisements falling under Section

¹ The Political Reform Act (“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 18104 through 18998 of Title 2 of the California Code of Regulations. Unless otherwise indicated, all regulatory references are to Title 2, Division 6 of the California Code of Regulations.

84504.3 or ballot measure advertisements falling under Section 84511(c) requiring a spokesperson disclosure.²

The intent conveyed by the SB 678 Senate Floor Analysis is that the primary purpose of new Section 84513 is to require disclosures on campaign advertisements paid for by a committee to be posted by a third person, such as social media “influencers,” instead of the committee posting content itself or paying a traditional vendor to do so.³

In addition to disclosure requirements on advertisements, Section 84513 has other requirements for advertisements. Section 84513 requires a committee to notify the person paid to post the content to include the required disclosure. The Commission is limited to only injunctive relief against the posting third-party for failing to include the disclosure on a Section 84513 advertisement. Specifically, it prohibits the Commission from seeking administrative, civil, or criminal penalties against the third-party poster. Further, the provisions of Section 84513 state that its disclosure requirements do not apply to content posted on the committee’s own website, profile, or landing page by a person compensated by the committee to post such content.

Lastly, Section 84513(a) further provides that the disclosure requirement does not apply to “[c]ontent posted by a compensated employee of a committee on the employee’s own social media page or account where the only expense or cost of the communication is compensated staff time.” This exception mirrors an exception in existing Section 84504.3(h), which covers electronic media advertisement disclosures for advertisements done by the committee itself.

Statutory Provisions

Section 84501 defines an 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.”

Section 84504.3 applies to various electronic media advertisements paid for by a committee, including those on internet websites, those that are audio only, video advertisements, those in the form of a graphic or image, and those on social media. For example, Section 84504.3(b) states in relevant part:

“(b) An electronic media advertisement that is a graphic, image, animated graphic, or animated image that the online platform hosting the advertisement allows to link to an internet website paid for by a committee shall comply with...the following:

² Section 84511 requires a spokesperson disclosure when an expenditure of \$5,000 or more is made to an individual for the individual’s appearance in an advertisement that supports or opposes the qualification, passage, or defeat of a ballot measure. It also requires the disclosure when an expenditure in any amount is made to an individual for the same as described above but that states or suggests that the individual is a member of an occupation that requires licensure, certification, or other specialized, documented training as a prerequisite to engaging in that occupation.

³ Senate Rules Committee, Office of Senate Floor Analyses, *SB 678 Senate Floor Analyses*, Jul. 05, 2023, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB678.

- (1) Unless the disclosure area described in paragraph (2) includes the full disclosure text required by Sections 84502, 84503, and 84506.5, the advertisement shall contain a hyperlink to an internet website containing the disclosures required by Sections 84502, 84503, and 84506.5 in a contrasting color and in no less than 11-point font.”

In addition, Section 84504.3(g) states in relevant part:

“(g) An advertisement in the form of a post, comment, or similar communication made via a form of electronic media that allows users to engage in discourse and post content, or any other type of social media, *is not required to include the disclosure provided in subdivision (b) if both of the following apply:*

- (1) The advertisement was posted *directly by the social media page or account of the committee* that paid for the advertisement...
- (2) (A) The disclosures required by Sections 84502, 84503, and 84506.5 are included on the cover or header photo of the committee’s profile, landing page, or similar location for the committee’s page or account from which the post, comment, or similar communication was made...”

The statute does not explicitly address instances where a committee pays a third party to produce content on their own social media page supportive of the committee. To help address this potential gap in disclosure for advertisements not posted on a committee’s own page, new Section 84513(a), added by SB 678, states in relevant part:

“(a)(1) If a committee *pays a person to post* content on an internet website, web application, or digital application for the purpose of supporting or opposing a candidate for elective office or a ballot measure, the person shall concurrently include a disclaimer with that content stating that the committee paid the person in connection with the posting.

...

(3) This subdivision does not apply to the following:

(A) *Content requiring a disclosure pursuant to Section 84504.3 or subdivision (c) of Section 84511.*”

To clarify when the advertisement disclosures of new Section 84513 apply instead of the electronic media ad disclosures of Section 84504.3, staff proposes two regulatory updates to the advertisement disclosure requirements for content posted on an internet website, web application, or digital application and to effectuate the intent that new Section 84513 covers influencer-type advertisements.

Proposed Regulatory Amendments

Adopt Regulation 18450.10 – Advertisements by a Paid Third-Party Influencer

To clarify Section 84513, staff proposes new Regulation 18450.10, which states that Section 84513 applies to advertisements where a committee pays a third-party to post content on an internet website, web application, or digital application supporting or opposing a candidate for elective office or a ballot measure where it appears the content is the speaker’s thoughts, opinion, or message rather than that of the candidate or committee, and the content is posted on a page or account other than the candidate or committee’s own page or account. In addition, the regulation draft provides that the electronic media advertisement disclosures under Section 84504.3 do not apply to these advertisements.

Further, staff proposes adding language that states Section 84513 does not apply to Section 84511 ballot measure advertisements that require a spokesperson disclosure. Staff also suggests providing a subdivision that states a “website, web application, or digital application” includes content posted on internet platforms, such as social media accounts and blogs, to prevent confusion about whether these platforms are covered by Section 84513.

At the pre-notice hearing in April, Commission members presented concerns about addressing the placement of the required Section 84513 disclosure in relation to the other contents in the caption of posted content. The concern was that someone might try to hide the disclosure at the very bottom of a post’s caption or message. Although this situation may arise, the current statutory rules do not specify a required location of the disclosures on these types of advertisements. Other electronic media advertisement disclosure requirements, such as those found in Section 84504.3, which contain more specific guidelines on how the disclosures should appear, do not apply to advertisements that fall under new Section 84513. Additionally, there are provisions of the Act pertaining to disclosures on advertisements in various formats that specify an exact location. Still, in this instance, the legislature chose only to provide that as long as the required disclosure is visible in a post’s caption or written message and is legible to an average viewer, the author of the posted content will comply with statutory requirements. If this is to be changed, staff believes it would be best done by statute.

Amend Regulation 18450.9 – Website Advertisements and Social Media Advertisements

Staff recommends amending Regulation 18450.9 by repealing subdivision (b) because it is now unnecessary.

Regulation 18450.9(b) provides the following:

“[a]n advertisement subject to Section 84504.3(g) that is made via a form of electronic media that allows users to engage in discourse and post content for which a committee pays a third party to post from a social media account that is [not] the committee’s account must include a tag, or otherwise include a link to, the social media profile or social media landing page of the committee that paid for the advertisement.”

With recent updates to Section 84504.3, effective January 1, 2023, disclosures are now required directly on committee-paid advertisements or the committee’s page posting the advertisements. Previously, the statute required disclosure only on the committee’s landing page and not on any other pages where the advertisements were posted, without requiring a link back to the committee’s landing page. Regulation 18450.9(b) was enacted to cure that discrepancy and require a link to missing disclosures.

However, Regulation 18450.9(b) is no longer necessary because such disclosures are now required where the advertisements appear via Section 84504.3, and new Section 84513 now also covers disclosures on third-party advertisements. Thus, instead of a third-party advertisement having a tag or link back to the committee’s page or account that paid for the advertisement, the disclosure on these types of third-party influencer advertisements will look something like: “The author was paid by [name of committee and committee identification number] in connection with this posting.” Accordingly, existing Regulation 18450.9(b) solved a problem that no longer exists.

Summary of Public Comment & Response Thereto

No public comment has been received at this time.

Education/Outreach Efforts

Commission staff will distribute the amended regulation to interested parties via the Newly Adopted, Amended or Repealed Regulations email list, update the “Newly Adopted, Amended or Repealed Regulations” page on the Commission’s website, and make necessary updates to training and educational materials resulting from the regulatory changes.

Conclusion

Proposed Regulation 18450.10 will clarify the application of the advertisement disclosure requirements contained in new Section 84513, and the amendments to Regulation 18450.9 will remove unnecessary language. Staff recommends the Commission adopt the proposed amendments.

Attachments: Proposed new Regulation 18450.10 and amendments to Regulation 18450.9.