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January 12, 2021

VIA EMAIL

Chair Miadich and Commissioners
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: Item 12, Proposed Amendments to Regulations 18360.1 and 18360.2 and New Regulation 18360.3

Dear Chair Miadich and Commissioners,

As sponsors of AB 249 (2017), the *California DISCLOSE Act*, which these proposed regulations would affect, we'd like to applaud the Commission and staff for its efforts to further improve the Commission's Streamline Settlement Program and its consideration of regulations to expand them so that enforcement can focus most on those violations that have the greatest degree of public harm. Creation of a second tier for violations that are more serious than the original tier while not requiring Mainline enforcement is a good idea. We greatly appreciate all the hard work and consideration that have gone into these proposed regulations thus far.

However, we do have concerns that parts of the new regulations as drafted could weaken enforcement of key parts of the *DISCLOSE Act* by allowing violations to be streamlined and therefore significantly reduce their fines even for violations that could have a major impact on elections. Streamlining fines of only $100 or $400 plus 1% of the cost of the advertisements for advertising disclosure violations is such a trivial cost for large committees that sophisticated committees may simply consider them to be a cost of doing business.

We believe the following issues could have a major impact on elections, so we would respectfully request the described amendments to the proposed regulations:

1. ADVERTISEMENTS WITH MISSING TOP CONTRIBUTORS SHOULD NEVER BE ELIGIBLE FOR STREAMLINING

The *California DISCLOSE Act* campaign was fought over seven years and supported by literally hundreds of thousands of people because of how crucial Californians felt it was that they always be able to clearly see each of the top contributors to political ads on ballot measures or independent expenditure committees.

That makes the clarification to Regulation 18360.1 (p. 11 line 22) to specify that violations of top contributor information can only be included in Tier One streamlining when it is incorrect (not missing) a welcome one.

However, though the latest amendment to proposed Regulation 18360.2 (p. 8 line 15-16) lowers the number of missing top contributors that are allowed for advertisements to qualify for Tier Two streamlining from two down to one, allowing streamlining with even one missing top contributor is completely unacceptable.

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The importance of such violations to the legislature and the seriousness to which it which it desired them to be enforced is demonstrated by the fact that AB 249 explicitly amended Section 84510 to say that:

> 84510. (a) (1) In addition to the remedies provided for in Chapter 11 (commencing with Section 91000) of this title, **any person who violates Section 84503 or 84506.5 is liable in a civil or administrative action brought by the Commission or any person for a fine up to three times the cost of the advertisement, including placement costs.**

Allowing committees that are large enough to have top contributors of $50,000 or more to leave off even one top contributor and still get into Tier Two streamlining, and hence only be charged $400 + 1% of the cost of the ad, would go completely against AB 249's intentions that they be liable for up to three times the cost of the ad.

In fact, we urge the Commission in the future to more closely follow the legislature's intentions in the *DISCLOSE Act* by applying the maximum penalty that that AB 249 called for in egregious cases when large and sophisticated committees leave one or more top contributors off their advertisements.

Although there are many cases where a penalty of up to three times the cost of the ad are not called for because they are not that egregious, ads missing any of the required top two or three contributors on advertisements calls for serious investigation on how knowingly the committee left them off to determine how close to the maximum three times the cost of the ad fine in AB 249 should be applied. It should never be done in a streamlined process that allows penalties of only $400 + 1% of the cost of the ads.

Request: Add the same "*(incorrect only)"* caveat to 18360.3 p. 8 line 13 after "top contributor information" as was added to Section 18360.1, and change the new addition of *"Only one of the four can be a top contributor that is incorrect or missing"* to just be *"Only one of the four can be a top contributor that is incorrect."*

2. ADVERTISING AND MASS MAILING DISCLOSURES NEED AUTOMATIC EXCLUSIONS FOR LARGE EXPENDITURES FROM STREAMLINING, THE SAME AS LARGE AMOUNTS EXCLUDIE IT FOR OTHER TYPES OF DISCLOSURES.
Though the most important part of AB 249 was ensuring that voters see the top two or three contributors, the very strict and clear disclosure formatting rules it put into law were also crucial.

The draft for Regulation 18360.1 appropriately delineates examples of violations of the *DISCLOSE Act'*s formatting rules that could be considered minor for small and unsophisticated committees. However, as written both Tier One and Tier Two could allow sophisticated committees to spend millions of dollars on ads violating AB 249's clearly written formatting requirements, making it harder for millions of voters to see the top contributors.

Every other type of streamlining has exclusions for committees that spend over certain thresholds. Committees with violations regarding their campaign statements, reports, or unreported contributions or expenditures would be automatically excluded from Tier One for violations ranging from $16,700 to $100,000, depending on the size of the jurisdiction. All such violations of over $100,000 are excluded even from Tier Two, as are violations of unreported lobbying activity over that amount.

Tier One and Tier Two must have similar exclusions for violations of advertising and mass mailing disclosure requirements for committees where the total cost of advertisements having violations is greater than the corresponding exclusion levels for campaign statements and unreported contributions and expenditures.

It would be appropriate to set the level for exclusion based on population, as for unreported contributions and expenditures, because smaller amounts of advertisements with violations will have outsized effects in smaller districts. $20,000 in independent expenditures in a small city can make a major difference, and bad actors may very well decide to accept a streamlining slap on the wrist to potentially alter the outcome of an election with advertising disclosure violations. The $16,700 threshold for small jurisdictions would address that problem.

Request: Add the same exclusion dollar thresholds to advertising and mass mailing violations for both Tier One and Tier Two as for violations of campaign statements, reports, or unreported contributions or expenditures, including the same Tier One population threshold amounts. We suggest basing it on the total amount the committee has spent on advertisements with violations.

3. PLEASE CONSIDER DEFINING "INCORRECT" TOP CONTRIBUTOR NAMES ON ADVERTISEMENTS

We greatly appreciate the new addition of *"incorrect only"* to Regulation 18360.1 p. 11 line 22 to specify that missing any top contributor will exclude a committee from Tier One streamlining, and as described above request that you extend it to the matching Tier Two paragraph for the same reason. However, its value in both cases depends in large part how "incorrect" is defined.

A definition of "incorrect" in this context that would make streamlining acceptable would mean that the advertisement shows the right contributor's name but somehow listed it in an incorrect manner, e.g. "IBM" vs "International Business Machines" or showing a business subsidiary's name when it should show the parent.

A definition of "incorrect" that would not be acceptable for streamlining in our view would be one that had them showing a contributor but showing the wrong top contributor, e.g. showing IBM as a top contributor when the real top contributor was Microsoft. Showing a wrong contributor rather than the right top contributor would be just as bad as if the right top contributor was missing.

Request: If this is not defined elsewhere, then please clarify how "incorrect" applies to top contributors, making clear that "incorrect" does not mean "wrong" (as in the wrong person/entity), but instead means an incorrect manner of listing the right person.

4. TOP CONTRIBUTORS THAT ARE NOT LEGIBLE TO THE AVERAGE VIEWER MUST BE CONSIDERED "MISSING"

Both 18630.1 and 18630.3's top contributor exclusions specify that *"A disclosure that fails to meet sizing requirements to the extent that the disclosure is not legible to the average viewer is considered a "missing or incorrect disclosure."*

If a top contributor is not legible to the average viewer, then it is to all extents and purposes *missing* for that average viewer because they will not be able to easily read it. This is important because the current draft only allows ads to be include in Tier One if they are "incorrect" and not if they are "missing", and because we are requesting that the same "incorrect only" standard also be applied to Tier Two.

Request: Clarify that a disclosure of a top contributor that fails to meet sizing requirements to the extent that the top contributor is not legible to the average viewer be considered a *"missing disclosure",* not an "incorrect disclosure" for both Tier One and Tier Two. An alternate solution would be to strike *"or incorrect"* in 18360.1 p. 12 lines 1-2 and 18360.3 p. 8 lines 17-18.

5. NO STREAMLINING SHOULD BE ALLOWED FOR LATE CONTRIBUTION REPORTS THAT WOULD HAVE RESULTED IN A CHANGE TO THE DISCLOSURE OF THE COMMITTEE'S TOP CONTRIBUTORS

Timely disclosures of contributions that would result in a change to the disclosure of the committee's top contributors are a bedrock of the *DISCLOSE Act*. Without them the press and most importantly voters would not be able to tell whether ads are in violation of the key *DISCLOSE Act* top contributor provisions until it's too late.

Regulation 18360.1 (p. 6 lines 13-15) recognizes this importance by purposefully excluding any late campaign statements or reports from Tier One streamlining if:

> "The late filed report was filed more than five business days after it was due and the timely reporting of the contribution would have resulted in a change to the disclosure of the committees' top contributors, as required by Section 84503."

This is a very appropriate and important exclusion that would only apply to committees that are large enough to have $50,000+ contributors to disclose.

Unfortunately, the current language has no such exclusion for unreported contributions that would have resulted in a change to the disclosure of the committee's top contributors in either Tier One or Tier Two, and in fact uses the fact that a contribution on a late filed report would have resulted in a change to the disclosure of the committee's top contributors as a reason to include a committee in the Tier Two streamlining.

These exceptions to allow committees that are large enough to have top contributors of $50,000 or more to fail to report changes to them in time and only get a slap on the wrist, denying the public the opportunity to verify whether or not they are in violation of the *DISCLOSE Act's* top contributor provisions in the election.

Request: Add the Regulation 18360.1 (p.6 lines 13-15) language to both the exclusions for Tier Two for late campaign statements or reports and to the exclusions for campaign contributions for both Tier One and Tier Two.

6. REPEAT VIOLATORS MUST NOT BE ELGIBLE FOR TIER TWO UNLESS TIER TWO FINES ARE SUBSTANTALLY RAISED

One of the most important parts of the original streamlining regulation that the California Clean Money Campaign and other advocates for fought for was the provision automatically excluding violations from streamlining when *"the same candidate, committee, or principal officer has paid a prior penalty to the Commission for the same type of violation occurring within the last five years."* (18360.1 p. 3 lines 21-22).

This addition was crucial – and carefully worded – because one of the most important justifications for allowing violators to have the exceedingly low fines of the streamlining program is when they are made by unsophisticated persons who innocently and unknowingly violate the regulations.

However, there is no such excuse when the same candidate, committee, or principal officer has paid a prior penalty to the Commission on the same type of violation, especially within the last five years. They clearly know about the violation and are purposefully or negligently choosing to make it again.

We therefore strongly request that the Tier One exclusion for repeat offenders also apply to Tier Two streamlining so that repeat offenders can't knowingly get away with streamlining slaps on the wrist for the same type of violations they were fined for within the last five years.

In fact, we also ask that all such exclusions explicitly include warning letters, because a candidate, committee, and principal officer cannot claim that they were unaware of a regulation if they received a warning letter. One possible compromise would be to include warning letters on the same type of violation in the last five years in the Tier One exclusion, but not the Tier Two exclusions.

If the Commission deems it crucial to save staff resources by allowing repeat offenders into Tier Two streamlining, then it is even more important that percentage fines for Tier Two streamlining violations be increased as described below.

7. INCREASE THE PERCENTAGES PENALTIES FOR TIER TWO VIOLIATIONS

The proposed Tier Two streamlining rules apply to much more serious violations of law with much more chance to impact elections and harm the public than do the original Tier One streamlining rules, but have penalties that are only trivially higher for extremely large violations.

For example, Tier Two streamlining will allow committees to qualify for streamlining after spending $100,000 in small local races – enough to dwarf most local candidates – without filing their contribution reports on time and therefore denying voters any knowledge of who gave that $100,000 or even that it was spent. As currently drafted, Tier Two would allow a streamlined penalty of only $400 + 1%, or $1,400 for such a case. The same with missing lobbying reports of up to $100,000.

If the public knew the Commission proposed to fine large campaign committees that filed late reports of $100,000 in contributions in local elections only $1,400, they would be appalled. Even worse if it allowed repeat offenders and late lobbying reports the same slap on the wrist, much less any missing top contributors.

The proposed Tier Two penalties increase the base penalty for late campaign statements from $200 in Tier One to $400 in Tier Two, for unreported contributions and expenditures from $100 to $600, for late lobbying reports from $200 to $600, for unreported lobbying activity from $100 to $400, for committee naming from $400 to $800, and for advertising and mailing disclosures from $100 to $400.

Those are all appropriate increases of the base penalty from Tier One to Tier Two. However, the current proposed language leaves the percentage penalty in all cases to only 1%, despite the more serious nature of many of the Tier Two violations, leading to the outrageously small fines for very large and serious violations.

Request: Increase the percentage fine by the same factor for Tier Two over Tier One as for the base fines so that the larger and more sophisticated actors who will often be included in Tier Two have to pay more serious violations, while still saving them and staff from the more time-consuming mainlining program.

One suggestion would be to have Tier Two violations increase both the base and percent fines for all types of violations by the same factor, e.g. by 3x, rather than by the different amounts currently. I.e. Right now Tier Two increases the base penalty by a factor of 2 for late campaign statements (from $200 to $400) but increases the base penalty from $100 to $600 for unreported contributions and expenditures. So one possibility would be to instead increase the penalty for late campaign statements from $200 + 1% to 3x that for Tier Two, i.e. $600 + 3%, and to instead increase the penalty for unreported contributions and expenditures from $100 + 1% to $300 + 3%, making all the penalty increases from Tier One to Tier Two consistent in both their base and percentage increases.

Thank you for the opportunity to comment on the proposed new streamlining amendments. In general, we believe these are positive changes to lessen unnecessarily burdensome penalties on small and/or unsophisticated committees that will allow the Commission to focus more on violations that have the greatest degree of public harm.

We strongly believe that the above amendment requests are crucial to stop the new regulations from letting off the hook serious violations that could impact elections at both the state and local levels and putting deterrents against violations of the *DISCLOSE Act*'s key provisions at risk.

We look forward to engaging with the Committee and Commission on ways these amendments or similar ones might be incorporated.

Sincerely,

Trent Lange, PhD.
President and Executive Director
California Clean Money Campaign