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To: Chair Miadich and Commissioner Baker

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Subject: Prenotice Discussion of Proposed Regulatory Changes Concerning Online Campaign Advertisements

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Introduction

Staff has prepared a package of regulatory proposals related to campaign communication and advertisement disclosure under the Act.[1] The proposals largely include changes aimed at ensuring proper disclosure is achieved when committees pay third parties to post campaign advertisements and other communications online. The proposals also contain provisions intended to help clarify how disclosures should be displayed for certain types of online advertisements where there is currently a lack of clarity.

The first proposal contains amendments to existing Regulation 18421.5, also known as the "blogger" regulation, to modernize and enhance the campaign expenditure reporting required in connection with communications where a committee has paid a third party to post favorable or unfavorable content. Amendments to this regulation also help harmonize the regulation with the campaign advertising provisions of the Act.

The second proposal is an amendment to existing Regulation 18450.4 to provide a minor clarification related to video advertisements posted on social media and what disclosure must be included on such videos.

The third proposal is new Regulation 18450.9, which clarifies disclosure requirements when a committee pays a third party, such as a social media influencer, to post advertisements on social media. Additionally, the new regulation provides guidance on disclosure for advertisements paid for by a committee that are in written format, and that are posted on third-party non-social media websites.

[1] The Political Reform 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 18110 through 18997 of 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.

Staff has presented the concepts covered in these regulatory proposals at the Commission's March and April Commission Meetings, and now presents drafts for prenotice discussion.

Regulatory Proposals

Amendments to Regulation 18421.5. Reporting an Expenditure for Paid Online Communications.

The Commission adopted Regulation 18421.5, also known as the "blogger" regulation in 2013, to require committees to include additional details on campaign reports when committees pay third parties to provide favorable or unfavorable content about a candidate or ballot measure on a website other than the committee's own website. Regulation 18421.5 applies to expenditures for communications that may or may not meet the Act's definition of advertisements.[2] Since the time Regulation 18421.5 was enacted, the platforms on which such paid content appears have expanded their presence greatly beyond traditional style blogs to other electronic formats such as applications, social media, and community news sites. Staff proposes updating the regulation to better address the expansion of platforms on which such paid content now more frequently appears. The proposed amendments to Regulation 18421.5 also expand the current expenditure reporting requirements of Regulation 18421.5 to include more specific information about a paid online communication such as a paid social media poster's username or handle and the title of an op-ed or article in addition to the extra reporting already required under the regulation. In addition, the changes to Regulation 18421.5 require the extra reporting under Regulation 18421.5 for each platform for which a committee pays a person to post, rather than only "in the first instance."

Though Regulation 18421.5 requires extra reporting on campaign reports as discussed above, subdivision (g) of the regulation permits a committee to opt out of the extra reporting if the communication includes a disclosure on the content itself. However, the form of the disclosure allowed on the content itself under Regulation 18421.5 is not consistent with what would be required by the Act if the communication was an advertisement, as the regulation was adopted before the current relevant advertising disclosure statutes. Currently, subdivision (g) provides:

> If the fact that a campaign has paid for content as described in this regulation is posted in a clearly conspicuous manner along with the posted content in each instance of the content appearing on the Internet or other digital platform, reporting is not required as described in this regulation. For example, the following type of posting would satisfy this requirement: "The author was paid by the Committee to Re-Elect Mayor Jane Doe in connection with this posting."

If the communication is an advertisement, the Act may require "Paid for by" language and additional information such as top contributors. Therefore, proposed amendments to

[2] Section 84501 of the Act defines advertisement generally to include 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. Regulation 18421.5 applies to communications that are in connection with favorable or unfavorable content about a candidate or measure, so the standard is slightly different.

Regulation 18421.5 clarify that the disclosure requirements in the regulation are in addition to the disclosure requirements for advertisements.

A related problem that Commissioner Wood raised at the April Commission Meeting is "amplification," the practice of artificially increasing the apparent audience size of online communications to give them a veneer of popularity, as well paying to increase the presence of a communication online through sharing and other means. For example, several services offer social media "likes" and "followers" for sale. Other services sell amplification "bots," automated programs that automatically retweet the customer's content. Under existing law, a candidate or committee that makes an expenditure to pay for such amplification services would be required to report the expenditure, but there is currently no requirement that the expenditure be described with sufficient specificity to inform the public about the nature of the payment. For example, when reporting an expenditure for amplification of social media messaging, a committee might use the codes CNS (campaign consultants), LIT (campaign literature and mailings), or WEB (information technology costs), none of which tells the public much about the purpose of the payment. By contrast, it would be much more informative if a committee reported an expenditure of $100 paid to "XYZ Strategies for 10,000 Instagram followers."

There are two ways in which the Commission could address this issue. One is by adding one or more new, more informative codes to the campaign forms, such as on Form 460, Schedule E, (Payments Made). However, the Secretary of State's Office, which oversees electronic campaign filings, is currently in the midst of rolling out its new CAL-ACCESS Replacement System (CARS) and may be unable to implement such a change at this time. Therefore, it may be prudent to wait until the system is launched to add any new fields or codes to the campaign forms.

The second way in which the Commission could ensure greater disclosure around "amplification" of online messaging is to require a more specific description of payments for amplification in particular. Currently, there are several situations in which additional reporting or more specific descriptions are required. Regulation 18421.5 requires a committee that pays for favorable or unfavorable content in the form of a blog, social media platform post, or online video to report "specific details of the payment," including the name of the payee, the name of the individual providing content, and the name of the website or the URL on which the communication is published, unless the communication itself contains a disclosure. Similarly, when completing a Form 461, Major Donor and Independent Expenditure Committee Campaign Statement, a filer that is an association must provide a specific description of its interests requires (Section 84211(t)(3).) Likewise, when reporting an itemized expenditure for a gift, a committee must briefly describe the political, legislative, or governmental purpose of the expenditure. (Regulation 18421.7.)

To provide information regarding amplification of online communications, proposed Regulation 18421.5 includes amendments requiring details to be reported in connection with payments for amplification.

Amendments to Regulation 18450.4. Video and Television Advertisement Disclosure.

The Legal Division has received questions regarding whether videos posted on social media that qualify as advertisements under the Act only require disclosure on the landing page of the committee and not on the videos themselves. The questions arose because Section 84504.3(h) states that for electronic advertisements posted on social media, disclosures shall only be required on the profile or landing page of the committee. However, Section 84054.3, in subdivision (g), also specifies that electronic media advertisements in the form of videos shall comply with the disclosure requirements for videos under Sections 84504.1 or 84504.5 of the Act, depending on the type of committee that paid for the advertisement. Sections 84504.1 and 84504.5 require disclosures to be placed directly on the video; in some cases, Section 84504.5 requires disclosures to be spoken as well. The Legal Division has advised that advertisements in the form of videos that fall under Section 84504.3, no matter where they are posted, must follow the video disclosure rules, including on social media. California Clean Money Campaign, the sponsor of the legislation that enacted these provisions, has advised that that this advice is in line with the intent of the law.

The amendments to Regulation 18450.4 clarify that a video posted on social media that is required to include disclosures under Section 84504.3 must contain the disclosures on the video, and not only on the committee's profile or landing page.

Adoption of Regulation 18450.9. Website Advertisements and Third-Party Social Media Advertisements.

Proposed Regulation 18450.9 addresses disclosure requirements for social media posts made by third parties and written posts on non-social media websites that are not the committee's website.

As noted previously, advertisements on social media that fall under Section 84504.3(h) are only required to include disclosures on the committee's profile or landing page and are not required to include the disclosures on each individual post, comment, or other similar communication. When a committee posts an advertisement from its own social media account, the post automatically links back to the committee's profile page where the disclosures can be found. However, when a committee pays a third party or influencer to post an advertisement there is no automatic link back to the committee's profile or landing page and thus no way for the viewer to easily access such disclosures.

The Legal Division has informally advised that an influencer paid by a committee to post an advertisement on social media should tag the committee in the influencer's post, so that voters can link back to the committee's profile or landing page to view the advertisement disclosure. Proposed Regulation 18450.9 codifies this advice.

With regard to non-social media websites, Section 84504.3(d) of the Act technically requires a disclosure at the top or bottom of every publicly accessible page of a website paid for by a committee when the content meets the definition of an advertisement. However, when a committee pays a third party to post content on a non-social media blog-style website that is not

the committee's own blog or website, it is not clear where the disclosure should be located. In informal email advice, the Legal Division has advised that a committee could include disclosures on the individual website/blog post. This makes practical sense when the entire page is not the committee's page and there may be multiple posts, some of which may not be campaign related. Proposed Regulation 18450.9 provides that a post on non-social media websites or blogs on websites that are not the committee's website(s) must have disclosures at the top or bottom of each individual post, rather than the top or bottom of every page of the website. This is an adaptation of the current rule found in Section 84504.3(d), which requires disclosures at the top or bottom of a committee's website.

Summary

The proposed amendments to existing Regulation 18421.5, 18450.4, and proposed new Regulation 18450.9 would provide the public with more information about online content paid for by committees at a time when campaigns are increasingly paying third parties to post online content.

Attachments

Proposed Amendments to Regulation 18421.5
Proposed Amendments to Regulation 18450.4
Proposed New Regulation 18450.9